EMPLOYMENT TRIBUNALS

Claimant: Ms S Boylan

Respondent: Hartlepool Borough Council

Heard at: Newcastle CFCTC **On:** 11 – 13 April 2022;
4 – 5 July 2022;
Deliberations
6 July 2022

Before: Employment Judge Loy
Mr K Smith
Ms B Kirby

REPRESENTATION:

Claimant: **Mr D Robson, a friend**
Respondent: **Ms Bethan Davies, counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaints of detriment contrary to Section 47B Employment Rights Act 1996 are not well-founded and are dismissed.

2. The complaint of automatic unfair dismissal contrary to Section 103A Employment Rights Act 1996 is not well-founded and is dismissed.

3. The complaints of health and safety detriment contrary to Section 44 Employment Rights Act 1996 are not well-founded and are dismissed.

4. The complaint of automatic unfair dismissal contrary to Section 100(1)(c) Employment Rights Act 1996 is not well-founded and is dismissed.

5. The complaint of unfair dismissal contrary to Sections 94 & 98 Employment Rights Act 1996 in respect of the dismissal of the claimant from her first Catering Assistant contract of employment is well-founded and is upheld.

6. The complaints of unfair dismissal contrary to Sections 94 & 98 Employment Rights Act 1996 in respect of the dismissal of the claimant form her first and second Cleaner contract of employment and from her second Catering Assistant contract of employment are not well-founded and are dismissed.

7. The respondent shall pay to the claimant a Basic Award of £551.53.

REASONS

The claimant's claims

1. The claimant was employed by the respondent under two separate contracts of employment: a contract for of employment as a Cleaner and a contract for employment as a Catering Assistant. By a claim form presented on 1 June 2021, and as discussed at a preliminary hearing before Employment Judge Aspden on 10 August 2021, the claimant brings the following claims.

1.1 Detriment for raising certain health and safety concerns contrary to Section 47B Employment Rights Act 1996 ("ERA") being detriments because she made protected disclosures;

1.2 In the alternative, that the detriments contravened Section 44 ERA, in that she was subjected to detriment because she brought to her employer's attention by reasonable means circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health and safety;

1.3 A complaint that she was automatically unfairly dismissed for raising health and safety concerns contrary to Section 103A ERA;

1.4 A complaint that she was automatically unfairly dismissed for raising health and safety concerns contrary to Section 100(1)(c) ERA;

1.5 A complaint of "ordinary" unfair dismissal, contrary to Sections 98 & 94 ERA.

2. Employment Judge Aspden identified, with the parties agreement, the following alleged detriments contrary to Section 47B ERA, alternatively Section 44 ERA:

2.1 Being told to get her stuff and leave site on 20 July 2020 as alleged at paragraph 4 of the grounds of claim;

2.2 Being required or expected to work at a different site from 22 July 2020;

2.3 Being suspended from both jobs on 15 January 2021;

2.4 Being dismissed from both jobs on 2 February 2021; and

2.5 Failing to allow her appeal and reinstate her to her original jobs at both St Joseph's School and Rossmere School and/or making it a condition of her appeal being upheld that she agreed to work at a site other than St Joseph's.

The Hearing

Conflict of Interest

3. At the outset of the hearing, we brought to the parties' and their representatives' attention certain information that Mr K Smith, one of the non-legal members of the Tribunal, had drawn to Employment Judge Loy's attention before the commencement of these proceedings.

4. Mr Smith is a full time official for the National Education Union. That union primarily represents Teachers, Teaching Assistants, Head Teachers, and Leadership Grades within the education sector. Geographically, Mr Smith's regional area includes: Durham County Council; Sunderland City Council; Darlington Borough Council; and Gateshead Metropolitan Borough Council. Accordingly, Mr Smith does not cover Hartlepool Borough Council as part of his employment duties.

5. Mr Smith informed me that he did not consider himself conflicted as a consequence of his association and role with the National Education Union, but that he would consider it appropriate for his employment circumstances to be brought to the attention of the parties and their representatives. Mr Smith also told me, and we in turn told the parties and their representatives, that although cleaning staff and catering staff (the two roles held by the claimant) were eligible in principle to join NEU, UNISON is the more natural union for cleaning and catering staff.

6. Neither party nor either representative objected to Mr Smith sitting on this matter. In those circumstances, we were content for the Tribunal to proceed as originally constituted.

7. The hearing was conducted in person at Teeside Justice Centre.

8. The respondents witnesses gave evidence first, followed by the claimant. The respondent called the following witnesses:

(a) Ms Diane Cotson – Cleaning Supervisor assigned to St Joseph's Primary School between October 2018 to August 2020 and thereafter a cleaner at St Joseph's Primary School.

(b) Ms Wendy Lilley – Team Leader, Cleaning Services.

(c) Mr Simon Cuthbert – Facilities Manager Officer.

(d) Mr Tony Hanson – Director of Neighbourhood and Regulatory Services.

(e) Mr Kieran Bostock – Assistant Director (Place Management) and the disciplinary manager.

(f) Ms Brenda Harrison – Councillor and Chair of the Personnel Sub-Committee considering the claimant's appeals against her dismissals.

9. The claimant gave evidence on her own behalf and called no further witnesses.

10. The parties produced a bundle of documents consisting of pages A1 to A336. Additional documents relating to the claimant's appeals to the Personnel Sub-Committee were added to the bundle during the course of the hearing as A337 and A338. The Hartlepool Borough Council Health and Safety Policy 2022 was added as A339. A copy of a template grievance invitation to a stage two hearing was added as A440.

11. The first morning of the hearing was taken up as reading. At the outset of day three of the allotted four days for this hearing, Counsel for the respondent indicated to the Tribunal that she had suffered a bereavement of a very close relative the effect of which was that she was not in a position to continue to represent the respondent beyond finishing the evidence of the current witness, Mr Mason, whose evidence had not completed the night before. The respondent's application for a postponement, which was helpfully acquiesced in by the claimant, was granted and the matter was then re-listed for a further three days (to include remedy if required) to take place on 4 to 6 July 2022. Evidence finished on day five after which submissions were made by each party. The respondent provided written and made supplemental oral submissions. The claimant made oral submissions only. We deliberated on 6 July 2022.

The Issues

12. A list of issues had been drawn up and agreed between the parties prior to the commencement of this hearing. The list of issues is at B60 to B62 of the bundle. It is (with minor amendments) in the following terms.

List of Issues

13. ***Unfair Dismissal***

(i) Has the respondent shown that the reason for dismissal was related to the claimant's conduct?

(ii) Was this the principal reason for dismissal?

(iii) If so, in all the circumstances (including the respondent's size and administrative resources), did the respondent act reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing her? This is likely to involve the following matters:-

(a) whether the respondent had reasonable grounds for believing the claimant had committed the misconduct alleged;

(b) whether the respondent carried out as much investigation into the matter as was reasonable?

(c) the ACAS Code of Practice on discipline and grievances;

(d) whether dismissal was a reasonable sanction.

(iv) If the dismissal was unfair:

(a) is there a chance that the claimant would have been fairly dismissed for misconduct in any event had a fair procedure been followed? If so, what is the effect of this on any compensatory award?

(b) did the respondent unreasonably fail to follow the ACAS Code of Practice on discipline and grievances? If so, would it be just and equitable to reduce any compensatory award and, if so, to what extent?

(c) was the conduct of the claimant before dismissal such that it would be just and equitable to reduce the amount of the basic award and, if so, to what extent?

(d) did the claimant cause or contribute to her dismissal? If so, to what extent should any compensatory award be reduced?

14. ***Detriment for making protected disclosures***

(v) Save for the alleged disclosure in 2019, which the claimant conceded at the Preliminary Hearing should be omitted from the Tribunal's consideration on liability , were the disclosures listed in the table produced by the claimant and dated 25 July 2021, made as described?

(vi) What is the alleged or actual failure to comply with a health and safety concern?

(vii) Were such disclosures as were made qualifying disclosures made pursuant to Section 43B(1)(b) or (d) of the Employment Rights Act 1996 ERA? In particular:-

(a) if any of the disclosures were qualifying disclosures pursuant to Section 43B(1)(b) or (d) did the claimant have a reasonable belief that the relevant failures tended to show one or more of the matters at Section 43B ERA; and

(b) did the claimant have a reasonable belief that any disclosures were made in the public interest?

(c) were (as far any potential remedy is concerned) the disclosures made in good faith? If not, to what extent should the compensatory award be reduced?

(viii) Were such disclosures as were qualifying disclosures, protected pursuant to Section 43C ERA?

(ix) Do the alleged acts or failures to act that make up the detriments alleged by the claimant form a series of similar acts and is there a relevant connection between them?

(x) If the acts or failures to act are not a series then are any of those acts or failures as are not part of a series out of time?

(xi) If any act or failure to act are out of time was it reasonably practicable to present a claim in respect of them in time and, if not, was the claim presented within a reasonable time.

(xii) Were any of the acts or failures to act that were brought in time or brought within a reasonable time pursuant to paragraph (xi) above, done on the grounds of protected disclosure(s) made by the claimant.

(xiii) Did the alleged detriments below occur:

(a) The claimant being told to get her stuff and leave on 20 July 2020 – see paragraph 4 of the claim;

(b) The claimant being required or expected to work at a different site from 22 July 2021;

(c) The claimant being suspended from both jobs on 15 January 2021, and/or

(d) The claimant being dismissed from both jobs on 2 February 2021, and/or

(e) Failing to allow the appeal and reinstate the claimant to her original jobs at Rossmere School and St Joseph's School and/or making it a condition of her appeal being upheld that she agreed to work at a site other than St Joseph's in the cleaning role.

(xiv) In all or any cases were any of the alleged detriments suffered on the ground of the claimant making protected disclosure(s)?

15. ***Section 44/100 Employment Rights Act 1996***

(xiv) Was the claimant an employee at a place where:

(a) there was no health and safety representative; or

(b) there was a health and safety representative but it was not reasonably practicable for the claimant to raise the matter by that means; if so

(c) did the claimant bring to her employers' attention by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety?

(xv) Were any of the acts or alleged detriments detailed in (xiii) (a) to (e) or was making it a condition that she would work elsewhere than St Joseph's or her dismissal on the grounds that the claimant brought to her employers attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety.

(xvi) If the claimant's dismissal was on the ground that the claimant brought to her employers' attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety, was it the principal reason for her dismissal.

(xvii) If not, does the Tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the dismissal?

16. ***Automatic Unfair Dismissal (Section 103A ERA)***

(xviii) If the disclosures listed above in paragraph 14(v)-(viii) (or any of them) were protected disclosures were they (or any of them) the principal reason why the claimant was dismissed.

(xix) If not, does the Tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the dismissal.

Concessions and scope of the hearing

17. At the outset of day one of the hearing Ms Davies helpfully made the following concessions:-

(a) The respondent concedes that if the facts are determined in the claimant's favour, then those facts would amount to a course of conduct leading to a concession by the respondent that the whistleblowing detriments are in time.

(b) The question of the "reasonable practicability" for the purposes of 14(b) of the List of Issues – is conceded both in respect of the claim under Section 44 ERA and Section 100 ERA. Accordingly, it is conceded that although there was a health and safety representative, it was not reasonably practicable for the claimant to raise the matter by that means; and

(c) For the purposes of (14)(c) of the List of Issues the respondent concedes that the claimant brought to her employer's attention by reasonable means circumstances connected with her work which the claimant contends she reasonably believed was potentially harmful to health or safety.

18. It was agreed between the parties and the Tribunal that this hearing would deal with liability only. However, given that this case had to be adjourned on a part-heard basis, it was agreed between the parties and the Tribunal that the reconvened three dates would consider both liability and, if appropriate, remedy and appropriate orders were made for the hearing to be so expanded as set out in the record of the Preliminary Hearing held by telephone on 13 April 2022, which orders were sent to the parties on 14 April 2022.

Findings of Fact

The witnesses

19. We have on a number of occasions preferred the evidence of the respondent's witnesses to that of the claimant, including where there were conflicting versions of the same events. We did not aways find the claimant to be a credible or reliable witness. This was for a number of reasons.

20. The claimant adopted positions both at the time the events took place and in these proceedings which were not objectively sustainable. For example, the claimant repeatedly said that her concerns were ignored and "swept under the

carpet" by management when that was demonstrably not the case. The claimant's main criticisms were directed at Ms Cotson, her supervisor at St Joseph's Primary School. It was clear that action had been taken which affected Ms Cotson as a direct result of the claimant raising concerns about Ms Cotson's abilities. The claimant was also given lengthy feedback on more than one occasion in response to her concerns, but the claimant persistently refused to acknowledge it.

21. The claimant also adopted extreme positions which were again difficult to sustain such as describing the lack of pine disinfectant at St Joseph's as "appalling" when it transpired on enquiry that there were adequate supplies of lemon disinfectant which was the same product just in a different fragrance. She also described her meetings with management and her grievance hearing in terms that we were unable to accept such as claiming that doors were slammed at her grievance meeting, managers were shouting in a way that she found intimidating and claiming that an HR representative openly disagreed with the proposed actions of the manager in charge at a meeting with the claimant – all of which were disputed by the respondent's witnesses whose evidence we preferred.

22. The claimant also adopted positions which appeared unreasonable and were not adequately explained, such as declining to return to Rossmere school on exactly the same terms and conditions when her appeal to a panel of councillors succeeded; and claiming that things had not changed at St Joseph's after she had raised her concerns when in fact the claimant did not return to St Joseph's for any significant period after she had spoken up. Another example is the claimant's repeated insistence that she had been dismissed by Ms Lilley on 20 July 2020 when she was asked to leave the workplace following a fracas for which the claimant was plainly primarily responsible. The claimant continued to be paid, attended meetings, raised grievances, was instructed but declined to attend the workplace while at the same time maintaining that she had been dismissed.

23. The claimant contradicted herself between her witness evidence and her own contemporary documentation, such as when she complained about having paperwork for her appeal being dropped on her at the last minute while maintaining at the same time in writing that she was fully ready for the hearing.

24. The claimant also appeared to have little insight into her own behaviour, for example appearing to attach little or no significance to her verbal abuse of her supervisor in the open workplace which had on any view been disruptive and could have caused difficulties with council's customers had the exchange been overheard.

25. The claimant also failed without explanation to disclose details of her earnings from dividends as ordered by the Tribunal with the effect that her loss calculations were inaccurate.

26. For all of those reasons we approached the claimant's evidence with a degree of scepticism.

27. In contrast, we found the respondent's evidence open and straightforward including being prepared to admit to their own mistakes such as when different roles in the disciplinary procedure became conflated when they ought to have remained separate.

The events

28. On 14 September 2015, the claimant started her employment with the respondent, Hartlepool Borough Council, as a Catering Assistant. This was the first of two contracts of employment upon which the respondent employed the claimant. The Catering Assistant contract of employment is at A4 to A16.

29. As a Catering Assistant, the claimant was initially assigned to English Martyrs School in Hartlepool. At paragraph 1 of her witness statement, the claimant accurately describes her contract as a Catering Assistant as a contract between her and Hartlepool Borough Council. Under her Catering Assistant contract, the claimant was engaged for ten hours per week, two hours per day, Monday to Friday at lunchtimes.

30. On 11 October 2015, the claimant started her employment with the respondent as a Cleaner. The Cleaner contract of employment is at pages A20 to A31. This contract is also between Hartlepool Borough Council and the claimant. The claimant was initially assigned to St Joseph's RC Primary School in Hartlepool ("St Joseph's").

31. In respect of the Catering Assistant contract the claimant's place of work is described in the following terms (A5):

"As a condition of employment you may be required to work at some other reasonable location as designated by the Authority".

32. It was common ground that under her Catering Assistant contract, the claimant could be and was moved from English Martyrs School to other schools and that she was assigned to Rossmere Primary School at the time relevant to these proceedings.

33. The place of work is very slightly differently described under the claimant's Cleaner contract of employment. The place of work is in the following terms (bundle A21):

""As a condition of employment you may be required to work at some other reasonable location as designated by the Council".

34. The claimant's Cleaner contract was also for ten hours per week. Two hours per day, Monday to Friday, between 06:30 and 08:30.

35. Hartlepool Borough Council provided cleaning and catering services to schools under contracts for which they are required to compete.

36. In 2017, the claimant was absent from work with pregnancy complications and on maternity leave.

37. On 25 November 2019, the claimant commenced a period of absence from work from both her catering and cleaning roles due to a surgical procedure and recovery period. She returned to work on 31 May 2020.

38. On 20 March 2020, it was announced by the Government as part of the steps to combat the spread of Covid-19 that schools in England and Wales would close except for children of key workers and vulnerable children.

39. On 1 June 2020, the claimant returned to work after her surgery and recovery period. The claimant was understandably concerned upon her return to work about covid risk mitigation measures. She had had a significant period of time away from the workplace due to her health concerns and she was returning to work at a time when covid was both prevalent and at the relatively early stages of risk management. In particular, the claimant was concerned about health and safety related covid risk measurement strategies and the risk assessments that were in place at the school to manage the risk of covid infection.

40. The claimant says that upon her return that she raised her concerns with her on-site Cleaning Supervisor at St Joseph's, Ms Cotson, regarding health and safety covid measures and the risk assessments that were in place at the school. The claimant says (A14) that Ms Cotson was flouting the risk assessments and that Ms Cotson had said that she [Ms Cotson] *"could not care less about Covid – 19"*. The claimant also complains about being harassed by Ms Cotson about leaving site early when the claimant had in fact agreed staggered flexible working hours. The claimant says that Ms Cotson did not know how to order stock and there was a lack of PPE and cleaning products to the extent that Ms Cotson had to take some PPE from Stanton Primary School, a different school in Hartlepool at which Ms Cotson also worked. The claimant says that Ms Cotson only told her about one covid-related change which was that only one person was allowed at the same time in the cleaning cupboard. It was common ground that cleaning had changed radically from the cleaning of the school prior to covid with an emphasis after the claimant's return on infection control rather than on traditional cleaning techniques.

41. On 2 June 2020, the claimant says that she saw toilets with faeces rubbed down the wall and spit *"all over the wall"* (A115). The claimant says there were only two pairs of yellow gloves that were available for four cleaners. The claimant says she became concerned for the safety of the children, the teachers, herself and her colleagues.

42. In June 2020, the claimant says that she found the classrooms were very dirty. She says that she expressed her concerns to Ms Cotson but that Ms Cotson was uninterested. The claimant also raised concerns relating to risk assessments with Ms Cotson. We accept that those matters were raised by the claimant.

43. The claimant then says that over the course of the *"next couple of days",* Ms Cotson and Ms Joanne Abbey (another Cleaner at St Joseph's), entered a classroom where the claimant was cleaning. The claimant says that was contrary to the risk assessment which said that staff should not enter other people's zones (A157 to A158).

44. In summary, after her return to work as a cleaner at St Joseph's, the claimant had a significant number of criticisms of Ms Cotson including breaking the covid restrictions by entering the cleaning cupboard when a colleague was already inside and touching children's trays and the trays' contents without wearing protective gloves.

45. Between 3 June and 8 June 2020, the claimant called Ms Lilley, Team Leader, Cleaning Services. As a Team Leader, Ms Lilley was responsible for cleaning services at a number of schools including St Joseph's. The claimant says she did so in line with the respondent's whistleblowing policy (A62- A72). We accept that these matters were raised by the claimant. In particular, that the claimant raised that: on occasion no one was on site when she arrived; there was no or insufficient PPE; there was no or insufficient social distancing; the state of cleanliness of the school was poor, Ms Cotson had been handling children's belongings; Ms Cotson was constantly going in and out of "workers' zones"; Ms Cotson was touching things, bringing equipment in and out of workers' zones; Ms Cotson was disregarding the risk assessments as well as not complying with the messages on the council's "ourpeople" App; and Ms Cotson being present in the cleaning cupboard with other members of staff contrary to the risk assessment. There were other criticism in addition but these were the main thrust of the claimant's issues with Ms Cotson.

46. We also find that the claimant had to a certain extent misunderstood some of the covid-related management measures that the respondent had put in place. In particular, we accept the respondent's evidence from, amongst others, Mr Cuthbert, that staff were not restricted from coming in and out of each other's "zones". The management requirement was at all times for staff to maintain two metres social distancing. The respondent did not at any stage require cleaners to avoid each other's classrooms. The Tribunal also accepts the evidence of Mr Cuthbert that as the Cleaning Supervisor Ms Cotson was entitled to inspect all the classrooms and other areas in the school that needed to be cleaned in order to discharge her supervisory function provided that she at all times maintained two metres social distancing.

47. On 9 June 2020, Ms Lilley asked the claimant to come into the staff room along with Ms Cotson and Ms Abbey. The claimant says that Ms Lilley repeated the complaints that the claimant had raised with Ms Lilley between 3 and 8 June 2020. The claimant says this made her feel "belittled and humiliated". The claimant says she once again mentioned that Ms Cotson didn't care about the covid risks. Furthermore, the claimant says that Ms Lilley was herself in breach of the risk assessments by having everyone in the staff room at the same time to communicate her message. We prefer the evidence of Ms Cotson when she said that she did not at any time say that she didn't care about the covid risk and we also find that Ms Lilley was not going against the risk assessments by having everyone in the staff room at the same time. As we have already said, the requirement of the risk assessment was for social distancing to be maintained. There was no additional requirement for no more than one member of staff to be in any particular room at any one particular time. Indeed, that would have been impractical in the context of cleaning and supervision.

48. After the meeting was convened by Ms Lilley, the claimant says Ms Cotson started to ignore her and that Ms Cotson stopped cleaning in the afternoons as she should have done with the effect that rooms were left dirty and full bins were left unaddressed.

49. Later, at an unspecified time in June 2020, the claimant says that Ms Lilley told her that she (the claimant) would be moving to a different site. The claimant says that this is a detriment for speaking up at St Joseph's about the fact that St Joseph's was not being adequately covered for cleaning.

50. Also on an unspecified date in June 2020, according to the claimant Ms Cotson set off the security alarms at the school because she was putting the security code not into the alarm panel but into the security door. On that same day, the claimant also says that Ms Cotson and Ms Abbey arrived together at 7.10 am not at 06.25 as required. The claimant also alleges that Ms Cotson was not respecting the social distancing of two metres; was not wearing PPE; and was behaving contrary to the risk assessments. Again, we prefer the evidence of Ms Cotson and we do not accept that at any particular time Ms Cotson was not observing social distancing requirements or failing to wear the required PPE.

51. On or around this time, Ms Lilley told the claimant to wear her proper uniform not the tabard that she was wearing when Ms Lilley was on site. Ms Lilley explained that the tabard could be worn on cleaning days but that the zip up overall uniform should be worn at all other times. The claimant says that two days later, Ms Lilley raised the uniform issue again telling the claimant that she was not wearing it correctly. The claimant also alleges that Ms Cotson told her to mop up sick in a classroom that Ms Cotson "forgot" to do the previous day. The claimant says that she refused. We prefer Ms Cotson's evidence on this matter which was a denial that this incident ever took place.

52. The claimant also says that Ms Cotson failed to order a new hose for the claimant's vacuum cleaner, apparently on the basis that Ms Cotson believed that Ms Lilley would not be happy if a new part was ordered. A short time afterwards, Ms Lilley visited St Joseph's and told Ms Cotson to order a new hose for the vacuum cleaner. Ms Lilley also told the claimant to be at work at 06.30 until 08.30 on the basis that Ms Lilley understood that the claimant was not complying with her required working times.

53. On 17 July 2020, the last day of the school term at St Joseph's, an incident took place which, along with the incident on 20 July 2020, is central to this claim. According to the claimant, Ms Cotson arrived after 07:00 and the claimant had been at work since 06:30 (the appointed time). The claimant left St Joseph's at 08:20, not the appointed time of 08:30. As a result, Ms Cotson called the claimant on the claimant's mobile at the claimant's home at approximately 08:40 asking where the claimant was. Ms Cotson told the claimant that she considered the claimant to have left before her contracted finish time.

54. The claimant's position was that she had been told by management not to hang around after she had completed her work. The claimant said that she had completed her work by 08:20 and she therefore left at that time. The claimant's

position was that such early departures were, in the covid circumstances which prevailed, authorised by management.

55. A dispute then arose on the phone between Ms Cotson and the claimant about Ms Cotson's own arrival times. According to the claimant Ms Cotson said that she arrived at 06:45 whereas the claimant said it was after 07:00. According to the claimant, Ms Cotson then called her a *"fucking liar"* and put the phone down. The claimant says that Ms Cotson called her back a short while later saying "*I am going to ring the Council and tell them to move you"* (claimant's witness statement paragraph 31).

56. On Monday 20 July 2020, the claimant said that she arrived at 06:30 at St Joseph's and that she was alone. The claimant says that Ms Cotson and Ms Abbey arrived at 07:10. The claimant says that Ms Cotson and Ms Abbey went into the cleaning cupboard together and this was against the risk assessment. As we have already found, we do not agree that this was against the risk assessment, the requirement for which was only that the cleaning staff maintained two metres social distancing.

57. The claimant accepts that she then confronted Ms Cotson. As the claimant says at paragraph 33 of her witness statement she said, "right Diane would you like to explain why you called my phone on Friday and why you are having me moved calling me a liar and slamming down the phone on me?". According to the claimant, Ms Cotson responded by saying to the claimant "shut up idiot".

58. At paragraph 33 of her witness statement, the claimant accepts that she said during this exchange with Ms Cotson that "well, if I am an idiot, you're Hartlepool Borough Council's biggest slime ball".

59. Between 07:40 and 07:45 on 20 July 2020, Ms Lilley asked the claimant once more to wear her uniform. The claimant said that she pointed out to Ms Lilley that it was a cleaning day and that Ms Lilley had already said that she could wear her tabard on cleaning days. The claimant and Ms Lilley agreed that this was the case and that Ms Lilley acknowledged it to be so on the morning of 20 July 2020.

60. Ms Lilley explained to the claimant that it had been her (Ms Lilley) who had asked Ms Cotson to ring the claimant the previous Friday morning in connection with the claimant's leaving time. The claimant says she asked Ms Lilley why she had done that and that Ms Lilley then told the claimant to *"get your stuff and leave now".* Ms Lilley accepted that she told the claimant to go home and that she said that she would get Mr Cuthbert, Facilities Manager Officer, to ring the claimant. There was no contact with the claimant from Mr Cuthbert for the remainder of that day. As a result, the claimant contacted HR directly.

61. Ms Lilley's version of events is that on 9 June 2020 she attended St Joseph's as she had promised to the claimant that she would do. This followed on from the information that the claimant had provided to Ms Lilley by phone on 8 June 2020. During that visit, Ms Lilley explained that Ms Cotson and Ms Abbey were still getting used to the ways of working which had been introduced during covid. Ms Lilley also made certain suggestions to address some of the

concerns that the claimant had raised. For example, she suggested putting a sign outside the cupboard door when anyone was using it or shouting to ask if anyone was in before getting too close. In that way the two-metre social distancing requirement could be respected. Ms Lilley also says that she expressly said to the claimant that she would arrange a socially distanced meeting in the staff room for a few minutes each Friday to ensure that things were running smoothly. We accept that evidence.

62. Ms Lilley commented on the claimant's disclosure table document dated 25 July 2021 at B42 – B46 and made the following observations as to what she recalls the claimant raised with her in the private telephone call on 8 June 2020. Ms Lilley has the following observations on those alleged disclosures:

(i) the fact that the claimant says that Ms Cotson had said the school had been deep cleaned and yet the claimant did not have to do anything while the school was filthy. Ms Lilley also says that the photographs of the school were not atypical of primary school classrooms prior to a cleaning shift being carried out.

(ii) Ms Lilley does not recall the claimant raising with her the fact that Ms Cotson had received a note complaining about the conditions of the toilet walls. Ms Lilley comments however that this would be an operational matter and was the responsibility of the members of the cleaning team to address during the shift.

(iii) that Ms Lilley does not recall the claimant saying that there was a lack of PPE on site. Ms Lilley does recall a conversation with the claimant in the school car park on a different occasion during which the claimant said that she wished to use her own gloves.

(iv) Ms Lilley says that the claimant did not raise the question of Ms Cotson "going into her [the claimant's] work zone". She says this was not raised on the telephone call or subsequently although social distancing was discussed and that allowing team members to enter each other's zones to help one another is perfectly acceptable as long as the two metre social distance was observed.

(v) Ms Lilley does not recall the claimant saying that Ms Cotson had touched children's toys and trays without PPE. Ms Lilley says that the first that she was aware of that allegation was at the meeting on 22 July 2020 between Mr Cuthbert, Ms Miller, Ms Lilley and the claimant.

(vi) Ms Lilley also says that the claimant did not raise any issues about cross-contamination of the areas with equipment. Ms Lilley was aware that there may have been concerns with cleaning equipment being used by other team members, which is why she put in place measures to prevent that occurring.

(vii) Ms Lilley was also clear that the claimant did not raise the fact that Ms Cotson was coming to and from school with a colleague (Ms Abbey). Ms Lilley says she was aware in general terms that Ms Cotson did walk into work with a colleague but that matters outside of the workplace could not be regulated by the respondent. Ms Lilley emphasises, however, that the two-metre social distancing rule was implemented within the school premises and workplaces generally.

63. The Tribunal prefers Ms Lilley's evidence to that of the claimant about what was raised or not raised during the telephone conversation between the claimant and Ms Lilley on 8 June 2022.

64. On 21 July 2020, Ms Alison Miller, HR Advisor, emailed the claimant (A102). Mr Cuthbert also called the claimant on her mobile asking the claimant to attend a meeting on 22 July 2022 at Hartlepool Civic Centre. On 22 July 2020, that meeting took place as arranged. In attendance were the claimant, Ms Miller, Mr Cuthbert and Ms Lilley. The notes of that meeting are at A103 – A112. The meeting ended just after 7pm.

65. At that meeting the claimant repeated her complaints, most of which the claimant had already made confidentially to Ms Lilley during the private telephone call between the two on 8 June 2020 (A109). At this meeting, the claimant is somewhat scathing about Ms Cotson. At A109 the claimant says *"Diane is incompetent, and puts everyone at risk including the children. She can't do her job. [She's] not following health and safety and [management] is letting her"*. The principal criticisms levelled at Ms Cotson by the claimant were:

- Not following risk assessments and openly flouting them;
- Not even reading the risk assessments;
- Not providing PPE;
- Taking PPE from other sites;
- Not keeping products sufficiently ordered so there was no pine disinfectant on site for two weeks;
- Saying that she doesn't care about covid;
- Not complying with social distancing;
- Cross-contaminating zones and equipment;
- "[c]onstantly" harassing the claimant in and out of work;
- Not cleaning and advising staff not to clean;
- Not being present at 06:30 as required with the effect that the claimant was "lone working" and since Ms Cotson was the first aid officer for the site there was no first aid representative until Ms Cotson arrived late for work;
- Telling the cleaners that "management" are advising her to go against risk assessments;
- Not doing sufficient work with the effect that the claimant was required to do extra work and extra hours; and
- Disposing of waste incorrectly.

66. At this meeting, Mr Cuthbert, Facilities Management Officer, told the claimant that he is moving her to Kingsley Primary School. The claimant asked for a reason for the move. Mr Cuthbert replies, *"your own health, safety and wellbeing"*. The claimant says that Ms Miller disagreed with Mr Cuthbert at the meeting and tried to stop Mr Cuthbert moving the claimant before investigating the matter further. We prefer the evidence of Mr Cuthbert in this respect who denied that Ms Miller said anything to that effect. We had no cause for concern around Mr Cuthbert's evidence not least because it seems to us to be inherently unlikely that an HR Advisor would openly disagree at a meeting with a management decision whether to move the claimant from one site to another or at all. We consider it far more likely than not that Ms Miller would have waited until the end of the meeting and raised the matter privately with Mr Cuthbert if she had any cause for concern.

67. The claimant asked for the decision to move her to be put into writing, which the claimant says was not forthcoming despite HR saying that it would be.

68. On 23 July 2020, Mr Cuthbert called the claimant. Mr Cuthbert asked the claimant if there was "*lemon fresh on site [and] what products were available on site".* The claimant says that she refused to discuss this without HR present. The claimant emailed HR accordingly.

69. On 18 August 2020, Mr Cuthbert called the claimant arranging a further meeting at Hartlepool Civic Centre to take place on 20 August 2020. This meeting was again attended by the claimant, Mr Cuthbert and Ms Miller. At that meeting, Mr Cuthbert again told the claimant that she was required to go to Kingsley Primary School to carry out her cleaning duties. It was Mr Cuthbert's position that the respondent was entitled under the mobility provision in the claimant's contract of employment (A21) to move the claimant from St Joseph's to Kingsley.

70. The hours at Kingsley Primary School were slightly different to those worked by the claimant at St Joseph's. At St Joseph's the claimant's two hour daily shift was undertaken between 06:30 and 08:30. The role at Kingsley Primary School was exactly the same in terms of job duties, however the shift was from 06:00 to 08:00 – a start and finish time thirty minutes earlier than at St Joseph's. There was no material difference in the travel times to and from each school. It is noteworthy that although the claimant subsequently said that the differing start times gave her childcare problems, that was not the claimant's original position for refusing the move to Kingsley which was (and remained) that the claimant considered that her place of work under her contract as a Cleaner to be St Joseph's and that the respondent was not entitled to move her elsewhere.

71. The claimant again asked on 18 August 2020 why she was being moved. On this occasion, Mr Cuthbert says it was, "*because of your threatening and abusive behaviour"* on Monday 20 July 2020. Mr Cuthbert refers to independent witnesses (Ms Abbey and Ms Amanda Gibson) who corroborated the claimant's behaviour.

72. On 20 August 2020, the claimant claims that Mr Cuthbert demanded that Ms Miller tell the claimant that the claimant *"is just a cleaner and not allowed to say*

anything". Mr Cuthbert denies that was said by Mr Cuthbert. We prefer the evidence of Mr Cuthbert in this regard.

73. At that meeting the claimant also asked for clarification on PPE and risk assessments. Mr Cuthbert again told the claimant that she will be moving to Kingsley Primary School. The claimant's response was that she should be free to raise genuine health and safety concerns *"without facing punishment or detriment for doing so"*. The claimant says in terms that she will not be accepting the move to Kingsley Primary School *"until my concerns were addressed and myself and others were safe"* (claimant's witness statement paragraph 42.2).The claimant again asked for the decision to move her to be put in writing and Mr Cuthbert says that she will receive something in the post.

74. On Monday 24 August 2020, the claimant asks HR for a copy of her contract of employment. The claimant also seeks confirmation and clarification of Mr Cuthbert's decision.

75. On Wednesday 26 August 2020, Mr Cuthbert writes to the claimant summarising the meetings that he and Ms Miller had with the claimant (A132 – A136). The letter of 26 August 2020 provides a very different account of and perspective on those meetings to that given by the claimant. Where there is any disagreement about what was said or done at the meeting on 20 August 2020, we prefer the evidence of Mr Cuthbert, which is supported by the contemporaneous documentation,.

76. In his letter of 26 August 2020, Mr Cuthbert comprehensively addressed the issues and concerns raised by the claimant. Mr Cuthbert arrived at his conclusions after speaking with not only the claimant and Ms Lilley but also with other members of the cleaning team at St Joseph's. Mr Cuthbert's letter in his own words *"outlines the concerns that [the claimant] raised and [his] findings, as discussed"*.

77. Mr Cuthbert's principal conclusions in his letter were as follows.

Staff moved unfairly

78. Mr Cuthbert explained that flexibility is an essential aspect of successful delivery of cleaning services where the respondent was a contractor to various customers. He explained that individual employees who are moved are usually informed of the reason for the move although Mr Cuthbert made clear that the respondent was under no obligation to do so under the contract of employment and that the respondent did not need to justify a decision to exercise the respondent's contractual right to relocate a particular employee on the cleaning or catering services. Mr Cuthbert also explained to the claimant that decisions to move staff in the past which the claimant considered to be "unfair" (although she did not expand on that contention) were not taken (as the claimant believed) by Ms Cotson. The claimant was accordingly wrong to attribute any blame to Ms Cotson for staff moves. Mr Cuthbert says in his letter (A132)

"… any decisions regarding moves were not ultimately Diane's".

Health and Safety/Covid 19 measures

79. Mr Cuthbert explained to the claimant that since March 2020 a number of instructions had been issued to staff. Risk statements have been communicated and updated as *"government and School Policy changes".*

80. In relation to the safety arrangements that the claimant raised at the meeting on 22 July 2020, Mr Cuthbert referred particularly to the claimant's concerns around bubbles, cleaning zones and social distancing. Mr Cuthbert explained that the claimant was incorrect when saying that Ms Cotson and other members of staff should not be in the classrooms together or when the claimant was in a particular classroom. The claimant had stated that employees could not move from one area to another and be together. Mr Cuthbert explained that the cleaning teams were not organised into dedicated bubbles but into allocated cleaning zones and that the Cleaning Supervisor at all of the respondent's school cleaning sites had full access to all areas being cleaned and were allowed to interact with all team members at any time providing they maintained appropriate social distancing. On the question of social distancing, Mr Cuthbert made clear that the respondent had emphasised the requirement to social distance at two metres on *"countless occasions".*

81. Mr Cuthbert also referred to his investigation with Ms Lilley. Mr Cuthbert referred to the contact that the claimant had with Ms Lilley on 8 July 2020 to express concerns about social distancing. He reminded the claimant that Ms Lilley had then visited the site the very next day - 9 July 2020 - and verbally reaffirmed the relevant rules and requirements to the cleaning team. He referred also to the "ourpeople" message which the claimant had read on 21 April 2020 that there was a further escalation procedure in place should the supervisor/team leader not resolve social distancing concerns. The claimant had not availed herself of that escalation facility despite the fact that she had opened (and presumably read) the message on the "ourpeople" app on 21 April 2020.

82. In relation to PPE/uniform, Mr Cuthbert reminded the claimant that she had been observed by Ms Lilley not wearing the correct tunic. The claimant's response had been that Ms Cotson did not always wear her rubber gloves. Plainly, whether or not Ms Cotson wore her rubber gloves was not a convincing response to the claimant not wearing the appropriate uniform. Nevertheless, Mr Cuthbert had investigated that particular point and Ms Cotson had strongly refuted the claim. The two members of staff who were questioned did not support the claimant's view that Ms Cotson did not wear gloves during her duties. Nevertheless all employees had been given a general reminder at the start of the new term about uniform standards and the wearing of PPE. Mr Cuthbert made clear that everyone was expected to comply with the standards set.

Security

83. Mr Cuthbert responded to the claimant's criticism that Ms Cotson had disclosed the alarm code to another colleague. Mr Cuthbert explained that the security of the school is not a responsibility of the cleaning team nor is it a requirement

of Ms Cotson's post as supervisor. There appeared to be a local agreement between the Headteacher of St Joseph's Primary School and Ms Cotson regarding the opening of the school. Essentially, Mr Cuthbert was saying that security was a matter for the school as opposed to the provider of the cleaning services to St Joseph's.

Sickness Absence

84. Mr Cuthbert addressed the claimant's concerns that Ms Cotson had called her by phone at home when she was on sickness absence regarding a fit note. Mr Cuthbert explained that Ms Cotson had not been aware of the claimant's fit note and therefore had a genuine reason to contact the claimant about her sickness absence. Enquiries about the status of fit notes were in Mr Cuthbert's view a proper matter for Ms Cotson to contact the claimant about. He concluded that Ms Cotson's contact on that occasion was *"entirely appropriate".*

Hours of Work

85. Mr Cuthbert addressed the claimant's concerns about Ms Cotson ringing the claimant at home on 17 July 2020 to ask why the claimant had left work early. Mr Cuthbert accepted that the claimant legitimately felt that she had finished her shift on 17 July at 08:20 and certainly by the time the phone call was received. Mr Cuthbert also explained to the claimant that it had been Ms Lilley who had asked Ms Cotson to ring the claimant on 17 July about timekeeping. Ms Lilley had been unaware that the cleaners had been given increased flexibility about timings at that time.

Pine Disinfectant

86. Mr Cuthbert explained that the claimant had described it as *"appalling"* that there was no pine disinfectant on site. Nevertheless, Mr Cuthbert's enquiries confirmed that lemon disinfectant had been available on site throughout this period which is simply a different fragrance of exactly the same product. By implication, Mr Cuthbert was rejecting the suggestion that there was no disinfectant available for a two-week period as the claimant had previously contended.

Cleaning standards

87. Mr Cuthbert addressed the claimant's contention that she felt that her zone had not been adequately cleaned during her sickness absence from work and that the claimant had returned to find cobwebs and smear marks which required her to carry out her duties. Mr Cuthbert referred to the fact that during covid-19 the emphasis of the cleaning regime had changed from traditional cleaning to infection control measures. One unfortunate consequence of that had been a potential reduction in traditional cleaning standards. Mr Cuthbert pointed out that, once highlighted, these concerns were rectified and the claimant had never had any blame attached to her (or indeed anyone else in the team) for cobwebs, smear marks or other reduced cleaning standards.

20 July 2020 incident

88. Mr Cuthbert confirmed that this incident had been discussed at the meeting on 22 July 2020. Mr Cuthbert apologised for the fact that after Ms Lilley had told the claimant to go home he had not been able to contact the claimant on the same day.

89. Mr Cuthbert confirmed the outcome of his investigation which was that the claimant was asked to leave early on 20 July 2020 because Ms Lilley felt that the claimant was becoming *"overly argumentative"* and that *"a cooling off period would be beneficial".* In Mr Cuthbert's judgment that was a reasonable management decision designed to avoid a situation which might escalate to an unacceptable level whilst carrying out work on a client's premises. That way, the risk of a complaint from the school was minimised. Mr Cuthbert made it very clear to the claimant that this was not in any shape or form a dismissal and that there had been no reduction in pay as a result of being asked to leave early.

Cleaning Days

90. Mr Cuthbert agreed with the claimant that the cleaning days had been changed without full consideration of the circumstances of the whole team (and not just the claimant) and also without the knowledge of the Team Leader. Mr Cuthbert explained that he had advised the claimant that these arrangements would be reverting back to the original dates on Mr Cuthbert's instruction.

Name-calling

91. Mr Cuthbert explained that this was an area of *"particular concern"* for him. The claimant had said that Ms Cotson had called her an *"idiot".* The claimant accepted that she had called Ms Cotson certain names. Those names were *"slimeball"* and *"the Hartlepool Borough Council's finest snitch".* Mr Cuthbert confirmed that this name-calling had been confirmed by other employees and independent witnesses about the language that had been used and the exchanges that they had heard. Mr Cuthbert said that he found this sort of verbal exchange between employees to be *"totally unacceptable"* and he did not intend to allow that to occur again at St Joseph's.

92. Mr Cuthbert then addressed Ms Lilley's decision to transfer the claimant to a different site. Mr Cuthbert had consulted with the Head of Service (Mr Mason) and the HR team (Ms Miller) and his conclusion after those discussions was that he would be insisting that the claimant move to a new site in accordance with her contract of employment. Mr Cuthbert confirmed that the details of the new site had been discussed with the claimant at the meeting on 20 August 2020. Accordingly, the claimant was instructed by Mr Cuthbert to attend work at Kingsley Primary School commencing at 06:00 and ending at 08:00. The claimant's contact at that Kingsley site would be Christine Adams, a highly experienced Cleaning Supervisor. Given the school holidays, the next working day at Kingsley (and therefore the date upon which the claimant was instructed to attend work) was 14 September 2020. Finally, Mr Cuthbert explained that there had been several other changes which he had implemented as a

consequence of his investigation which affected not just the claimant but other staff members at St Joseph's.

93. Mr Cuthbert ended his letter by saying that he trusted that the claimant would find his letter *"a comprehensive response in which [he has] set out [his] findings, conclusions and the outcome [he] wish[ed] to see in some detail."* Mr Cuthbert was clear that he did not intend to comment further on any of the points raised the claimant had raised and that which he now considered the matter to be closed.

94. We concluded that Mr Cuthbert was entirely justified to describe his response as *"comprehensive".* The claimant's subsequent assertions made on a number of occasions that her complaints had been *"ignored"* or *"brushed under the carpet"* are in our view completely without foundation. It may very well be that the claimant did not get the outcomes (particularly in relation to having to move her place of work from St Joseph's) that she wanted, but that of course is an entirely different thing from complaints being ignored or brushed under the carpet. Put simply, her complaints were addressed thoroughly and conscientiously by Mr Cuthbert.

95. Nevertheless, once the claimant had received Mr Cuthbert's letter of 26 August 2020, she entered into further correspondence. At paragraph 45 of her witness statement she says that Mr Cuthbert's letter of 26 August 2020 "*confirmed to me that a cover up was taking place*". The tone and contents of the letter the claimant said confirmed to her that *"she was unsafe and was being punished for speaking up and raising what I believe to be serious genuine health and safety concerns".* The net effect of the claimant's unhappiness with Mr Cuthbert's outcome letter was that the claimant brought a formal grievance in a letter dated 28 August 2020 (A139) sent to Hartlepool Borough Council HR department. As is set out in the letter from the claimant of 28 August 2020 the claimant's position was that she had raised legitimate health and safety concerns in June 2020, the outcome of which (as she saw it) was that she was being required to move her place of work. In her own words she says the decision to move her place of work was *"a direct result of my reporting of a legitimate H & S concern".*

96. On 2 September 2020, the new school term at started at St Joseph's. The claimant had been instructed to attend Kingsley Primary School for cleaning duties with effect from 14 September 2020. On 29 August 2020, the claimant began a period of pre-operative shielding. Initially it was thought that the claimant would have to shield until 12 September 2020 but due to a change in plans shielding was required between 11 and 26 September 2020.

97. On 7 September 2020, Geoff Mason, Strategic Policy and Facilities Management Manager, wrote to the claimant. Mr Mason acknowledged that the claimant had resubmitted her concerns by way of a formal grievance. However, Mr Mason also made clear that it was the management's expectation that notwithstanding the grievance that the claimant would attend for work at her new location at Kingsley Primary School. Mr Mason noted that both verbally and in two separate emails to Mr Cuthbert and Ms Miller on 1 September 2020, the claimant had categorically stated that she would not be

attending work at Kingsley on 2 September 2020 despite the instruction given. Mr Mason referred to Ms Miller's reference to the potential consequences of the claimant not turning up for work at Kingsley Primary School, in particular should the claimant decide not to attend management may treat that as a refusal to attend work and record the matter as unauthorised unpaid absence which may be considered a failure to follow a legitimate management instruction under the disciplinary procedure.

98. Mr Mason also made clear what the reason for the claimant's move was, at least in the eyes of the respondent's management. Mr Mason says (A148) that the primary reason for the move was

"to ensure you were placed with one of our best and most experienced supervisors who could ensure any special needs in relation to covid-19 are fully recognised and that standard social distancing and other measures set out in the risk assessments would be stringently adhered to". Giving the findings in relation to the incident involving yourself which took place on 20 July 2020, it was also felt that this move was essential to ensure the cleaning contract arrangements at St Joseph's School were not jeopardised and that a high quality, frictionless service was in place for the new term at that site".

99. By an email also of 7 September 2020, the claimant responded to Mr Mason. Her position was unaltered. She repeated the fact that there was not in her view a legitimate reason to move her as she felt she was being moved for raising health and safety concerns.

100. Turning to our view of the reason for the respondent's decision to move the claimant, we were satisfied that in the mind of Mr Cuthbert and of Ms Lilley before him, the claimant was being moved primarily as a response to the fracas which had involved unpleasant name-calling towards Ms Cotson by the claimant on 20 July 2020. We consider this was part and parcel of the related objective of finding a working environment which was more likely to prove to the claimant's liking in relation to her perception of health and safety and covid risk assessment standards. We find that what happened was that what started as a concern around dealing with the position at St Joseph's and indeed assuaging the claimant's concerns quickly evolved after 20 July 2020 into serious concerns around the claimant's behaviour. We find that the claimant was clearly the aggressor on 20 July 2020. It was the claimant who started the disagreement by challenging Ms Cotson's decision to make a telephone call to her while she was at home and she did so in such a highly confrontational and unprofessional manner that it was very likely to have repercussions for her. In short, the claimant verbally abused her supervisor in terms that ran the clear risk of irreparably damaging her working relationship with Ms Cotson and destabilising the dynamics of the cleaning team at St Joseph's as a whole. Ms Cotson had done nothing which could even begin to justify such behaviour by the claimant.

101. On 15 September 2020, Ms Miller invited the claimant to a stage two grievance meeting and included a copy of the grievance procedure with that letter (A150). The grievance hearing had to be re-arranged for unavoidable reasons and Ms Miller again wrote to the claimant on 18 September 2020 (A152

– A153) to set a revised date of 30 September 2020 at Hartlepool Civic Centre. The claimant was informed that Mr Hanson, Assistant Director of Environment and Neighbourhood Services, would be the chair of the grievance meeting with Mr Mason and Mr Pendlington, HR Advisor also present.

102. The grievance hearing duly took place on 30 September 2020 and the notes of that meeting are at A155 to A161. The claimant chose to attend the grievance hearing without representation. There is again a dispute of fact in relation to what that the claimant says happened at the grievance hearing. In particular, the claimant says that she had difficulty raising her concerns and that Mr Pendlington had slammed his fists onto the table and screeched at her *"you, who do you think you are … you're a dictator"*. The claimant provides further details at paragraph 53 of her witness statement in which she says that Mr Pendlington said, *"you, who do you think you are, you do what we say you do, what managers say you do, you're a dictator, who do you think you are I'll tell you, you'll do as we say"*. As a result, the claimant says that she was scared and upset and could not speak because she was crying. She then says that she said nothing because she *"didn't dare*". She says that she left the room shaking and that the meeting was cut short by fifteen minutes with the door *"crash[ing] shut"* behind her.

103. At the grievance hearing on 30 September 2020, the claimant raised once again a number of the concerns that she had raised previously at different times since she returned to work on 1 June 2020. Mr Hanson in his witness statement identifies the following issues that were again raised by the claimant:

- Other cleaning staff were not working the full two hour shift
- The claimant says she was told by Ms Cotson that she (the claimant) had nothing to do:
- There were cobwebs on the passage radiator
- That Ms Cotson's time keeping was not appropriate
- That Ms Cotson shouldn't have contacted her about leaving early
- That cleaning staff were coming into each other's bubbles
- That social distancing was not being maintained by Ms Cotson
- Ms Cotson had been coming into her classroom/zone when she was cleaning
- There was no proper PEE available
- Ms Cotson was getting PPE from Stanton School – another site where she also worked for the respondent
- There were no disposable gloves

- That a risk assessment had been changed retrospectively to cover up the concerns that she had raised

- Rubbish and the vacuum cleaner were being left in the hall.

104. During the course of the grievance hearing the claimant admitted calling Ms Cotson *"a snitch and a moron"* on 20 July 2020.

105. By a letter dated 9 October 2020 , Mr Hanson provided his outcome to the claimant's stage two grievance hearing (A165–168). The claimant was again given a comprehensive response to the issues that she had raised, this time by way of a response to her formal grievance.

106. Mr Hanson's response was in the following terms.

Health and safety concerns raised in June 2020

107. The claimant repeated her criticism of Mrs Cotson at the grievance hearing. Mr Hanson's response was that the cleaning staff do not operate in bubbles; the site supervisor was permitted to access all areas of the building provided that social distancing was maintained; and that the cleaning staff at St Joseph's had all been reminded by Ms Lilley on 9 June 2020 of good practice in relation to covid risk mitigation.

108. Mr Hanson also confirmed that transferring PPE from one site to another was permitted. To the extent that Ms Cotson had been so doing she was not acting inappropriately but in fact in accordance with management guidance. Mr Hanson also found that there had never been an occasion when the cleaning services at St Joseph's had run out of gloves.

109. Mr Hanson's accepted that the claimant had genuine concerns and perceived Ms Cotson's personal standards to be below that required. Mr Hanson did not accept that risk assessments had been amended in response to conversations that she had had with management and that issues with Ms Cotson had been addressed with her. Mr Hanson was at that time not at liberty to go into details in relation to the steps taken in relation to Ms Cotson for reasons of confidentiality, but he did indicate that appropriate action had been taken in the light of concerns that the claimant had raised.

Moving the claimant in response to her health and safety concerns

110. Mr Hanson reminded the claimant of the mobility clauses which are in both of the claimant's contracts of employment. He confirmed that in the region of 60 people had been moved for multiple reasons recently around the service for a variety of reasons. Mr Hanson said that in his view, having read and listened to the claimant's grievance which included information from other cleaners and cleaning service managers, it was clear to him that there had been a complete breakdown in the relationship between the claimant and Ms Cotson. He also referred to the fact that the claimant accepted calling Ms Cotson a *"slimeball", "incompetent"* and *"the council's finest snitch"*. Mr Hanson also referred to the evidence of another employee that on one occasion the claimant

had gone into the school shouting loudly at Ms Cotson about telephoning her and that she had called Ms Cotson a *"moron"* publicly. Mr Hanson also pointed out that her behaviour on 20 July 2020 could have been dealt with as a disciplinary matter but that management had made a decision to try and resolve the issues informally and by other routes. Since the claimant's behaviour had been below the expected standard, the claimant was told that she was being moved to another site.

111. Finally, Mr Hanson noted that the start and finish times at Kingsley Primary School were 30 minutes earlier than those at St Joseph's. Mr Hanson therefore committed to speaking to Mr Cuthbert to see what alternative options might be available with closer start and finish times to those at St Joseph's. Mr Hanson nevertheless supported the decision of Mr Mason that the claimant would not be returning to St Joseph's school.

112. Mr Hanson acknowledged that the claimant would be disappointed that he had not accepted that she had been asked to move schools as a result, in whole or in part, of the health and safety concerns she hade raised. He nevertheless expressed the hope that the claimant might be able to move forward.

113. In summary, Mr Hanson's view was that:

(i) the claimant didn't have to work in bubbles but rather in allocated cleaning zones where the primarily requirement was for social distancing to be maintained;

(ii) The supervisor was entitled to access all areas;

(iii) The supervisor was permitted to transfer PPE/gloves from one site to another. That was a management matter. The cleaning service as a whole had never run out of gloves on any site;

(iv) The risk assessments had not been amended retrospectively out of convenience;

(v) The issues with Ms Cotson's performance had been addressed and remained private.

114. Mr Hanson noted that there had been a complete breakdown in the claimant's relationship with Ms Cotson which had been confirmed by other cleaning staff and managers. At a management meeting the claimant had referred to Ms Cotson as a *"slimeball", "incompetent"* and *"HBC's finest snitch"* and had called Ms Cotson a *"moron"* in public. The claimant had also shouted at Ms Cotson in public. Another employee had also confirmed that the claimant had called Ms Cotson *"the council's finest snitch".*

115. Mr Hanson said that he could not have disputes of this nature in a school environment, particularly where the client was free to change provider. Elements of the claimant's behaviour could have been perceived as disciplinary in nature and the claimant's behaviour fell below the standard expected. Ms Cotson was still at the site at St Joseph's but was no longer the supervisor, so

Mr Hanson concluded that both Ms Cotson and the claimant had been impacted by what had happened at St Joseph's since the claimant's return from sick leave on 1 June 2020.

116. The claimant was advised of her right of appeal. After having initially indicated that she did wish to appeal, the claimant confirmed by an email to Mr Pendlington of 26 November 2020 (A170 - A171) that she did not wish to do so. The claimant said that she had decided that she had "*decided not to appeal as [she didn't] believe the outcome of the appeal would of been any different."*

117. On 27 November 2020, Mr Pendlington sent an email (A170) to the claimant referring to the claimant's continued refusal to attend alternative sites, which included the following:

"… this may impact on all your contractual roles you hold with the council i.e. dismissal from both cleaning and catering roles".

118. On 27 November 2020, Mr Pendlington sent an email to the claimant asking her to confirm whether she wanted to return to work, or alternatively whether she intended to resign from her role. Mr Pendlington explained that the current situation was that the claimant remains employed in a cleaning role but was refusing to attend work and was therefore now not being paid. He explained that these circumstances cannot continue and needed to be finalised one way or another. Mr Pendlington ended his email by saying to the claimant that if she does not intend to return or to resign the only option for the council as an employer would be to bring the situation to an end in accordance with its formal policies and procedures and Mr Pendlington explained that this may impact on all the claimant's contractual roles with the council *"i.e. dismissal from both cleaning and catering roles".*

119. By an email of 1 December 2020 (A173 – A174), Mr Mason wrote to the claimant. He sets out the current situation. The claimant had not undertaken cleaning duties since 2 September 2020 when she went on unauthorised, unpaid leave. As a result of her non-attendance at work, Mr Mason had instructed payroll not to pay the claimant for her cleaner role from 26 September 2020. Mr Mason confirmed that in the meantime the claimant had carried on attending work as normal in her catering capacity at Rossmere School.

120. Mr Mason pointed out that the claimant's grievance had been through the council's grievance procedure, had not been appealed and was now therefore closed. He referred to Mr Pendlington's email of 27 November 2020 setting out the claimant's options and notes that the claimant had not responded to Mr Pendlington.

121. Mr Mason gave the claimant the opportunity to come and meet him to discuss her return. He told her that he had found an alternative site, High Tunstall College of Science, which had exactly same cleaning hours as St Joseph's: 06.30 to 08.30, Monday to Friday. Mr Mason ends his letter by saying that if the claimant did not attend work at that time, formal disciplinary action will be taken against her which may result in her dismissal from both of her contractual roles with the council.

122. On 7 December 2020, the claimant responded to Mr Mason's letter of 1 December 2020 (A177). The claimant queries the link between the two roles. She asserted again that she considers herself to have been dismissed by Ms Lilley on 20 July 2020 from working at her *"original workplace at St Joseph's"* and that she continues to be willing to work at St Joseph's in what she refers to as *"my job".* The claimant again says that she has not been listened to and that serious issues have been swept under the carpet. The claimant also pointed out what she considered to be shifting rationales for her move. In the first instance she said she was told the move was for reasons related to her safety and wellbeing and that latterly it had been because of her *"threatening and abusive behaviour*".

123. On 12 January 2021 (A179 – 181), Mr Mason responded to the claimant's letter of 2 December 2020. Mr Mason explained that in his view the contract for cleaning and contract for catering were linked on the basis that they were contracts between the same employer and employee; that conduct under one contract may impact on the other contract; and the same facilities management team was common to both contracts.

124. Mr Mason again told the claimant that she had not been dismissed by Ms Lilley when asked to go home on 20 July 2020. Mr Mason also made clear his support for Ms Lilley's decision to remove the claimant from site on 20 July 2020 to allow a cooling down period after what on any view had been a heated incident.

125. Mr Mason also addressed the claimant's persistent and restated wish to return to St Joseph's. Although that had been the claimant's position throughout, it had been made clear that it was unacceptable to the respondent for reasons which had been given to the claimant clearly and which Mr Mason then repeated. In Mr Mason's own words (A180) *"your move away from that site was determined for reasonable and sound business reasons, i.e. based on your unacceptable behaviour on the school site, your relationship with another council employee "DC" and the absolute necessity for us to make sure we retain the cleaning contract at this school and protect the jobs this contract provides for other employees".*

126. Mr Mason also addresses the claimant's desire to meet and discuss matters again. Mr Mason (A180) makes clear that it was entirely appropriate for the claimant to have raised matters with Ms Lilley and have formal meetings with Mr Cuthbert and Ms Alison Miller (HR). He referred to the stage one grievance review where Mr Mason says that he examined the facts of the issue and the stage two grievance hearing where the facts were again explored but this time with the Departmental Director, Mr Hanson. Mr Mason then said:

"in my opinion a fair and reasonable approach has been taken to listening and responding to the issues you have raised. The face to face meetings described above have each been several hours in length and have provided extensive opportunities for you to air your comments and concerns. I completely disagree with your view that the issues have been brushed under the carpet. Matters have been investigated thoroughly, decisions have been taken on the basis of findings and business need and all outcomes have been communicated to you in a series of detailed correspondence".

127. Mr Mason ends his letter by reviewing the claimant's refusal to attend an alternative site as a Cleaner. He points out that on at least three previous occasions the claimant has been clearly informed that no return to St Joseph's School will be sanctioned and in those circumstances he does not feel a further meeting to revisit that issue would be appropriate. Finally, Mr Mason repeats the instruction that the claimant must report to High Tunstall College of Science, at 6.30 am on Thursday 14 January 2021 to resume her school cleaning duties. Mr Mason also identifies the alternative: that if the claimant continues to refuse to attend work formal disciplinary action would be taken against her which may result in her dismissal from both of her contractual roles with the council.

128. On 19 January 2021, Mr Mason verbally suspended the claimant from both her cleaning and catering roles with the council. As a result of the suspension the claimant returned to normal pay on both contracts for the period of the suspension. By a letter dated 19 January 2021 (bundle A183) the claimant's suspension from work is confirmed by Mr Mason. The suspension is pending an investigation into the following three matters:

(i) that the claimant had failed to attend work in [her] capacity as a Cleaner and undertake [her] contract of employment, i.e. abandoning duties and place of work without permission or acceptable reason.

(ii) that the claimant had failed to follow a reasonable management instruction by refusing to attend work as a Cleaner as instructed.

(iii) that the claimant had committed serious insubordination.

129. Lynne Bell, Facilities Management Officer, was appointed to support the claimant as a Support Officer/Mentor during the period of her suspension and any disciplinary process. Mr Mason enclosed copies of the respondent's suspension guidance and disciplinary procedure.

130. Also on 19 January 2021 (A185), Kieran Bostock, Assistant Director (Place Management), wrote to the claimant convening a disciplinary hearing. The same three matters as referred to by Mr Mason are repeated in that letter as the matters to be considered at a disciplinary hearing. The claimant's attention is also drawn to the fact that dismissal is a possible outcome of the disciplinary hearing.

131. The disciplinary hearing took place on 1 February 2021. The notes of the disciplinary hearing are at pages at A195 to A205. In attendance were Kieran Bostock as the disciplinary manager; Julie McGinley, HR Advisor, Geoff Mason, Strategic Policy and Facilities Management Manager, Mr Pendlington HR Advisor, and the claimant. The claimant in her witness statement describes the disciplinary hearing as *"an interrogation".* She says that she was told by Kieran Bostock that she was *"disrespectful", "untrustworthy",* and should resign (claimant's witness statement paragraph 68). Mr Bostock denies saying any of those things to the claimant. We prefer the evidence of Mr Bostock on this conflict of evidence and we find that Mr Bostock did not say to the claimant that she was disrespectful, untrustworthy or should resign.

132. The disciplinary hearing resumed on 2 February 2021, at which point Mr Bostock gave his decision. Mr Bostock pointed out that the claimant was employed as a Cleaner for Hartlepool Borough Council, and that she was not employed to work at any one particular site. It had been a management decision to deploy resources where the council saw fit. The claimant had twice been instructed to attend Kingsley Primary School. She had also twice been instructed to attend High Tunstall College of Science. The claimant had said that she did not intend to attend High Tunstall. In those circumstances Mr Bostock considered that the claimant had committed gross misconduct and should be dismissed from her cleaning contract. Mr Bostock went on to consider the claimant's second employment under her catering contract of employment and he informed the claimant that her second role was "*now untenable because of her failure to follow instructions from Mr Mason – the head of both services."* The claimant was informed the dismissal was effective today without notice and that she had the right to appeal.

133. By a letter dated 11 February 2021 (A206 – A208), Mr Bostock summarised his decision to dismiss the claimant from both her cleaning contract and her catering contract. Mr Mason made direct reference (A207) to the number of times that the claimant had refused to attend either Kingsley Primary School or High Tunstall College of Science and that he had asked the claimant directly during the disciplinary hearing if she intended to work as a cleaner at the High Tunstall site and that the claimant had confirmed that she did not so intend. The claimant's justification was to refer to her grievance letter of 28 August 2020. Mr Bostock pointed out that the grievance had been dealt with at both stage one and stage two and the claimant had declined to take the matter to stage three – the final stage of the process. In those circumstances, Mr Bostock upheld the allegations against the claimant and considered her to be abandoning her duties without acceptable reason and that the claimant had made clear that she would continue to do so unless she is returned to her preferred site at St Joseph's. Mr Bostock concluded that was a clear failure to follow a reasonable management instruction from both Mr Cuthbert, Facilities Manager, and Mr Mason, the Departmental Head of Service. He accordingly confirmed the claimant's dismissal for gross misconduct.

134. Mr Bostock also addressed the claimant's continued assertion that her health and safety issues had not led to any change and that the matters had been *"brushed under the carpet".* Mr Bostock made direct reference to Mr Mason's confirmation that things had been changed as a direct result of the matters that the claimant had raised, including the fact that the supervisor that the claimant had previously worked with (Ms Cotson) was no longer undertaking a supervisory role. Mr Bostock also referred to the fact that the claimant was in no position to say whether or not things had changed at St Joseph's since she had not returned there since she was asked to leave site on 20 July 2020. Mr Bostock also repeated his conclusion that the claimant should be dismissed from her second role due to her position being untenable. The date of the dismissals from both posts was Tuesday 2 February 2021. The claimant was reminded of her right to appeal.

135. By a letter dated 18 February 2021 (A209), the claimant exercised her right of appeal. The claimant's position remained that she had been subjected to a "double detriment" having been dismissed from both of her posts for what she saw as a consequence of raising health and safety concerns.

136. On 22 March 2021, (A220 – 221), Gillian Laight, HR Manager, wrote to the claimant arranging the appeal hearing. It was to be conducted by Teams video platform given the covid circumstances. She also confirmed that the appeal would be to members of the Council's Personnel Sub-Committee. The original date for the claimant's appeal was to be 16 April 2021.

137. On 31 March 2021, the claimant notified ACAS that she was in dispute with the respondent.

138. At paragraph 75 of the claimant's witness statement, the claimant says that on 13th April 2021 she received bundles of paper running to some 107 pages of documents for the appeal hearing two days before it was due to take place. The claimant says that a number of the documents contained within the appeal papers were papers that she had not previously seen. However, also on 13 April 2021 (bundle A224(b)) the claimant wrote to Dave Cosgrove (Principal Democratic Services Officer) who was assisting with the appeal arrangements telling him:

"Hi Dave

Yes, all good and ready my end.

Yes, it happened in my last meeting I was stuck in the lobby for forty minutes. Hopefully it all goes smoothly tomorrow.

Kind Regards

Sarah"

139. The only conclusion that can be drawn from that letter is that the claimant felt that she was in a position to proceed with her appeal hearing and to participate fully in it.

140. On 16 April 2021, the appeal hearing took place. The notes of the appeal hearing are at A249 – A275. The claimant was unaccompanied, despite the fact that she was informed of her right to have a companion with her. The Personnel Sub Committee consisted of three council members and was chaired by Ms B Harrison. Jillian Laight, HR Manager, provided support to the panel. Also in attendance were Kieran Bostock, Julie McGinley, Geoff Mason and Mr Pendlington. Mr David Cosgrove, Democratic Services Officer also attended.

141. After the appeal hearing on 16 April 2021 (A284 – 285), Gillian Laight telephoned the claimant to tell her that the councillors had upheld her appeal and reinstated her. The claimant's response to that news is significant. The claimant does not respond positively to the news that her appeal has been successful and her employment reinstated. Rather, the claimant says that she

had not been *"given a chance"*; and that *"no one had listened or considered her wellbeing".* She also said that the council *"had tried to cover up serious going ons because she is just a cleaner"*. The claimant also said that *"she has already made an application to the Courts and it was her intention to sue the council"* (A285).

142. The decision of the appeal committee was:

i. to reinstate the claimant back into her role as a Catering Assistant assigned to Rossmere school on the same terms and conditions and with back pay restored; and

ii. to reinstate the claimant back into her role as a Cleaner assigned to High Tunstall College of Science on the same terms and conditions and with back pay restored.

143. By a letter dated 29 April 2021 (A287 – 293), Ms Harrison set out the appeal committee's decision together with its supporting reasons for reinstating the claimant into both roles. Ms Harrison refers to the following points when reaching her decision:

(i) The appeal panel felt that not enough had been done by Ms Cotson to reassure the claimant when she came back from long term sick into the working environment with its covid restrictions and risks.

(ii) That the concerns raised by the claimant on 8 June 2020 were acted upon by Ms Lilley on 9 June 2020 "*re-inforc[ing], with all staff, the importance of following the risk assessment and guidance in relation to working during Covid"*.

(iii) The claimant's lone working caused by Ms Cotson and Ms Abbey arriving after their appointed start time had been immediately rectified.

(iv) In relation to supervision, the appeal panel concluded that there had been a *"clear breakdown in the relationship between [the claimant] and the cleaning supervisor and accept that this has had an effect on other members of staff"*. The concerns expressed by the claimant on Ms Cotson's competence and conduct were acted upon not least because Ms Cotson was transferred to another site alongside a more experienced supervisor to obtain more training and development. No decision had been taken on whether Ms Cotson would go back to St Joseph's at the time that the claimant was reassigned to (initially) Kingsley Primary School. The appeal panel also noted that management sought to address the concerns raised on 8 June 2020 in an onsite meeting on 9 June 2020, at which stage the claimant was offered the opportunity to transfer to an alternative location which would have enabled her to have worked with a more experienced supervisor. This was in an attempt to alleviate the claimant's heightened level of anxiety and fear of being in the workplace, and by implication had nothing to do with any concerns related to health and safety that the claimant had raised on 8 June 2020 or at any other time.

(v) The committee also addressed the incident on 20 July 2020 between the claimant and her supervisor (Ms Cotson) that resulted in Ms Lilley, Team Leader, attending site. The appeal panel noted at that point, Ms Lilley had asked the claimant,

who she had found to be argumentative, to leave site advising that Mr Cuthbert, Facilities Management Officer would be in touch later that day.

(vi) The appeal panel identified "this incident" (A290) as what had resulted in the claimant being told that she was to be transferred to another site. The appeal panel also noted that management also took the decision to move the supervisor to undertake further training and development at the same time. As a result of that incident the supervisor (Ms Cotson) made a request to step down from the position of supervisor which was granted.

144. Accordingly, it is clear that the appeal panel considered that the incident on 20th July and its repercussions (and no other matter including the raising of health and safety concerns) was the effective and sole cause of the decision to move the claimant from St Joseph's to an alternative site.

145. Whilst recognising the claimant's frustration at having been asked to move sites, the Committee accepted that in the circumstances *"it would not be reasonable for [the claimant] to return to St Joseph's as this would not be a healthy working environment. Additionally, the impact of poor supervision and a disconnected team could put the cleaning services contract with the school in jeopardy."*

146. Ms Harrison went on in her letter to directly address the claimant's perception that she had been transferred to an alternative location *"for raising concerns related to health and safety"*. The committee's assessment of that contention, with which we agree, is at A291. In the words of the committee:

"It is your perception that the decision by Management to transfer you to an alternative location was a punishment for raising concerns related to health and safety. The Committee was satisfied that Management took the concerns raised by you seriously and they subsequently resulted in positive action being taken. You were initially offered the opportunity to transfer to another location and declined, however, following the incident on 20 July 2020 management took the decision to transfer you to an alternative location. I reiterate the committee's disappointment that the situation escalated to a point where management felt this action was necessary."

147. The committee's decision was therefore to reinstate the claimant as a Cleaner with effect from 2 February 2021 and to be paid retrospectively for the period between her original dismissal and the committee's appeal decision. That reinstatement as a Cleaner would be at High Tunstall College of Science and her employment would remain continuous from 9 November 2015.

148. The appeal committee regarded the claimant's dismissal from her catering position as "harsh" and reinstated her as a Catering Assistant at Rossmere Primary School with effect from 2 February 2021 and with arrears of pay also reinstated. Her employment in that position would remain continuous from 14 September 2014.

149. The committee told the claimant that she could accept both posts, one post or neither post or to resign with a deadline of Wednesday 4 May 2021. The committee indicated that if the claimant did not accept either or both

reinstatements then the claimant would again be dismissed with effect from Wednesday 4 May 2021. That deadline was subsequently extended due to ongoing discussions until 11 May 2021.

150. The claimant declined to accept reinstatement into either of the two posts. On 4 June 2021 (A229 – 300) Kieran Bostock dismissed the claimant once again from both roles and this time with effect from 11 May 2021 if the claimant did not get in touch by that date. She did not.

151. On 6 June 2021 (A301), Gillian Laight confirmed the claimant's dismissal from both roles with effect from 11 May 2021. The claimant presented her claim form to the Employment Tribunal on the same date.

The relevant Law

The law of unfair dismissal (Section 94 – 98 ERA)

The statutory provisions

152. 98 – General

[1] In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one, the principal reason) for the dismissal; and

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

[2] A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(AA) […]

[3] [….]

[3A …]

[4] 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 reasons 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.

The reason for the dismissal

153. In a claim of unfair dismissal within the meaning of Section 98 of the ERA, it is for the employer to prove ("show") the reason, or the principal reason, for the dismissal. That is the result of Section 98(1)(a). In order to be a fair reason, the reason must be either "some other substantial reason" (Section 98(1)(b) or one of the reasons in Section 98(2) (which includes "conduct" or is some other substantial reason within the meaning of Section 98(1)(b).

154. What is the "reason" for the dismissal is the subject of some helpful case law. It is often the case that an employer dismisses an employee for what could be regarded as several "reasons". In Abernethy -v- Mott Hay and Anderson [1974] IRLR 213, [1974] ICR 323, at 330 B – C, Cairns LJ said this:-

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which caused him to dismiss the employee".

155. DI [821] of Harvey Industrial Relations and Employment Law ("Harvey") helpfully (and in my view accurately; if we refer below to any other passages of Harvey, we do so on the basis that we agree with it as a description of the applicable case law) states the manner in which those words have been approved and applied in subsequent case law:

"These words, widely cited in case law ever since, were approved by the House of Lords in W Devis and Sons Ltd -v- Atkins [1977] AC 931, [1977] 3 ALL ER and again in West Midlands Co-Operative Society -v- Tipton [1986] AC 536, [1986] IRLR 112, HL where the rider (important in later cases) was added that the "reason" must be considered in a broad, non-technical way in order to arrive at the "real" reason. In Beatt -v- Croydon Health Services NHS Trust [1977] EWCA (CIF) 401, [2017] IRLR 748, Underhill LJ observed that Cairns LJ's precise wording in Abernethy was directed to the particular issue before the court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what "motivates" them to do what they do".

156. In paragraph DI [824] of Harvey this is said:-

"*[I]n cases of alleged mixed motivations, once the employee has put in issue with proper evidence a basis for contending that the employer has dismissed for some extraneous reason such as out of pique or antagonism, it is for the employer to rebut this showing that the principal reason is a statutory reason. If the Tribunal is left in doubt it will not have done so. Evidence that others would not have been dismissed in similar circumstances would be powerful evidence against the employer, but it is*

open to the Tribunal to find that the dismissal was unfair even in the absence of such strong evidence. In a case of mixed motives such as malice and misconduct, the principal reason may be malice even though the misconduct would have justified the dismissal had it been the principal reason: Aslef -v- Brady [2006] IRLR 576, EAT".

157. Similarly, in paragraph Q [722] of Harvey, this is said:

"*The reason must be that of "the employer"; in the case of a corporate employer that will usually mean the reason motivating the dismissing manager but if that manager (acting in good faith) is in fact manipulated by another manager who acts for another reason (which may well be unfair) that second managers reason can be attributed to "the employer", at least if that manager is higher in the organisation's hierarchy than the claimant: Royal Mail Group LTD -v- Jhuti [2019] UKSC 55, [2020] IRLR 129, [2020] ICR 731 (a whistleblowing dismissal case), but the principle is applicable across unfair dismissal law. In Uddin -v- London Borough of Ealing [2020] IRLRL 332, EAT, Jhuti was extended to allow an ET to take into account that second managers knowledge of facts, not just his or her motivation".*

The fairness of the dismissal

158. Where the employer has satisfied the Tribunal that the reason is a potentially fair one, the question of the fairness of the dismissal falls to be determined under Section 98(4) ERA, which provides this:-

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regards to the reasons 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".

The range of reasonable responses of a reasonable employer test

159. Section 98 ERA has been the subject of much case law, the effect of which can be summarised by saying that the key question when the fairness of a dismissal is in issue is whether or not it was within the range of reasonable responses of a reasonable employer to dismiss the employee for the reason for which the employee was in fact dismissed. However, particular considerations arise in relation to the different reasons falling within subsections (1) and (2).

Conduct dismissals

160. In a case where the employer relies on conduct as the reason for the employee's dismissal, the following questions arise:

(i) Has the employer satisfied the Tribunal on the balance of probabilities that the reason for which the employee was dismissed was indeed the employee's "conduct"?

(ii) Did the employer before concluding that the employee had done that for which he or she was dismissed, carry out an investigation which it was within the range of reasonable responses of a reasonable employer to conduct? The best authority in that regard is the decision of the Court of Appeal in J Sainsburys plc -v- Hitt [2003] ICR 111.

(iii) The following statement of the applicable principles in British Home Stores -v- Burchell [1978] IRLR 379 (but bearing in mind the fact that the test at every stage is whether what was done or omitted was within the range of reasonable responses of a reasonable employer) also applies:

"what the Tribunal have to decide every time is broadly expressed whether the employer who discharged the employee on the grounds of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element.

first of all, there must be established by the employer the fact of that belief; that the employer did believe it.

secondly, that the employer had in mind reasonable grounds upon which to sustain that belief.

thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case".

The final question which then falls to be answered is whether the dismissal for the conduct for which the employee was in fact dismissed was outside the range of reasonable responses of a reasonable employer. Normally that question arises only when the preceding questions have been answered in the employer's favour.

The importance of a proper investigation

161. In paragraph DI [1482] of Harvey, this is said:

"The investigative process is important for three reasons in particular:-

- It enables the employer to discover the relevant facts to enable him to reach a decision as to whether or not an offence has been committed;

- If properly conducted, it secures fairness to the employee by providing him with an opportunity to respond to the allegations made and where relevant raise any substantive defence(s); and

- Even if misconduct is established it provides an opportunity for any factors to be put forward which might mitigate the offence and affect the appropriate sanction".

162. The ACAS code emphasises the importance of an investigation to establish facts … even putting the code to one side, there is a whole series of cases emphasising the significance of the need for proper procedural enquiries as to the need for the employer to acquaint himself with all relevant facts, as Viscount Dilhorne said in W Devis & Sons Ltd -v- Atkins [1977] IRLR 314, [1977] ICR 662, HL, the employer cannot be said to have acted reasonably if he reached his conclusion "in consequence of ignoring matters which he ought simply to have known and which would have shown that the reason was insufficient". The same sentiment was expressed slightly differently by Stevenson LJ in W Weddel & Co Ltd -v- Tepper [1980] IRLR 96 at 101:

"… [employers] do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the [employment] tribunal in this case, "gathered further evidence" or in the words of Arnold J in the Burchell case, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case, that means they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain themself, their belief is not based on reasonable grounds and they are certainly not acting reasonably".

The range of reasonable responses of a reasonable employer test applies to conduct dismissals

163. The severity of the consequences to an employee of dismissal are a relevant factor. So is the employee's length of service. So is his or her past record as an employee of the employer (whether good or bad). Those things are stated helpfully in the following passage from paragraph DI [1535.01] of Harvey:

"In para 3 of the ACAS code … it is stated that:

"where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case". See also the ACAS guide … there are a whole range of potential factors which might make a dismissal unfair … in misconduct cases they include especially the employees length of service and the need for consistency by the employer. The importance of length of service and past conduct were emphasised by the EAT in the early case of Trusthouse Forte (Catering) Ltd -v- Adonis [1984] IRLR 382 as being proper factors for a Tribunal to take into account when considering whether the sanction imposed falls within the band of reasonable sanctions moreover, it was later accepted by the Court of Appeal that the severity of the consequences to the employee of a finding of guilt may be a factor in determining whether the thoroughness of the investigation justified dismissal: Roldan -v- Royal Salford NHS Foundation Trust [2010] EWCA Civ 522, [2010] IRLR 721 (dismissal likely to lead to revocation of work permit and deportation). While this latter point has obviously sense behind it (particularly where for example, some form of professional status is in grave jeopardy) it was suggested subsequently in Monji -v- Boots Management Services Ltd UK EAT/O292/13 (20 March 2014, unreported) that some care may be needed in this application; the basic principles not doubted, but three caveats were mentioned:

(i) this is an area where the EAT must be particularly careful not to substitute its own view on the facts for that of the Tribunal;

(ii) it may be that the Roldan principle may be most applicable to facts such as those in that case itself namely where there is an acute conflict of fact with little corroborating material either way, and/or where the case against the employee starts to "unravel" as it proceeds, in which case it makes sense to expect a higher level of investigation and adjudication on the part of the employee in the light of the severe affects of dismissal on that employee. The question is whether the Tribunal has in fact applied Roldan approach not just whether they have done so expressly, though the ET did add that in such a case a Tribunal is advised to make it clear in their judgment that this has been part of their reasoning".

164. Expanding on those principles, Elias LJ in *Crawford v Suffolk Mental Health Partnership NHS Trust* [2012] EWCA Civ 138, [2012] IRLR 402, said this:

"25

The relevant law

The basic legal principles are not in dispute. Ever since the seminal case of British Home Stores v Burchell [1978] IRLR 379 (as modified to the extent that the burden of proof has since been amended by legislation) it has been recognised that it is for the employer to satisfy the tribunal that he dismissed for a potentially fair reason. Thereafter, the tribunal has to determine whether the employer acted reasonably in treating that reason as sufficient to dismiss the employee. It is accepted by the trust that the following self-direction given by the tribunal accurately reflects the law:

'It is for us to consider whether the employer had an honest belief in the misconduct alleged and that that belief was based upon reasonable grounds after having carried out sufficient investigation. It is not for us to determine on the evidence that we have heard whether we believe the misconduct had occurred. The tribunal views the matter through the eyes of a reasonable employer. Provided that the actions of this employer fall within a range of responses by a reasonable employer, the tribunal cannot interfere. It is also an exercise which is carried out when considering the penalty that follows from the employer's belief. It may be that the tribunal would have imposed a different penalty but the sole question is whether the penalty applied by this employer was such that no reasonable employer would have applied such a penalty.'

26

The tribunal reminded itself on numerous occasions throughout its decision that it must not substitute its own view for that of the employer.

27

Moreover, as I observed in the Court of Appeal in Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 paragraph 13, it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as is the case here, the employee's reputation or ability to work in his or her chosen

field of employment is likely to be affected by a finding of misconduct. The court was approving a passage to that effect in A v B [2003] IRLR 405.

28

Of course, the mere fact that there has been an appropriate self-direction will not preclude an appellate court from finding that there has been an error of law if it is satisfied that the tribunal has, in fact, failed to act in accordance with that self-direction. As Lord Justice Mummery observed in Brent London Borough Council v Fuller [2011] IRLR 414 at paragraph 30:

'.... There are occasions when a correct self-direction of law is stated by the tribunal but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has, in fact, correctly applied the law which it has said is applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques, over-analysing of the reasoning process; being hyper-critical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid.'

However, it should not readily be assumed that a tribunal has failed to follow its own directions. There must be a proper basis for an appellate court to conclude that the tribunal has failed to follow its own self-direction; see Roldan, paragraph 51.

The law of whistleblowing detriment

Qualifying disclosures

165. To attract protection, a whistle-blower must have made a "qualifying disclosure" under Section 43B(1) ERA:

"a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following …

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

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) **that the health or safety of any individual has been, is being or is likely to be endangered**,

(e) that the environment has been, is being or is likely to be endangered to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed".

166. Section 47B ERA provides that employees are protected from being "subjected to any detriment by any act, or any deliberate failure to act" by their employer on the ground that they have made a qualifying, protected disclosure.

167. In terms of a qualifying disclosure, that means any disclosure of information which, in the reasonable belief of the worker making it is in the public interest and tends to show one or more of a number of factors – the most pertinent ones for our present purposes being that the "health or safety of any individual has been/is being or is likely to be endangered (Section 43B(1)(d) ERA).

168. Reasonable belief in turn relates to the worker's belief in the accuracy of the information. The test is, in essence, a subjective one, although there is an objective element to it. Clearly the focus is on what the worker in question believed rather than what anyone else (including the proverbial man on the Clapham omnibus) might or might not have believed in the same circumstances. However, there has to be some substantiated basis for the worker's belief – so rumours, unfounded suspicions, uncorroborated allegations and the like will not be sufficient.

169. In Babula -v- Waltham Forest College [2007] ICR 1026, it was held that a belief may be reasonably held and yet be wrong. Provided the whistle-blower's belief is objectively reasonable, the fact that it turns out to be wrong is not sufficient to render it unreasonable.

Disclosure of Information

170. The disclosure must be a disclosure of information, not a matter of opinion or an allegation, see Cavendish Munro Professional Risks Management Ltd -v- Geduld [2010] IRLR 38. The Court of Appeal in Kilraine -v- London Borough of Wandsworth [2018] EWCA Civ 1436 agreed there was no disclosure of any "information" which tended to show a breach of the legal obligation or any of the other relevant failures in an employee's letter simply complaining of "inappropriate behaviour towards her" without anything more.

Reasonable Belief

171. What is reasonable will depend on all the circumstances, assessed from the perspective of the worker at the relevant time, without the benefit of hindsight, see Darnton -v- University of Surrey [2003] ICR 615. However, there does have to be some substantiated basis for the worker's belief, unfounded suspicions, uncorroborated allegations and the like will not be enough.

172. The claimant conceded at the Preliminary Hearing before Employment Judge Aspden that she was not relying upon the potential disclosures made during November 2020 on the basis that the disclosure succeeded the alleged detriments.

Public Interest

173. In the Court of Appeal decision in Chesterton Global Ltd (T/A Chestertons) -v- Nurmohamed [2017] EWCA Civ 979 the Court of Appeal provided the following relevant factors:-

(a) what was in the public interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;

(c) the nature of the wrongdoing disclosed; and

(d) the identity of the alleged wrongdoer.

Whistleblowing Dismissal

174. Section 103A ERA provides:-

"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".

175. The combined effect of those sections was conveniently explained by Mummery LJ in Kuzel -v- Roche Products [2008] IRLR 430 from paras 40 to 60. In summary, below:

(a) The unfair dismissal provisions, including those related to protected disclosures, presuppose that in order to establish unfair dismissal it is necessary for the ET to identify only one reason or one principal reason for dismissal (para 52).

(b) The reason for dismissal consists of the set of facts which operated on the mind of the employer when dismissing the employee (para 53).

(c) The burden of proof must be kept in proper perspective, because in contrast to discrimination cases (which are often difficult to prove) it is rare in practice for unfair dismissal cases to turn upon the burden of proof (paras 54 and 46).

(d) If it is necessary to resort to the burden of proof, however, it operates as follows (para 59):

(i) it is for the respondent to establish (if it can) the principal reason for dismissal;

(ii) if it cannot do that, then it is for the claimant to establish (if it can) that the principal reason for the dismissal was the fact of the protected disclosure;

(iii) if the claimant cannot do so, then the dismissal will be ordinarily unfair, but not automatically unfair.

176. The above "combined effect" of Section 103A ERA is taken from Ms Davies' written submissions with which we agree.

177. In Bolton School -v- Evans [2006] EWCA Civ 1653, and Parsons -v- Airplus International Ltd [2017] UKEAT a distinction is drawn between on the one hand the protected disclosure itself and conduct related to the making of that disclosure on the other. To fall within Section 103A the claimant must establish that it is the disclosure being made itself, rather than any related conduct, which was the reason for the dismissal.

178. It is not for the Tribunal to substitute its view for that of the employer. The legal question for the Tribunal is whether the dismissal (both procedurally and in terms of substantive decision making) falls within the band of conduct which a reasonable employer could have adopted (J Sainsbury plc -v- Hitt [2003] ICR 111).

179. The Tribunal must look at fairness when looking at the procedure as a whole including any appeal on the fairness of the dismissal (Taylor -v- OCS Ltd [2006] IRLR 613).

Detriment – Section 7B ERA

180. In order to establish liability, the detriment must be established as a matter of fact and the detriment must have been "done on the grounds that" the worker made a protected disclosure. The Court of Appeal provided guidance in Fecitt and ors -v- NHS Manchester (public concern at work intervening) [2022] ICR 372. The Court of Appeal identified a very significant difference in terms of causation between automatically unfair whistleblowing dismissals and establishing whistleblowing in relation to detriment under Section 47B ERA. In sharp contrast to the unfair dismissal claim, where the protected disclosure must be the reason or principal reason for the dismissal in order for the dismissal to be unfair under Section 103A ERA, in relation to a claim for detriment the protected disclosure only has to materially influence the treatment, where "material" means "more than trivial", and it is for the employer to show why it acted as it did. As Elias LJ said in Fecitt once the employer has satisfied the Tribunal it has acted for a particular reason, that necessarily discharges the burden of showing the protected disclosure played no part in it, but if the Tribunal considers the reason given is "false" or it has not been given the full story it is legitimate to infer the treatment was by reason of the protected disclosure.

Dismissal/Detriment under Section 100 ERA and Section 44 ERA

181. Section 100 ERA provides as follows:

"(1) 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 –

(c) being an employee at a place where –

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety …

182. Section 44 ERA provides:-

(i) An employee has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the grounds that –

(c) being an employee at a place where –

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means he brought to his employers attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.

183. Again, Sections 44 ERA requires the Tribunal to look into the subjective mind of the employee. The particular reasons for the employee's belief are not to the point – Chatterjee -v- Newcastle upon Tyne Hospitals NHS Trust [2019] 9WLUK 556.

184. It is for the Tribunal to make findings as to what the claimant believed in order to decide whether that added up to a belief that there were circumstances of danger which were serious and imminent and to decide whether that belief was reasonable – Edwards-v- Secretary of State for Justice [2014] 7WLUK 909. The same principles apply to the assessment under Section 100(1)(c) ERA. As the EAT stated in Kerr -v- Nathan's Wastesavers Limited EAT/91/925, when considering Section 100(1)(c) ERA that "in considering what is reasonable, care should be taken not to place an onerous duty of enquiry on an employee".

Conclusions

185. We have not followed precisely the list of issues in the order in which they appear at paragraphs (B60 and following). However, we have addressed each of the matters in the list of issues that the Tribunal it necessary to consider.

Did the claimant make one or more protected disclosures?

186. We considered the table of alleged disclosures produced by the claimant on 25 July 2021 set out at B42 to B45. We were satisfied that the following disclosures were made.

Phone call from claimant to Ms Lilley 8 June 2020

187. The claimant alleged that she made the following disclosures to Ms Lilley in a private phone call on 8 June 2020:

(i) That St Joseph's school was unclean including excrement smeared and spit in cubicles.

(ii) That Ms Cotson had been touching children's items without gloves.

(iii) That Ms Cotson had not been following social distancing.

(iv) That Ms Cotson was cross-contaminating areas with cleaning equipment.

(v) That Ms Cotson was using other people's equipment and touching children's trays and toys.

(vi) That risk assessments were not being followed.

188. Out of those disclosures the respondent accepted that (iii) above – Ms Cotson not following social distancing was made during the conversation between the claimant and Ms Lilley on 8 June 2020. The respondent disputes that any other disclosure was made as a question of fact during the telephone conversation on 8 June 2020. We accepted that the claimant's recollection was to be preferred in relation to (i), (ii) and (vi). We do not find that (iv) and (v) were disclosed during that conversation. However, as will be clear below, nothing material turns on whether the full range and matters were disclosed or simply a number of them.

Meeting at Hartlepool Civic Centre 22 July 2020: Ms Lilley, Mr Cuthbert, Ms Miler and the claimant

189. The claimant alleges that she made the following disclosures at the above meeting on 22 July 2020 the majority of which are repeating the alleged disclosures made to Ms Lilley on 8 June 2020

(i) Ms Cotson was incompetent and did not know how to order PPE or equipment.

(ii) Ms Cotson told the claimant she did not need to do cleaning.

(iii) No PPE was available.

(iv) Ms Cotson said she would obtain PPE from another site.

(v) Ms Cotson had not been following social distancing requirements.

(vi) That Ms Cotson was using other people's equipment and touching children's trays and toys.

(vii) Ms Cotson was telling Cleaners to sit in the staff room which goes against the risk assessment.

(viii) Ms Cotson had said that she didn't care about Covid.

(ix) Ms Cotson entering other people's covid zones.

(x) Ms Cotson left security doors open with a chair and left bin bags piled in the doorway.

190. We accepted that the claimant disclosed those matters at that meeting.

Alleged disclosure during a telephone call with Mr Cuthbert on 20 August 2020

(i) The clamant alleges she asked Mr Cuthbert was trying to cover up the lack of disinfectant on site at St Joseph's

191. We accepted that the Claimant disclosed all of those matters to Mr Cuthbert.

Alleged disclosure during the claimant's grievance hearing with Mr Hanson on 30 September 2020

(i) The respondent had retrospectively amended and backdated risk assessments because of matters that the claimant had raised.

192. We accepted that the Claimant disclosed all of those matters to Mr Hanson.

Alleged disclosure at the claimant's appeal hearing with 3 councillors and Mr Hanson, Mr Bostock, Mr Mason and Mr Cosgrove in attendance on 16 April 2021

(i) Mr Mason had to ask the claimant what a certain risk assessment meant.

(ii) Mr Mason not understanding the need for PPE

(iii) Ms Cotson saying that she did not care about Covid

(iv) Staff entering other people's covid zones

193. We accepted that the Claimant disclosed all of those matters at that meeting.

194. We find that the claimant did make qualifying disclosures under section 43B ERA and brought relevant matters to her employer's attention for the purposes of sections 44 and 100 ERA. In particular, we accepted that the claimant genuinely and reasonably believed that the covid breaches she perceived and the changes to the risk assessments she identified was information that tended to show that the health and safety of individuals had been, was being and would be likely to be endangered and were likely to be harmful or potentially harmful to health and safety. We reminded ourself in coming to this conclusion that it is not necessary for the claimant to be correct in her perceptions provided she held a genuine and reasonable belief. We therefore make no finding to the effect that any of the matters disclosed by the claimant either did or did not occur. We also accept that the claimant reasonably believed that her disclosures were in the public interest given that they were

made in the context of covid safe workplaces and working practices at a primary school.

195. We find that since all of these disclosures were made by the claimant to her employer such that they were made in accordance with section 43(c)(1)(a) ERA and therefore had the status of protected disclosures and in accordance with section 100(1)(c) ERA.

Unfair Dismissal Section 98 ERA

First dismissal - Cleaner contract of employment

196. Turning to the first dismissal of the claimant from her role as a Cleaner.

197. We were satisfied that the sole reason for the claimant's dismissal were the facts and matters referred to by Mr Bostock in his letter of dismissal (A206). The sole reason was the claimant's repeated failure to attend work as a cleaner amounting to a failure to follow a reasonable management instruction and serious insubordination.

198. We reject the contention that Mr Bostock was influenced either by others or in his own decision-making by any disclosures that the claimant made. Our opinion in that regard is fortified by the fact that we reject the claimant's repeated assertion that her disclosures were ignored or brushed under the carpet. We have found as fact that plainly they were not. We have also rejected the claimant's contention that the respondent was ignoring the claimant's concerns or "sweeping them under the carpet". On the contrary, successive managers gave thorough and conscientious consideration to the claimant's concern which led to tangible changes at St Joseph's including measures affecting Ms Cotson personally.

199. In coming to this conclusion, we find that the instructions given to the claimant to move from St Joseph's first to Kingsley Primary School and latterly to High Tunstall College of Science were both lawful under the claimant's contract of employment and reasonable. We find that the respondent did have a contractual power to change the claimant's place of work which it exercised due, we find, solely to the relationship difficulties that developed in the claimant's working relationship with her supervisor Ms Cotson. In contrast, the claimant had no reasonable grounds not to comply with those instructions not least because her insistence that her concerns had been ignored and/or brushed under the carpet were groundless and contrary to the evidence.

200. We also find that the respondent carried out a reasonable investigation. This requirement of Section 98(4) needs to be put in context. In this particular case, the need for an investigation was very much a low hurdle because the essential facts giving rise to potential disciplinary action were not in dispute. It was not contested that the claimant had refused on a number of occasions to attend either Kingsley or High Tunstall for her cleaning duties and the background reasons to the management decision to move her and the claimant's reasons for her refusal to move were already very well known on both sides. There was no requirement to interview witnesses because that

had already been done at a previous stage in the management of the claimant's concerns. In these circumstances, the investigation was more in the nature of an administrative exercise, gathering together documents which had already been produced.

201. We specifically considered the claimant's submission that there was a failure to separate the powers between the Investigating Officer and the Lead Officer under the respondent's disciplinary procedure. The respondent conceded that there had been a technical breach of procedure in this regard. However, the point of substance is whether it was an unreasonable failure. In this case, there was no prejudice to the claimant arising from the involvement of Mr Mason as both Investigating Officer and Lead Officer. Contrary to Mr Robson's submissions, Mr Mason was not judge and jury. We find that Mr Bostock, who was after all the dismissing manager, approached the disciplinary hearing and decision with an open mind and was not inappropriately influenced by Mr Mason or indeed anybody else. While we acknowledge the importance of compliance with contractual disciplinary procedures, this was a failure of such a minor nature in the context of this case as not to render the process unfair.

202. The contention that the ACAS Code of Practice was not followed was not substantiated on the evidence and was not addressed in the claimant's submissions. We were unclear as to what provision was being relied upon and nor was any reference to the Code made in the claim form. In those circumstances, we cannot make any finding or draw any conclusion. To the extent that this was a repeat of the allegation of the Investigating Officer and Lead Officer roles being conflated, we have already set out our conclusions on that issue above.

203. Addressing the question of whether the sanction was within the band of reasonable sanctions open to a reasonable employer, we find that the decision to dismiss the claimant from her contract of employment as a Cleaner fell squarely within the band of reasonable responses. We accept the respondent's case that this was a question of serious insubordination which was itself identified as a matter of gross misconduct in the respondent's disciplinary procedure. The claimant was given, on a number of occasions, the opportunity to attend work before her dismissal all of which she declined despite being warned that dismissal was a potential consequences on a number of occasions.

204. In the circumstances, we therefore find that the claimant's first dismissal under her cleaning contract to be fair. The matters identified in the list of issues at 4(a)-(d) (paragraph 13 above) do not fall to be decided given that conclusion.

First dismissal – Catering Assistant contract of employment

205. The Tribunal has accepted Mr Bostock's evidence that the reason for the claimant's dismissal from her contract as a Cleaner related to her conduct, namely the claimant's refusal to obey line management instructions from Mr Cuthbert and Mr Mason to attend Kingsley Primary School/High Tunstall

College of Science in her cleaning role and its perceived impact on the sustainability of her catering position.

206. We find that the sole reason for the claimant's dismissal under her Catering Assistant contract of employment was the respondent's genuine belief that her employment had become unsustainable due to the fact that it was the same managers whose instructions the claimant had disobeyed in her cleaning role who also manged her in her Catering Assistant role.

207. In accordance with our findings in respect of the claimant's first dismissal from her cleaning job we also find that the respondent had reasonable ground to believe that the claimant had committed the misconduct alleged and that the misconduct would have repercussions for the claimant's role as a Catering Assistant.

208. It is at this point that we have some difficulty with the respondent's decision-making. The respondents position is set out at A267 of the bundle. Essentially, the respondent relies on the fact that there are the same senior managers (but not the same immediate managers) involved in both the management of the catering contract as well as the cleaning contract with the effect, the respondent submits that it was reasonable to dismiss the claimant from the contract as a Catering Assistant. That was despite the fact that it was admitted by the respondent that there had been no issues and no failure to attend by the claimant at any stage in relation to her catering role at Rossmere Primary School. The way the respondent presented its case both during the management phase and at this Tribunal was that the claimant's conduct in refusing instructions from senior facilities managers (including Mr Cuthbert and Mr Mason) gave rise to a concern that the claimant might do so again and lead to a fundamental breakdown in trust and confidence between the respondent and the claimant in general terms.

209. However, the background to the claimant's dismissal arose out of a personal dispute between the local supervisor at St Joseph's, Ms Cotson, and the Team Leader responsible for a number of schools including St Joseph's, Ms Lilley. The respondent submits that the position is akin to a theft or dishonesty dismissal which has the effect of breaching trust and confidence between the employee and the employer generally to the extent that it would be reasonable to dismiss the employee from all or any entirely different contracts of employment between the same parties. We reject that submission on the facts of this particular case. This was a localised matter not akin to a pan-organisational act of misconduct such as theft or dishonesty. The problem essentially arose out of a breakdown of relationships between specific individuals at the local level as was borne out by the fact that the no issues arose at Rossmere School at any time.

210. We accordingly find that the sanction of dismissal of the claimant from her Catering Assistant role was not within the band of reasonable responses open to a reasonable employer and that the claimant's first dismissal from her contract of employment as a Catering Assistant was unfair.

Contributory Fault

211. It was common ground that there had been no managerial issues under the Catering Assistant contract between the claimant and the respondent. She attended her duties at Rossmere Primary School throughout the period up until and including the day of her suspension. In those circumstances, we can identify no conduct or blameworthy action by the claimant which would serve to reduce any element of her Basic or Compensatory Awards.

Second dismissal - Cleaner contract of employment

212. Again, we accept that conduct was the reason for the claimant's dismissal. On this occasion it was the failure by the claimant to attend her cleaning duties at High Tunstall College of Science consequent upon the upholding of her appeal against dismissal by the appeal committee. We find that the sole reason for the second dismissal of the claimant from her contract of employment as a Cleaner was that the claimant refused to attend High Tunstall College of Science to carry out her cleaning functions upon the successful outcome of her appeal against dismissal and reinstatement by the committee.

213. We find that the committee acted in good faith when it rejected the claimant's contention that she had been asked to move and was subsequently dismissed from her role as cleaning assistant at St Joseph's because of health and safety concerns that she had raised with the respondent and we find that the committee, under Ms Harrison's chairpersonship, had clear reasonable grounds for coming to that conclusion.

214. The investigation relied upon by the committee was essentially the same as that which we have already found to have been reasonable on the occasion of the first dismissal. We also repeat our findings in relation to the ACAS Code of Practice.

215. It is difficult to see what more the committee could have short of putting her back into her cleaning role at St Joseph's. That option was discounted on lawful and reasonable grounds by the committee. The claimant suggested, albeit late in the day, that the offer of a job at Kingsley Primary School was an offer that the respondent knew the claimant had to refuse because the respondent was aware of the claimant's childcare commitments. We reject that contention. The difference in hours was some thirty minutes, with the St Joseph's School cleaning contract starting at 06:30 and ending at 08:30, whereas the Kingsley Primary School cleaning hours were 06:00 to 08:00. Difficulties with childcare was not a reason given by the claimant at the time she initially refused the move to Kingsley. The claimant consistently stated that the reason that she was not going to accept jobs at (any) alternative schools was that she regarded her cleaning job to be at St Joseph's School and nowhere else and it was plainly the claimant's position that if she was not to be reinstated into her previous role at St Joseph's she would refuse to comply with any instruction to move elsewhere.

216. We also reject the suggestion that the respondent was only offering the move to Kingsley because it knew the claimant's childcare arrangements were such that the claimant was bound not to accept the role. Once the respondent learned about the claimant's childcare commitments it went on to find the claimant the job at High Tunstall College which was on the exact same hours as the claimant's had been working at St Joseph's. That step is plainly inconsistent with the claimant's argument that the respondent was looking to offer her only roles that it knew (sic) that she could not do.

217. Furthermore, the claimant having refused the job at High Tunstall can hardly say that it was because of childcare commitments that she refused the instructions to attend there on several occasions. We also reject the claimant's suggestion made at this hearing that it was some previous accident at High Tunstall which led her to reject that job. Again, this was not the reason that the claimant gave at the time for rejecting the move to High Tunstall. The claimant's position at the material time was a simple one: either she was going to be assigned back to St Joseph's or she would refuse to carry out her cleaning duties anywhere else.

218. Accordingly, we find that the respondent reasonably concluded that the claimant's reason for not returning to work under her Cleaner contract of employment was solely because the claimant was only prepared to do cleaning work at St Joseph's. The claimant was effectively issuing the respondent with an ultimatum that she either return to St Joseph's or she would not be returning at all and by this stage that ultimatum applied to both the claimant's cleaning and catering positions. This became a point of principle to the claimant, but not one that involved any unfairness in the claimant's second dismissal of the claimant by the respondent from her cleaning contract.

Second dismissal - Catering Assistant contract of employment

219. We find that the second dismissal of the claimant for failing to return to her role at Rossmere Primary School was fair.

220. It was common ground that the claimant refused to go back to Rossmere Primary School to carry out her catering duties despite the fact that she was reinstated into the very same role, on the very same hours, on the same terms and conditions and with full back pay from which she had been dismissed from previously. We therefore rely upon essentially the same matters and reasons as we have referred above in relation to the respondent's second dismissal from her cleaning contract in coming to our conclusion that the second dismissal from her catering role was unfair.

221. We also note that the claimant's position in her appeal in terms of what she wanted from her appeal was unhelpful. The claimant refused to say what she wanted out of her appeal hearing when directly asked by the respondent.

Section 103A ERA automatically unfair whistleblowing dismissal and section 100(1)(c) ERA automatically unfair dismissal for bringing matters harmful to health and safety to the attention of the employer

222. Both section 103A ERA and section 100(1)(c) ERA focus on the reason for the dismissal of the employee.

223. We have found that the reasons for both of the claimant's dismissals from each of her contracts of employment were solely for reasons related to the claimant's conduct, it follows that the claimant's contention that she was automatically unfairly dismissed for a whistleblowing reason and/or for bringing matters of health and safety to the attention of her employer must also both fail.

Section 47B ERA detriment for making protected disclosures and Section 44 ERA detriments for bringing matters harmful to health and safety to the attention of the employer

224. The claimant relies upon the following detriments.

(i) Being told to get her stuff and leave by Ms Lilley on 20 July 2020.

(ii) Expected to work at a different site from 22 July 2020.

(iii) Being suspended from both jobs on 19 January 2021.

(iv) Being dismissed from both jobs on 2 February 2021.

(v) Failing to allow the appeal and making it a condition of her appeal that she agreed to work at a site other than St Joseph's.

225. The Tribunal accepts that all of the (i) to (v) above happened to the claimant as a matter of fact and that they are all capable in principle of amounting to a detriment. However, we find that the claimant accepted on 17 July 2020 that she called Ms Cotson a "slimeball" and sarcastically referred to her as "Hartlepool Borough Council's finest snitch" in the workplace. There was also evidence which the respondent accepted and which we have found ourselves did in fact occur that the claimant shouted at Ms Cotson and called her a "moron" in public. This is self evidently disrespectful and abusive conduct.

226. We have no hesitation in accepting that the reason and the sole reason that the claimant was told to get her stuff and leave by Ms Lilley on 20 July 2020 was the claimant's remarks on that day and her argumentative and confrontational demeanour. Ms Lilley's evidence, which we accepted, was that she sought to diffuse the situation. A situation that we find to have been primarily caused by the claimant and in respect of which the claimant was plainly the aggressor. We find that the reason and sole reason for the decision to ask the claimant to leave site was the claimant's own conduct and that considerations of the disclosures made before 20 July 2020 relating to health and safety or otherwise did not have even a material influence on that decision. We find that disclosures played no part whatsoever in Ms Lilley's decision.

227. We acknowledge that Mr Cuthbert's decision to require the claimant to work at a different site from St Joseph's under her cleaning contract was made after certain disclosures had been made by the claimant. However, we again find that the decision to move the claimant was not to any material extent influenced by any concerns the claimant had raised. We find that the sole matter to which Mr Cuthbert had regard was the desire to avoid conflict and friction arising out of the breakdown in the claimant's relationship with Ms Cotson for which we find that the claimant was responsible. That allocation of responsibility drew a clear and logical line of separation between the claimant and Ms Cotson with the entirely rational consequence that the respondent decided to move the claimant and not Ms Cotson. It was after all the claimant who had publicly abused and shouted at her supervisor and not the other way around.

228. We find that Mr Cuthbert was entitled to move the claimant under her contract of employment notwithstanding the claimant's heightened feelings on the matter. We also acknowledge that a detriment can occur even if an instruction under a contract is lawful at common law. However, we find that the exercise of the right to move the claimant was not influenced to any extent by any disclosures.

229. In coming to that conclusion we reject Mr Robson's argument that it is sufficient that if the disclosures had not been made that any subsequent detriments which would not otherwise have occurred thereafter is sufficient make out liability in favour of the claimant. We accept the respondent's submission that it is not a "but for" test that the Tribunal is required to apply under Sections 47B and 44 ERA. The Tribunal must apply the test as described in Fecitt and the disclosures must be a material influence on the decision-making of the employer. As we have said above, we find that they were not.

230. In relation to the claimant's suspension from both jobs on 19 January 2021, we find that this was simply a continuation of the respondent's inability to persuade the claimant to return to work under her cleaning contract, by this stage to High Tunstall College of Science. By 19 January 2021, the claimant had been both asked and instructed to return to work on numerous occasions. Mr Mason's evidence, which we accept, was that the claimant's suspension from both roles was due to an ongoing refusal by the claimant to return to work in her cleaning role. We accept that those refusals were the sole reason for the claimant's suspension.

231. After all, it was by now some six months after the initial disclosures and four months since the claimant had undertaken any cleaning work. The respondent had also carefully looked into the claimant's concerns (which were fed back to the claimant on two formal occasions) and had sourced an alternative cleaning role on exactly the same hours as the claimant worked at St Joseph's to accommodate the claimant's childcare arrangements. None of those steps were likely to have been taken by an employer nursing any sense of indignation or resentment against the claimant for having raised health and safety matters. We find it wholly unlikely that the respondent would wait for six months before suspending the claimant when it would have been at liberty to do so on numerous occasions prior to 19 January 2021 given the claimant's

behaviour. We again find that the relatively low threshold of causation between disclosure and detriment in Fecitt is not made out.

232. Our findings in respect of the claimant's dismissal from both jobs on 2 February 2021 follows the same reasoning. We find that exactly the same reasons that applied to the claimant's suspension were also the reasons that applied to the claimant's dismissals. Nor do we draw any adverse inference from our finding that the claimant's first dismissal from her Catering Assistant role was unfair. We accept that the respondent was acting in good faith when deciding to dismiss the claimant from her Catering Assistant position but that the sanction of dismissal was unreasonable.

233. Accordingly, we find again that the relatively low threshold of causation between disclosure and detriment under Fecitt is not made out in relation to dismissal while also noting that a dismissal by an employer cannot amount to a detriment under section 47B ERA for these purposes in any event.

234. We also find that the appeal outcome was not influenced to any extent by any disclosures. We accept the evidence of Ms Harrison that the committee considered and rejected the claimant's submission that the reason that she had been dismissed was because she had raised health and safety matters. We satisfied ourselves that the committee was right in coming to the conclusion that the dismissals were wholly uninfluenced by any disclosures. We noted the criticisms that the committee made of the way in which the claimant was managed on her return to work and of the harshness of the claimant's dismissal from her Catering Assistant position. The committee were plainly willing to come to its own independent conclusions when it considered the claimant's appeal and indeed it overturned the decisions of operational management. We satisfied ourselves that it was the claimant's misbehaviour through refusing to attend work as a Cleaner that constituted the respondent's decisions to dismiss the claimant.

235. We also carefully considered whether the committee's decision not to reinstate the claimant back into her assignment to St Joseph's Primary School was influenced by any of her disclosures. We find that it had nothing to do with them and it was solely because, as Ms Harrison puts it in evidence, "too much had happened" at St Joseph's for her to be assigned back to that school as her place of work. We also again bear in mind that the committee were generally very receptive to the claimant's grounds of appeal and there was not even a hint of any animosity towards the claimant by the appeal committee, quite the reverse. The committee, as it ought to have done, considered the appeal from an independent standpoint and were prepared to, and indeed did, reach its own conclusions.

236. The claimant is essentially asking us to find that despite upholding her appeal the specific terms of her reinstatement to the cleaning contract to High Tunstall rather than to St Joseph's was materially influenced by the claimant's disclosures. For the reasons we have given, we totally reject that contention. Ms Harrison gave a clear, plausible and sufficient explanation as to why the committee did not think it appropriate to assign the claimant to St Joseph's. It is also noteworthy that the criticisms that the committee made were confined to

the management of the claimant's return to during the covid pandemic after a lengthy absence. The committee was very clear, as was Ms Harrison in her evidence, that this criticism, did not extend to how Ms Lilley, Mr Cuthbert, Mr Mason, Mr Hanson and Mr Bostock had managed the claimant.

237. Accordingly, the standard of causation required by Fecitt has not been met and the claimant's claims for being subjected to detriments under sections 47B ERA and Section 44 ERA must both fail.

Remedy

238. We have found that the claimant's dismissal under her first catering contract was unfair. We have also noted that the claimant was fully remunerated between the date of her dismissal under that contract and the deadline by which she had to accept reinstatement. We have found the second dismissals in relation to both cleaning and catering contracts to be fair. It follows that the claimant has suffered no financial loss in relation to the period between her unfair first dismissal from her Catering Assistant contract and her fair second dismissal from that contract of employment.

239. The Tribunal declines to make an award for loss of statutory rights on the basis that the claimant was fairly dismissed from her second catering contract shortly after her first dismissal with the effect that the claimant would have lawfully lost her statutory rights in any event.

240. The claimant is therefore entitled to a Basic Award by way of remedy for the unfairness of her first dismissal from her position as a Catering Assistant. The parties reached agreement on the level of a Basic Award and we therefore award the claimant the agreed sum of £551.53.

241. We also find that in the event that the second dismissals had been found unfair that the claimant wholly failed to mitigate her loss. The claimant accepted in cross-examination that she made no application for benefits or for alternative work. The claimant's explanation was that she was concerned that the form that she was required to fill in to apply for state benefits would require her to reveal health-related issues. That position was entirely undermined by her acceptance in cross-examination that she had made no effort to contact the DWP to establish whether or not such information would actually have been required on the form.

242. We also note in that regard, that the claimant failed to disclose income she accepts that she received from dividends in her capacity as a shareholder in Apras Ltd. When cross-examined as to why she had not disclosed her dividends her response was *"no particular reason".* That response is self-evidently wholly unsatisfactory. The information in relation to dividends income ought to have been disclosed by the claimant in compliance with the Tribunal orders and it was only enquiries made by the respondent when it searched the publicly available information on Companies House website which revealed this source of income for the claimant.

Employment Judge Loy

7 November 2022

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