EMPLOYMENT TRIBUNALS

Heard at:	London South
On:	19 to 22 March 2024
Claimant:	Mr J Smith
Respondent:	South Thames Colleges Group
Before:	Employment Judge Ramsden
With members	Mrs J Clewlow Ms N O'Hare
Representation:	
Claimant	In person
Respondent	Mr C Crow, Counsel

RESERVED JUDGMENT ON LIABILITY

Background

1. The Respondent is a further education corporation which operates four schools.
2. The Claimant worked for the Respondent at its Carshalton College site as a Workshop Assistant in the Construction department from 5 January 2015 until his dismissal on 31 March 2022.
3. The Claimant became a Workplace Organiser for the GMB Trade Union in 2018, and he sat on the Respondent's Health & Safety Committee in that capacity.

The claims

4. The Claimant has brought three complaints against the Respondent:
   a) of unfair dismissal (under section 94 of the Employment Rights Act 1996, the **1996 Act**);

b) of automatic unfair dismissal, for one or more of three reasons:

i. for having made one or more protected disclosures (pursuant to section 103A of the 1996 Act);

ii. for carrying out activities to prevent or reduce risks to health and safety (section 100(1)(a) of the 1996 Act), or for performing his functions as a worker health and safety representative or a member of the Respondent's Health & Safety Committee (section 100(1)(b) of the 1996 Act); and/or

iii. for taking part in the activities of an independent trade union (i.e., performing his role as a GMB Workplace Organiser) (section 152(1)(b) of the Trade Union & Labour Relations (Consolidation) Act 1992 (the **1992 Act**)); and

c) that he was subjected to a detriment on the ground that he made one or more protected disclosures (section 48 of the 1996 Act).

5. The issues to be decided to determine those claims were set out in the Case Management Orders of Employment Judge Leith of 21 June 2023, and those are appended to this judgment.

The facts

6. Save where specifically identified below, these facts are agreed by the parties.

7. On 5 January 2015 the Claimant commenced work for the Respondent. The Claimant's job description, with a person specification attached to it, did not mention carpentry, or specify the type of construction work he was to do, though it did identify required qualifications as including "*Appropriate Level 3 qualification in Construction – Plumbing, Bricklaying or Plastering*".

8. The Claimant and the Respondent entered into a written contract of employment on 27 February 2015. That contract includes the following:

a) "*You are expected to… maintain the highest professional standards and to promote and implement the policies of the Corporation*";

b) "*You shall not either during your employment (except in the proper performance of your duties)… divulge to any person, corporation, company or other organisation whatsoever any confidential information belonging to the Corporation*"; and

c) "*The Corporation and all members of staff have a responsibility to ensure a safe and healthy work place*".

9. The Claimant initially worked solely in Carpentry, but in the summer of 2015 he started to assist with the Multicraft workshop (i.e., a workshop that taught students skills across a number of disciplines). The Claimant's evidence is that

at that time he spent about half a day on the Multicraft course, with the majority of his working time (he worked 37 hours per week) spent in Carpentry.

10. In 2016, at the time when the new Level 2 workshop opened, the Claimant orally raised concerns with Peter Mayhew-Smith, the Group Principal and CEO for Carshalton College, about the lack of ventilation/dust extraction in the carpentry workshop (**Disclosure 1**).

11. In 2018, the Claimant became a Workplace Organiser for the GMB, and as part of that role became the GMB's representative on the Respondent's Health & Safety Committee. From 2018 onwards the Claimant regularly raised concerns in Committee meetings about the lack of dust extraction in the carpentry workshop (**Disclosure 2**).

12. Around 2019 the Claimant was asked to assist with a Painting and Decorating course the Respondent offered, and so his working proportion altered, with him spending around half a day in Multicraft, around 1 day in Painting and Decorating and the remainder in Carpentry.

13. In July 2020 the Claimant began a period of sickness absence and was advised that it would take some time for his health to return to what it had been previously. During his absence an agency worker was engaged by the Respondent to cover the Claimant's carpentry duties, and a second agency worker was engaged to assist the Brickwork team and elsewhere.

14. In January 2021 the Claimant was considered by Occupational Health (**OH**) to be ready to return to work, with a phased return, but that coincided with lockdown, and so his return to work was delayed.

15. The Claimant in fact returned to work in late May/early June 2021, after a further OH report of 5 May 2021. That OH report, based on the assessor's understanding of "*the [Claimant's] job role and the likely impact of the condition/symptoms on his ability to perform specific job tasks*", said:

    a) "*he was assessed by occupational health at the beginning of January as fit to resume work*";

    b) "*I can see no medical reason why Jeffrey cannot resume work*";

    c) "*I do however recommend he partake in a short-phased return to work programme of working hours as follows:*

    Week 1 – Equivalent to 50% of contract hours

    Week 2 – Equivalent to 75% of contract hours

    Week 3 – Contract hours"; and

    d) "*As Jeffrey's role has a physical element, I suggest moving and handling risk assessment is carried out on his return to work. I also recommend regular weekly welfare meetings, to monitor his progress during his phased return to work programme of hours*".

16. Upon his return to work, the Claimant continued to spend most of his working time in Carpentry, getting the workshop ready for the start of the new academic year.

17. On 13 September 2021, Steve Miller, the Deputy Head of the Construction team, told the Claimant that he was no longer performing the role of Workshop Support for Carpentry, and that the new agency worker was going to cover those duties in his place. Instead, the Claimant was to be assigned to Brickwork and Plumbing. The Claimant was unhappy about this, and so he contacted his trade union, which advised that he raise a grievance.

18. On 14 September 2021 the Claimant raised a Stage 1 informal grievance with John Duffy, Senior Technician.

19. On 21 September 2021 the Claimant was working alongside the Respondent's Carpentry lecturer, Tom Hill, in teaching a Multicraft workshop. The class included Student A (a student with an Education, Health and Care Plan, an **EHCP**, which identified his educational, health and social needs and set out the additional support he needed to meet those needs). Student A's mother subsequently complained to the Respondent about two interactions between the Claimant and Student A in this workshop. It is agreed that:

    a) The Claimant asked each student in turn what they had learned in the class; and

    b) When it came to Student A, Student A said to the Claimant that he had difficulties with short-term memory and recalling information.

    There is a dispute about the words that the Claimant used in response to this.

    c) The Claimant acknowledges that he likely said to Student A words to the effect that he will have to remember this stuff, and that he should write it down if he could not remember things;

    d) Student A's mother later wrote to the Respondent saying that the Claimant said: "*If you have problems with your memory then why are you here? This course isn't for you*", and that he "*approached [Student A] in an aggressive demeanour and asked if [Student A] was getting pissed off with him yet.*" (**Allegation 1(a)**); and

    e) Student A's mother also alleged that the Claimant said to Student A in this workshop that – as set out in the complaint from Student A's mother:

    "*black people should not feel the way that we do because black people were not the only ones that were an enslaved group*" (**Allegation 2**).

20. On 23 September 2021, the Claimant filed a written grievance (a Stage 2 grievance under the Respondent's Grievance Policy) about his reassignment from Carpentry to Brickwork and Plumbing.

21. Student A's mother wrote an email of complaint to the Respondent about what happened in the 21 September Multicraft workshop, which was seen by the Respondent on 4 October 2021.

22. A Learning Support Assistant, Laurie Barker, who had been supporting Student B in the Multicraft Workshop on 12 October 2021, made a complaint to the Respondent's HR team on 14 October 2021 about the Claimant's behaviour towards her and Student B in the 12 October 2021 workshop. The parties agree that the Claimant had asked Student B to work out the mid-point of a piece of material he was working on, i.e., divide its width by two. The detail of the interaction between the Claimant, Student B and Ms Barker is disputed.

    Ms Barker wrote in her complaint:

    "*I was trying to give [Student B] the answer as it is not a Maths class and I could see that [Student B] was getting angry and upset by being thrown on the spot like that. [The Claimant] told me a few times to sshh and shut up I said no I am helping the student. [The Claimant] continued to talk very loudly belittling [Student B] in front of the whole group and continuing to pressure for him to answer the question. This left [Student B] upset and wanting to leave the class. I took [Student B] outside the classroom and we came down to see yourself about the situation. We went back the classroom and [the Claimant] shouted again at [Student B], Where have you been or where did you disappear to. I told [the Claimant] to leave it as [Student B] was with me.*"

    This is referred to as **Allegation 1(b)**.

    The Claimant agrees that he told Ms Barker to "*shhh*", saying that he'd "*like him [Student B] to have a go [at the sum]*". In oral evidence to the Tribunal he denied that he told Ms Barker to "*shut up*", but he agreed that he pushed Student B to answer his question. The Claimant agreed that he did not look at, or enquire about, the contents of Student B's EHCP.

23. In September or October 2021, at either a Health & Safety Committee meeting or a Community Interest Group meeting, the Claimant raised concerns regarding the amount of pigeon faeces in the brickyard (**Disclosure 3**). Disclosure 1, Disclosure 2 and Disclosure 3 are together referred to as the **Disclosures**.

24. The Claimant watched a documentary on 19 October 2021, presented by David Harewood, which examined aspects of the history of Black slavery.

25. The Respondent gave the Claimant a letter on 3 November 2021 (dated 1 November 2021), informing him that it had been made aware of a possible breach of conduct by him. "*It is alleged that you:*

    - *You acted unprofessionally to 2 students, both with a recognised disability on 21September 2021 [Allegation 1(a)] and 12 October 2021 [Allegation 1(b)] respectively.*

- *You made racist comments to a student on 21 September 2021 [Allegation 2]*".

Julie Percival, Assistant Principal – Curriculum and High Needs, was appointed as the investigating officer, and she invited the Claimant to an investigation meeting to be held on 17 November 2021.

26. The Claimant, and his trade union representative, attended that investigatory meeting with Ms Percival on 17 November 2021 (the **First Investigation Meeting**). In that meeting:

a) Ms Percival told the Claimant that confidentiality must be observed in relation to the investigation;

b) The Claimant said that he talked about a range of subjects with students, and never stopped students from talking on any subject;

c) "*[The Claimant] said he can recall that around the 21 September he had watched a documentary called 1000 years of slavery with David Harwood who was investigating his heritage. [The Claimant] can remember raising the point that white man gets the blame but an argument put forward by David, was that there must have been collusion from black people in Africa.*

[Ms Percival] asked how and why did this come up. [The Claimant] could not recall but he did not feel he said anything unprofessional or made any racist comments, the comments were in context to the conversation.

[Ms Percival] said with the benefit of hindsight did [the Claimant] think that was a wise thing. [The Claimant] said if you are going to look into black history and how and why things happened, then yes this was part of that discussion.

[Ms Percival] said that [the Claimant] was not employed to do this.

[The Claimant] reiterated that they take a holistic approach to learning.

[Ms Percival] said that this is a level 1 group of students and their ability in terms of age was equivalent to a 12-year-old. She therefore thought that [the Claimant] was trying to explain quite a complicated documentary to this group of individuals who would have found it difficult to understand.

… [Ms Percival] expanded and said teachers may have views but it was not always appropriate to share these with the students. This was more of a pastoral role and the documentary that [the Claimant] had referenced had not been approved by the College.

[The Claimant] said that was not what he said… he is not at all racist and will challenge any forms of racism. [Ms Percival] said but in hindsight could [the Claimant] seen how the conversation could have come across and [the Claimant] said he did…

[Ms Percival said that] [the Claimant]'s comments appeared to have been taken in a certain way but she accepted that it was not intentional";

d) The Claimant told Ms Percival that he did not know the educational, social or health needs of the students (as recorded in their EHCPs), "*but [said by the Claimant in relation to each of Student A and Student B] he tends to treat them all equally…*

[Ms Percival] said that the student [Student B] has an EHCP and that was why [Ms Barker] was in class, to support him and did [the Claimant] realise by reinforcing the need for [Student B] to answer that he causing him some stress."

The Claimant continued to maintain the position that what he did was appropriate, and that it was important that Student B have a go at the sums, as "*If students cannot perform to the standard required for a class they will fail*"; and

e) The Claimant said, in the context of trying to get Student B to have a go at dividing by two he did tell Ms Barker to "*sshh*", and that he *may* have told her to "*shut up*". The Claimant said he did not think he acted unprofessionally, and when asked by Ms Percival whether with hindsight he would act any differently, the Claimant said that he would still have asked Student B to have a go at dividing the length of the material by two.

27. On 26 November 2021, Student C sent an email to the Respondent complaining that the Claimant used inappropriate language towards him earlier that day – specifically, that the Claimant told Student C to "*piss off*" when he attended class without the required equipment (**Allegation 3**).

28. On 29 November 2021 a member of the Respondent's staff (Charlene Munroe-Harrison) complained to Ms Percival that the Claimant had, earlier that day, talked to Ayanne Poorman (another member of staff) about Allegation 2 in the staff room (the **Staff Room Incident**). This was a breach of the instruction given to him in the First Investigation Meeting to maintain confidentiality about the investigation (**Allegation 4**). The Claimant agrees that he did this. There is disagreement about whether the Claimant aired his views on slavery/post-slavery, or whether he merely repeated the allegation of racism levelled at him (Allegation 2).

29. Allegations 1(a), 1(b), 2, 3 and 4 are together referred to as the **Allegations**. In light of the further allegations made against him (i.e., Allegations 3 and 4 added to Allegations 1(a), 1(b) and 2), the Claimant was suspended from work on 5 January 2022.

30. A further investigation meeting was held with the Claimant and Ms Percival on 14 January 2022 (the **Second Investigation Meeting**). At that meeting:

a) The Claimant raised the fact (in relation to Allegation 2) that he was mistaken about the race-related conversation he had with Student A on 21

September 2021. The Claimant had since checked the date of the David Harewood documentary, and realised that it had aired *after* 21 September 2021, and so he could not have discussed that with Student A on 21 September 2021;

b) The Claimant could not recall the incident relating to Allegation 3, but he said that:

   i. there were some students in the Friday morning brickwork lesson who continually turned up and did no work, did not have the required equipment with them, and disturbed other students. The Claimant said "*I then tell them to go home*", and he said that they do not want to do the subject to "*piss [off] and do something else*"; and

   ii. when asked whether he thought that was appropriate language, that he uses language to prepare students for work; and

c) The Claimant confirmed he had a conversation with another member of staff about his suspension, which he appreciated was in breach of the instruction given to him in the 17 November 2021 investigation meeting.

31. Ms Percival presented her investigation report to Mr Pemberton-Billing on 25 January 2022 (although the date written on the report is erroneously recorded as 2021). Ms Percival's report concluded:

"*After the initial interview with [the Claimant] I had planned to recommend [the Claimant] engage in a comprehensive training package to help him better understand the needs of students and professional conduct within the classroom. However, further to the second set of allegations and the second interviews I would recommend a disciplinary hearing be held to consider the findings of the investigation.*"

32. The Respondent wrote to the Claimant on 3 March 2022 advising him that the conclusion of the Respondent's investigation was there was a disciplinary case to answer. The letter stated:

"*It is alleged that you:*

- *acted unprofessionally to 2 students, both with a recognised disability on 21September 2021 [Allegation 1(a)] and 12 October 2021 [Allegation 1(b)] respectively*
- *made racist comments to a student on 21 September 2021 [Allegation 2]*
- *verbally abused a student on 26 November 2021 [Allegation 3]*
- *failed to follow a management instruction and observe confidentiality in relation to the current investigation on 29 November 2021 [Allegation 4]*".

33. The Disciplinary Hearing took place on 23 March 2022. Mr Pemberton-Billing chaired the meeting. Ms Percival attended to present the management case, and a member of the Respondent's HR team attended along with a note-taker. The

Claimant attended with his trade union representative, Alice Reynolds. The key points from the notes of this meeting are:

a) In relation to Allegation 1(a), the Claimant said that he did not remember this conversation specifically, but he usually asked the students what they have learned. He said that he did not believe that he was required to go on to the Respondent's system, Promonitor (which records student's needs and their support plans), as part of his role;

b) In relation to Allegation 1(b):

   (i) the Claimant said that "*he was aware that all of the students put in the class have issues. He said that they [i.e., he and Tom, the lecturer] assessed their abilities in lessons… he treats them equally and gives them equal opportunities to perform*";

   (ii) when challenged by Ms Percival that treating everyone the same is not treating them equally because that does not take account of their individual needs, the Claimant disagreed;

   (iii) the Claimant said that "*If Learning Support does it for them, then they are not learning*"; and

   (iv) when Ms Percival asked the Claimant whether it would be better to have a word with the Support Staff person who was with the student before the class to discuss how best to approach this, the Claimant said that he does not have the time to do that;

c) Regarding Allegation 2:

   (i) After a short adjournment the Claimant and Ms Reynolds returned to the meeting and Ms Reynolds said that "*both comments [i.e., the comment on 21 September and the subsequent Staff Room Incident] were not intended to be racist"*;

   (ii) Ms Percival noted the similarity in the complaint of racism from Student A's mother and the terms of the complaints from staff about what was purportedly said by the Claimant in the Staff Room Incident; and

   (iii) When Mr Pemberton-Billing questioned why this topic came up all, the Claimant said that "*they [he and the lecturer he worked with] do not censor, they have to deal with [topics that come up]*". When Mr Pemberton-Billing questioned whether it was appropriate for the Claimant to offer his views on this subject, the Claimant "*asked why not, it might calm things down*";

d) In relation to Allegation 3:

   (i) The Claimant said Student C frequently turned up late and without the required boots for the course;

(ii) The Claimant said that Student C does not want to do the course, so when he started disrupting the course "*he may have said 'piss off' to him*"; and

(iii) Mr Pemberton-Billing "*noted that language such as this may be used on a building site but at college we need to remain professional and model good behaviours*";

e) The possibility of the Claimant undertaking training was discussed. The Claimant said that he did not need training, but he would do the course, but he hoped that he would be able to challenge what he heard in that course;

f) At one point, the Claimant said that he "*noted that students are not allowed to take drugs in College. When he smells drugs as he passes students, he makes a remark to make the point, asking is that the good stuff*"; and

g) The Claimant, in the latter part of the meeting, mentioned that he raised a grievance in relation to his timetable. The Respondent's HR team member said that the Respondent was not aware of that grievance, because she believed the Claimant had rescinded his grievance, and so she understood him to be referring to a different one. The Claimant said that he thought his grievance was one of the causes of the Disciplinary Hearing. Mr Pemberton-Billing questioned how it could be, given the Disciplinary Hearing arose from complaints from students and staff who have nothing to do with the Claimant's timetable.

34. Mr Pemberton-Billing wrote to the Claimant on 31 March 2022, informing him of the outcome of the Disciplinary Hearing: the Claimant was dismissed summarily for gross misconduct. Mr Pemberton-Billing found all four Allegations made out. Mr Pemberton-Billing's decision records that "*Allegations 1,2,3 and 4 have been upheld are very serious, and do constitute gross misconduct*". He considered the appropriate sanction to impose on the Claimant.

35. The Claimant appealed the decision to dismiss him on 8 April 2022 (without specifying any grounds for doing so).

36. On 21 April 2022 he was sent an invitation to an Appeal Hearing, and that Appeal Hearing took place, chaired by Mr Mayhew-Smith, on 6 May 2022. The points of significance from this meeting are that:

a) The Claimant reiterated in that meeting that he did not say that "*black people should get over slavery*";

b) In the context of Mr Pemberton-Billing saying that the Claimant had said that other communities have similar experience to black people, the Claimant's trade union representative "*said that [the Claimant] does recognise that it is racism*"; and

c) When asked by Mr Mayhew-Smith whether he would be prepared to go through training, the Claimant said that he was, but that "*he would challenge anything he was being taught if he has a different point of view*".

37. Mr Mayhew-Smith wrote to the Claimant on 18 May 2022 with the outcome of his appeal. Mr Mayhew-Smith upheld the decision of Mr Pemberton-Billing. That letter records that:

a) In relation to Allegation 1(a) and 1(b) (acting unprofessionally to Students A and B), Mr Mayhew-Smith believed the Respondent could help the Claimant with his approach, "*but it would require you to positively engage with training that would challenge your opinions and I cannot be certain that we would be able to change your way of working with this cohort of students*";

b) In relation to Allegation 2, Mr Mayhew-Smith wrote: "*I am not 100% sure whether you said that 'black people should get over slavery' which witnesses asserted… However, you made it clear in your discussion of this subject that you felt that slavery was not an issue exclusive to black people and that you opposed all forms of slavery, regardless of the ethnicity of its victims. This comment denies the fundamental link between race and enslavement… is racist and offensive… That you do not understand the impact your words may have had on the people around you, and the appropriateness of expressing these, is also highly concerning in itself*"; and

c) Mr Mayhew-Smith did not consider that Allegations 3 and 4 constituted gross misconduct in their own right, but he did consider that the four allegations taken together did constitute gross misconduct.

38. Early conciliation commenced on 11 April and ended on 22 May, both of 2022.

39. The Claimant presented his Claim Form on 3 August 2022.

The disputed facts

Disputed fact 1: What was the reason, or if more than one, the principal reason for the Claimant's dismissal?

40. The Respondent identified the person who took the decision to dismiss the Claimant as Mr Pemberton-Billing, and the Claimant did not assert that anyone else took the decision to dismiss him.

41. Mr Pemberton-Billing, in his written and oral evidence:

a) Stated that his reason for dismissing the Claimant was gross misconduct;

b) Denied the Claimant's assertion that he was dismissed due to his Workplace Convenor activities for the GMB; and

c) Denied the Claimant's assertion that he was dismissed for having made protected disclosures.

42. The Claimant's witness statement records that he believes that:

"*I have been targeted for working hard in my role as Workplace Organiser, challenging management on H&S, work practices and the decisions being made… I believe that my position supporting carpentry was taken away without consultation and my work life made harder to encourage me to resign. This I refused to do… I refused to resign, raised a grievance, identified failings in my capacity as a Union Rep. and Safety Rep., and next thing allegations are made and I am dragged into an investigation.*"

43. Mr Pemberton-Billing was questioned by the Claimant by way of cross-examination about his attitude to the Claimant's Disclosures, and Mr Pemberton-Billing vehemently denied that the Claimant's dismissal was related to health and safety matters or to his role as a Workplace Organiser.

44. Mr Pemberton-Billing said in oral evidence that:

"*We had allegations, pretty serious allegations… when we came to the hearing, what came out in the hearing was your position was absolutely fixed – you believed the way you assessed students, including those with higher needs and EHCPs, meant you could treat them in the same way. You also had fixed views about African slavery. We talked about training… you were resistant… Your approach couldn't meet the needs of our requirements at Carshalton College… you were entrenched…*".

45. Mr Pemberton-Billing also noted that the Claimant had been raising the concerns in the Disclosures and in his role as Workplace Organiser for many years, and averred that the Claimant's assertion made no sense as to why, in 2021, the Respondent would suddenly consider those matters to be so problematic as to manufacture a disciplinary process to dismiss the Claimant. Mr Pemberton-Billing said that the thing that had changed was the Allegations, and his findings on those were the reason the Claimant was dismissed.

46. Mr Mayhew-Smith, who considered the Claimant's appeal, said that far from looking to dismiss the Claimant for raising the concerns that he did, the Respondent welcomed the Claimant doing so, even if they had a difference in opinion about the matters the Disclosures related to.

47. Like Mr Pemberton-Billing, Mr Mayhew-Smith questioned why, if the Respondent were looking to dismiss the Claimant for making the Disclosures or for being a Workplace Organiser, it chose to do so in 2021 and not before. He said, in response to questions from the Claimant as part of cross-examination:

"*I genuinely remember working very gratefully with you during pandemic when I was Chair of Health and Safety Committee, trying to come up solutions for the most challenging time. You held us to account, and that was absolutely how that relationship worked to my mind.*

What I found later on, late 2021, was that there were complaints from families of students about your treatment of them, which was not in-keeping with the record you had built up over the years. I thought these were probably wrong, or could be dealt with by a process that allowed correction (training or support), but in engaging with you through those processes I was disappointed to find that you not only didn't back away from some of the things you had said but said them with even more force. It was with the utmost regret that I upheld [Mr Pemberton-Billing]'s decision. The things you said were not appropriate and you should not have said those things, and I was unable to persuade you to reflect on those and express regret."

48. The Tribunal considered Mr Pemberton-Billing, and later, Mr Mayhew-Smith, to be honest and truthful about the reason for the Claimant's dismissal. In particular, the Tribunal believed Mr Mayhew-Smith when he said that he started upon the appeal process anticipating and hoping that he could uphold the Claimant's appeal.

49. As the Supreme Court said in the case of *Royal Mail Group Ltd v Jhuti* [2020] ICR 731: "*In searching for the reason for a dismissal... courts need generally look no further than at the reasons given by the appointed decision-maker*".

50. The Tribunal notes that the timing of the first two Disclosures (having been made in 2016 and 2018) make it unlikely that they provided motivation for the Claimant's dismissal. While Disclosure 3 was made around the time of the first investigation into the Claimant's conduct, the Tribunal considers the more plausible explanation is the complaints received about the Claimant's conduct. This is particularly so given the evidence before the Tribunal was that the pigeon faeces concern that formed the basis for Disclosure 3 was relatively easily dealt with (by way of bird-proofing which cost around £7,000), albeit that it took some time for the Respondent to action that.

51. In oral evidence, Mr Pemberton-Billing's frustration and upset at the Claimant's attitudes to:

    a) The subjects he could and should discuss with students;

    b) The language with which he was prepared to speak to students and colleagues (with the Claimant saying that (i) he does not recall telling Student C to "*piss off*", but that he has said that students on other occasions, and (ii) he does not remember telling Ms Barker to "*shut up*", but nor did he think it inappropriate to do so);

    c) The Claimant's failure to and unwillingness to differentiate his approach to students in his classes, including where they have higher needs and ECHP; and

    d) Most particularly, the Claimant's refusal to acknowledge the racial element to Black slavery,

    came across very clearly.

52. Mr Mayhew-Smith's evidence was less emotionally charged, but he was clearly extremely disappointed with what he regarded as the Claimant's intransigence when faced with criticism of his behaviour.

53. In summary, the Tribunal favoured the explanation given by Mr Pemberton-Billing and Mr Mayhew-Smith, that it was the Claimant's conduct that was the subject of the various complaints that was the real concern, over the argument made by the Claimant, that it was his role as Workplace Organiser for the GMB and/or the fact he had made the Disclosures. There were two reasons for this:

    a) The Respondent's explanation is more plausible given:

        (i) the dates of the Claimant acting as Workplace Organiser for the GMB, Disclosure 1 and Disclosure 2;

        (ii) the "fix" needed as a result of Disclosure 3 was not particularly significant or costly; and

        (iii) the obvious seriousness of Allegations 1(a), 1(b), 2 and 3; and

    b) The Tribunal's assessment of the oral evidence of Mr Pemberton-Billing and Mr Mayhew-Smith – we believed what they said about the reason for the Claimant's dismissal and not overturning that dismissal as part of his appeal.

54. The Tribunal finds that the Claimant was dismissed for the sole reason of misconduct.

<u>Disputed fact 2: Was the Claimant reassigned from carpentry to plumbing and brickwork without consultation or agreement?</u>

55. It is very clear that there was no consultation before the Claimant was told that he was to work in Plumbing and Brickwork rather than Carpentry, and certainly no agreement to the change from the Claimant.

56. The Respondent has centred its argument on the fact that there was nothing in the Claimant's contract of employment which assigned him to Carpentry, and in fact there were references to his needing to have qualifications in plumbing and bricklaying.

57. However, it was also clear that, on the facts, the Claimant had begun employment with the Respondent working entirely in Carpentry, and while he had branched out into spending a minority portion of his working time on Multicraft, he was significantly assigned to Carpentry.

58. The Tribunal finds that the change in his day-to-day activities *from* Carpentry *to* Plumbing and Brickwork (which he had never assisted with at the Respondent's Carshlaton College previously, save where those skills came up as part of Multicraft), clearly <u>did</u> represent a reassignment of his duties.

The hearing

59. The Claimant represented himself in the hearing, and the Respondent was represented by Mr Crow, Counsel.

60. When both parties were asked whether any adjustments should be considered to the conduct of the hearing, the Claimant informed the Tribunal that he is receiving treatment for a serious medical condition and sometimes feels tired. He did not think he needed any particular adjustments, but he was encouraged to talk to the Employment Judge about any needs that arise in the course of the hearing. He needed to leave the Tribunal by 2:30pm on the final day to attend a medical appointment, which was accommodated (by reserving this judgment). None of the attendees on the Respondent side requested any adjustments.

61. The Tribunal spent some time at the outset of the hearing discussing the appropriate content of the hearing bundle. The Respondent had provided a hearing bundle of 841 pages (including index) in length, but there were some changes that the Respondent sought to make to it.

    a) Firstly, it said that some further documents should be added, namely:

        i. A job description for the Claimant's role as at 2013;

        ii. A job description for the Claimant's role as at 2017;

        iii. The Respondent's Disciplinary policy, dated July 2021;

        iv. The Respondent's Code of Conduct, dated May 2015;

        v. The Respondent's Dignity at Work policy, dated 2010;

        vi. The Claimant's timetable as at 20 September 2021;

        vii. The minutes of the Health & Safety Committee of 15 November 2021; and

        viii. An email from Ms Barker to a member of the Respondent's HR team dated 14 October 2021.

        The Claimant did not object to these additions, and so those documents were added, taking the Bundle to 908 pages.

    b) Secondly, the Respondent said that a privileged document had been included in the Bundle in error. This document was removed.

    c) Thirdly, the Respondent contended that certain documents in the Bundle should be anonymised should a member of the public ask to see them, because they contain student names. Unfortunately, those pages were not available to the Tribunal on the first day of the hearing, so neither the Panel nor the Claimant could look at those redactions against the pages in the Bundle to see that their purpose was as the Respondent indicated. On the

second day, those redacted pages were available, and the Tribunal took a short break for the Claimant and the Panel to review them against the unredacted pages. The redactions did solely pertain to student names, the names of student's family members, and the contact details for those individuals. The Panel agreed that the pages in the Bundle were replaced with the redacted versions.

62. It was most unfortunate, given that the Respondent has been legally-represented throughout and that the Claimant is a litigant-in-person, that these changes had not been identified ahead of the start of the hearing, not least because the Claimant is undergoing medical treatment for a serious medical condition, and his medication causes him to be extremely tired, and so his capacity to review new documents in the evening after a day's hearing is very limited. It was extremely disappointing that they were not all rectified in the Tribunal's reading time on the first morning of the hearing.

63. On the second day of the hearing:

a) the Claimant applied for his CV to be added to the Bundle, and that was done without objection from the Respondent; and

b) the Employment Judge asked Mr Crow about certain additional documents that were among the pack of documents that the Respondent asked to be admitted into evidence on the previous day, but which had not been discussed by the Respondent when the Respondent outlined what the additional documents were or why it sought for them to be admitted. Mr Crow apologised for not realising that there were additional documents amongst those he had sought to be admitted, but two of those were duplicates of documents already elsewhere in the Bundle, and two were earlier drafts of the finalised version of those documents in the Bundle. Mr Crow raised no concerns with those further additional documents being entered in as evidence, and nor did the Claimant - they were admitted, for the ease of finalising the Bundle and having the page numbering understood and sequential, and should the Claimant wish to rely on them.

64. Evidence was given in the form of written witness statements and oral evidence by:

a) Jason Pemberton-Billing, the College Principal for Carshalton College;

b) Mr Mayhew-Smith, the Group Principal and CEO for Carshalton College; and

c) Sharon Muncie, the Respondent's Vice Principal – Curriculum and Quality for Carlshalton College,

on behalf of the Respondent, and by:

d) the Claimant; and

e) Steven Miller, his Deputy Head of Department,

on the Claimant's behalf. Further written evidence in the form of quasi-witness statements (in the form of 'question and answer' documents) was provided by:

f) John Duffy, a former colleague of the Claimant's, who also worked in the Respondent's Construction department at Carlshalton College;

g) Sean P. Henry, who worked with the Claimant in the Brickwork Department of Carlshalton College;

h) Hisham Zubeidi, who worked with the Claimant in a previous role, before he came to work for the Respondent;

i) Doug Meens, who also worked with the Claimant in a previous role, before he came to work for the Respondent;

j) Errol Morris, a former colleague of the Claimant's, who also worked in the Respondent's Construction department at Carlshalton College;

k) Kevin Swain, who worked with the Claimant both in other colleges prior to the Claimant's employment with the Respondent and who also worked with the Claimant while the Claimant worked for the Respondent;

l) Mohamed Swei, who worked with the Claimant in a previous role, before he came to work for the Respondent; and

m) Lt Col (Rtd) Ibrahim Sheaka Kabia, a former colleague of the Claimant's in the Territorial Army/Army Reserve.

Mr Crow had no questions for these last eight witnesses, and nor did the Panel, so they were not called to give oral evidence.

The relevant law

ECHPs

65. Section 42 of the Children and Families Act 2014 provides that EHCPs impose a legal obligation on the local authority to secure the specified special educational provision for the child or young person.

66. Section 43 of that Act provides that if an institution within the further education sector in England is named in an EHCP, that institution must admit the child or young person for whom the EHCP is maintained.

Unfair dismissal: The law on dismissal for misconduct

67. The protection of employees from unfair dismissal is set out in section 94 of the 1996 Act.

68. Section 98(1) sets out that that an employer may only dismiss an employee if it has a **fair reason** (or principal reason) for that dismissal:

"*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 such as to justify the dismissal of an employee holding the position which the employee held."

69. The Supreme Court in *Royal Mail Group Ltd v Jhuti* [2020] ICR 731 held that:

"*In searching for the reason for a dismissal... courts need generally look no further than at the reasons given by the appointed decision-maker*".

70. Subsection (2) of section 98 identifies "*the conduct of the employee*" as a reason falling within subsection 98(1).

71. In the context of a dismissal for "conduct", the employer must have reasonably believed the employee guilty of misconduct at the time of the decision to dismiss them. The seminal decision of *British Home Stores Ltd v Burchell* 1980 ICR 303, EAT, as refined in subsequent authorities such as *Singh v DHL Services Ltd* EAT 0462/12 and *Boys and Girls Welfare Society v McDonald* [1996] IRLR 129, set out the questions to be answered when assessing the fairness of a conduct dismissal:

a) Did the employer believe the employee guilty of misconduct at the date of dismissal?

b) Did the employer have reasonable grounds for that belief? and

c) At the stage when the employer's belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances?

72. As for the degree of thoroughness required for an investigation to be reasonable, that is, according to the EAT in the case of *ILEA v Gravett* [1998] IRLR 497:

"*infinitely variable; at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase. At some stage, the employer will need to face the employee with the information which he has. That may be during an investigation prior to a decision that there is sufficient evidence upon which to form a view or it may be at the initial disciplinary hearing*".

73. The requisite degree of thoroughness of an investigation is not only assessed by reference to the weight of initial evidence of what the employee is alleged to have done (e.g., whether they have been "*caught in the act*"), but also by the gravity of the charges and their potential effect upon the employee (*A v B* [2003] IRLR 405).

74. Subsection (4) of section 98 provides:

"*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

75. In other words, when the employer has been shown to have a potentially fair reason for dismissal, a further enquiry follows as to whether, looked at 'in the round', the dismissal was fair or unfair.

76. The test in section 98(4) is an objective one. When the employment tribunal considers the fairness of the dismissal, it must assess the fairness of what the employer in fact did, and not substitute its decision as to what was the right course for that employer to have adopted (*British Leyland v Swift* [1981] IRLR 91).

77. In many (though not all) cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another. The correct approach is for the tribunal to focus on the particular circumstances of each case and determine whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted in light of those circumstances. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

78. Therefore, if all three of the *Burchell* questions are answered in the affirmative, two further questions must be answered by the Tribunal – whether the respondent otherwise acted in a procedurally fair manner, and whether, in light of its genuine and reasonable belief in the employee's misconduct, the sanction of dismissal was within the range of reasonable responses open to it on an objective basis (*Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] EWCA Civ 903).

79. Section 98(4) (i.e., the fourth and fifth questions referred to above) requires a tribunal to "*consider the fairness of procedural issues together with the reason for the dismissal and decide whether, in all the circumstances, the employer had acted reasonably in treating it as a sufficient reason to dismiss*" (*Taylor v OCS Group* [2006] EWCA Civ 702). As Smith LJ, giving the judgment of the Court, said in (paragraph 48 of) that case:

"*it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not… the employment tribunal … should consider the procedural issues together with the*

reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee."

80. Consequently, not every procedural defect will render a dismissal unfair. As Mr Justice Langstaff (President) stated, in the EAT case of *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/SM:

"*It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness*".

81. Moreover, the assessment of the fairness of the dismissal required by section 98(4) takes account of the particular factual circumstances, including the "*size and resources of the employer*".

82. Summarising the above, this means that the tribunal must answer five questions when considering the fairness of a dismissal for misconduct:

a) Did the respondent genuinely believe the claimant guilty of misconduct at the date of dismissal?

b) Did the respondent have reasonable grounds for that belief?

c) When the respondent's belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances?

d) Did the respondent otherwise act in a procedurally fair manner? and

e) Was the respondent's response – of dismissing the claimant – within the range of reasonable responses available to it?

<u>Unfair dismissal: Multiple reasons for dismissal</u>

83. Where an employer has more than one reason for dismissing an employee, section 98(1) provides that in determining whether the reason for dismissal was a fair one, the employer's *principal* reason for dismissal is the one that is examined:

"*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 such as to justify the dismissal of an employee holding the position which the employee held.*"

84. Where an employer decided to dismiss based on the consideration of a number of different complaints against the employee – i.e., those reasons together comprised a composite reason for dismissal – the tribunal must assess fairness on the basis of that composite reason (*Smith v Glasgow City District Council* [1987] ICR 796).

85. It does not matter if some of those reasons, in the Tribunal's view, would on their own have been sufficient justification for dismissal if that is not how the employer reasoned when determining to the dismiss the employee (*Robinson v Combat Stress* UKEAT/0310/14/JOJ). It is the employer's actual reason that must be examined by the Tribunal.

86. "*Finding what is the reason or principal reason for the dismissal is not a free-floating inquiry. The employer must show what the reason for the dismissal is… it might have been open to an ET, properly directing itself, to find the Claimant was not dismissed [for some parts of the composite reason it gave for the dismissal]. But such a conclusion… would have required cogent explanation*" (*Broeker v Metroline Travel Limited* UKEAT/0124/16/DM).

87. If the employer reasoned that, of the different grounds it was considering, each ground would be sufficient to justify dismissal, then if the Tribunal disagrees with one of the grounds but finds that dismissal for one or more of the other principal reasons was within the range of reasonable responses, then the dismissal will be fair (*Tayeh v Barcester Healthcare Ltd* [2013] ICR D23).

Unfair dismissal: Investigating misconduct

88. If there has been a procedural flaw at the 'decision to dismiss' stage, but that stage is followed by an appeal brought by the employee against that decision, it is the entirety of the employer's process (together with its reasons for dismissal) that should be assessed when considering whether the employer acted fairly in dismissing the employee (*Taylor*).

Automatic unfair dismissal: on the ground of protected disclosure

89. Section 103A of the 1996 Act 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.*"

Automatic unfair dismissal on the ground of health and safety

90. Section 100(1)(a) and (b) of the 1996 Act provide:

"*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-*

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employer carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee-

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee…".

Automatic unfair dismissal on the ground of trade union membership

91. Section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**) provides:

"*(1) For the purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason (or, if more than one, the principal reason) was that the employee-*

…

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time…

(2) In subsection (1) "an appropriate time" means-

…

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in activities of a trade union or (as the case may be) make use of union services".

Protected disclosure detriments

92. Section 47B(1) of the 1996 Act sets out that:

"*A worker 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 ground that the worker has made a protected disclosure.*"

93. The term "*protected disclosure*" is defined in section 43A:

"*In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*"

94. The basis on which a disclosure will be a "*protected disclosure*" is described in section 43B as follows:

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

…

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

….

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."

95. A "*qualifying disclosure*" made to the discloser's employer is a "*protected disclosure*" pursuant to section 43C.

96. In other words, for a person to demonstrate that they have made a protected disclosure they need to show the following:

a) That they have made a "**qualifying disclosure**" by:

(i) disclosing information;

(ii) in the reasonable belief that the disclosure was in the public interest;

(iii) in the reasonable belief that the information disclosed tended to show one or more of the "**relevant failures**" in section 43B(1)(a) to (f); and

b) That their qualifying disclosure was made in accordance with one of the six specified methods of disclosure, which includes disclosure to their employer.

97. The language "*in the reasonable belief of the worker*" involves applying an objective standard to the personal circumstances of the discloser (and this was considered by the EAT in the case of *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4, which concluded that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe). This

"*reasonable belief of the worker*" language applies to both whether the disclosure is in the public interest and whether the disclosure tends to show one or more relevant failure. There are both subjective and objective elements to this test.

a) The subjective element is that *the worker must believe* that the disclosure is in the public interest and that the information disclosed tends to show one of the relevant failures; and

b) The objective element is that that belief must be objectively reasonable

(*Phoenix House Ltd v Stockman* [2017] ICR 84).

98. The protection afforded workers by section 47B is from detriment by his employer done *on the ground that* the worker has made a protected disclosure, so a claimant pursuing a claim under section 47B must show:

a) That they made a protected disclosure;

b) That they suffered some identifiable detriment;

c) That detriment was at the hands of their employer; and

d) There was a causal connection between the act or failure and the protected disclose – that the detriment was on the ground of their protected disclosure.

99. Whether something amounts to a "*detriment*" is to be assessed from the point of view of the worker (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337).

100. Being subjected to a "*detriment*" does not mean anything more than "*putting at a disadvantage*". A detriment "*exists if a reasonable worker would or might take the view that the [act] was in all the circumstances to his detriment*" (*Ministry of Defence v Jeremiah* [1980] ICR 13).

101. It is not a "but for" test, but rather whether the detriment is "*on the ground*" of the protected disclosure is to be understood as meaning that the protected disclosure "*materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*" (*Fecitt v NHS Manchester* [2012] ICR 372).

102. This requires an examination of the mental processes (conscious or unconscious) of the decision-maker – what caused or influenced them to act (or fail to act) as they did (*London Borough of Harrow v Knight* EAT/0790/01).

<u>Burden of proof in protected disclosure detriment complaints</u>

103. Section 48 of the 1996 Act provides:

"*(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B…*"

"*(2) On a complaint under subsection… (1A)… it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*"

104. Section 48(2) does not mean that the burden of disproving the necessary causative link between the protected disclosure and the detriment shifts to the employer – rather, it means that while the burden of proving that connection rests with the employee, the employer is expected to identify and evidence the ground or grounds on which it acted or failed to act so as to result in the detriment shown by the claimant. The claimant does not 'win' by default if the employer fails to establish a reason for its actions – there remains an evidential burden on the claimant (*Ibekwe v Sussex Partnership NHS Foundation Trust* UKEAT/0072/14/MC).

105. However, "*In the absence of a satisfactory explanation from the employer… tribunals may, but are not required to, draw an adverse inference*", but any "*inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found*" (*International Petroleum Ltd v Osipov* UKEAT/0058/17).

Discussion and conclusions

Unfair dismissal

106. As set out above, "*the conduct of the employee*" is a potentially fair reason for dismissal (under section 98(2) of the Employment Rights Act 1996). In light of the line of authority stemming from *Burchell*, the questions to ask and answer then become:

    a) Did the Respondent genuinely believe the Claimant guilty of misconduct at the date of dismissal?

    b) Did the Respondent have reasonable grounds for that belief?

    c) When the Respondent's belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances?

    d) Did the Respondent otherwise act in a procedurally fair manner? and

    e) Was the Respondent's response – of dismissing the Claimant – within the range of reasonable responses available to it?

Question 1: Did the Respondent genuinely believe the Claimant guilty of misconduct at the date of dismissal?

107. Yes (as is set out above in relation to our factual findings), the Tribunal finds that:

    a) Mr Pemberton-Billing was the decision-maker for the Respondent; and

    b) Mr Pemberton-Billing's sole reason for dismissing the Claimant was his genuine belief in the Claimant's misconduct in relation to the Allegations.

Question 2: Did the Respondent have reasonable grounds for that belief?

108. Taking each of the Allegations in turn, the Tribunal considers that:

In relation to Allegation 1(a): That the Claimant acted unprofessionally to Student A, who is a student with a recognised disability, on 21 September 2021

109. The Respondent's evidence and the questioning of the Claimant as part of the First Investigation Meeting, the Disciplinary Hearing and the Appeal Hearing makes it clear that the Respondent's reference to unprofessional behaviour on the part of the Claimant is to both 'the Claimant's failure to consider the student's needs and to differentiate his teaching methods accordingly', and 'the Claimant's use of unprofessional language when talking to the students concerned'.

110. The Tribunal considers that the Respondent had reasonable grounds for finding this allegation made out. The Claimant:

a) Agreed, in the First Investigation Meeting, the Disciplinary Hearing and the Appeal Hearing, that he did not look at individual student's needs (on Promonitor) or make enquiries of any Support Worker accompanying them;

b) Agreed, in the First Investigation Meeting and the Disciplinary Hearing, that he did not treat students according to their needs, but rather treated all students equally; and

c) Did not recall asking Student A whether Student A was getting "*pissed off*" with the Claimant, but he agreed in the Disciplinary Hearing and the Appeal Hearing that he did use that kind of language with students.

111. The Respondent has pointed out that the Children and Families Act 2014 provides that EHCPs impose a legal obligation on the local authority to arrange the specified health care provision for the child or young person. The Respondent is part of that provision.

112. The Claimant maintained in evidence to the Tribunal that he had never been told to look at Promonitor and did not have log-in details, but in any event the Claimant had access to information about the contents of the EHCP from the class teacher and the Support Workers accompanying students. The Tribunal finds the Claimant's admissions in a) and b) above gave the Respondent reasonable grounds for concluding that the Claimant's actions, in failing to enquire about Student A's needs so as to enable him to respond to them, amounted to an unprofessional action.

113. The Tribunal agrees with the Respondent that the Claimant's use of language with students - such as asking them whether they are "*pissed off*" - was contrary to the Respondent's Code of Conduct, upon which the Claimant had been

trained, which states that "*Students have the right to be treated with respect and dignity*". The Claimant's admission that he used this kind of language with students as a matter of course was, in the Tribunal's view, sufficient to support a conclusion that by doing so the Claimant behaved unprofessionally. However, the allegation was specifically that he did so on 21 September 2021 with Student A.

114. We consider:

a) the Claimant's general admission about use of this language;

b) the evidence from Student A's mother; and

c) the evidence from Ms Barker about Allegation 1(b), which describes behaviour very similar to that in Allegation 1(a),

were sufficient to find that the Respondent had reasonable grounds to conclude that Allegation 1(a) was made out.

In relation to Allegation 1(b): That the Claimant behaved unprofessionally to Student B, who is a student with a recognised disability, on 12 October 2021

115. For the reasons set out above, we consider the Claimant's admissions in the First Investigation Meeting, the Disciplinary Hearing and the Appeal Hearing sufficient for the Respondent to reasonably conclude that the Claimant behaved unprofessionally by not accessing the available information about Student B's needs, and not tailoring his approach to Student B.

116. The unprofessional behaviour alleged in respect of Student B on 12 October 2021 also includes Ms Barker's allegations that the Claimant belittled Student B in front of the class and pressured him into asking the question.

117. The Claimant agreed that he applied pressure on Student B to answer (which the Claimant considered appropriate), but he did not admit to belittling Student B. The notes from the Appeal Hearing record that the Claimant said that "*he makes the students feel uncomfortable, so that he could find out what they can do*". Whilst this was a general admission rather than specifically in connection with Student B on 12 October 2021, the Claimant made this admission in the context of Mr Mayhew-Smith asking him about Allegation 1. The Tribunal finds this admission, together with Ms Barker's evidence, sufficient for the Respondent to reasonably conclude that the Claimant behaved unprofessionally towards Student B on 12 October 2021, in his questioning of Student B.

In relation to Allegation 2: that the Claimant made racist comments to a student on 21 September 2021

118. The Claimant was adamant in the First and Second Investigation Meetings, the Disciplinary Hearing and the Appeal Hearing that he is not racist. He was equally

adamant in his evidence to the Tribunal, and was clearly distressed to be labelled as such by the Respondent.

119. The evidence available to the Respondent as to what was actually said to Student A on 21 September 2021 is confined to:

a) the email from Student A's mother; and

b) the evidence of the Claimant provided to it as part of the Respondent's investigatory, disciplinary and appeal processes.

The former is clear in its terms (that the Claimant had stated "*that black people should not feel the way that we do because black people were not the only ones that were an enslaved group*"). However, the evidence from the Claimant was incredibly confused and confusing. The reference to the David Harewood documentary was very unhelpful (given it post-dated the incident with which the allegation is concerned), but the Claimant also continually looked to explain his views rather than focusing on what he said on 21 September 2021. In doing so, the Claimant did not take any of the opportunities presented to him to resist this allegation effectively. Indeed, his continual turning of the questions posed to him about what happened on that day into a debate as to the rights and wrongs of his views could be regarded as the Claimant avoiding the question of what he actually said to Student A on 21 September 2021 on the subject of race.

120. Moreover, there was a real danger that, in the course of investigating and considering (in the Disciplinary Hearing and the Appeal Hearing), the Respondent could have reached conclusions about whether the Claimant expresses racist views to students generally, rather than on this specific occasion.

121. However, on balance we find that the Respondent did have reasonable grounds for concluding that the Claimant made racist comments to a student on 21 September 2021. Our reasons are as follows:

a) The Respondent made numerous enquiries of the Claimant, and the views he expressed could be regarded as racist, for example, denying the link between African slavery and race (e.g., the Disciplinary Hearing notes record the Claimant as saying that "*the argument he would put forward was that white people have been enslaved by the rich for thousands of years*"). This is something the Claimant and his trade union appeared to acknowledge when, in the Disciplinary Hearing, his representative said that his "*comments were not intended to be racist*". If the views he holds could be regarded as racist, and if, as he admits, he openly discussed topics such as racism and slavery with his students, then however unintentional this may be, he could have made comments that objectively would have been regarded as racist in the 21 September 2021 workshop, even though the Claimant would not acknowledge or intend them to be racist; and

b) <u>There are two pieces of evidence that support the assertion that he did express racist views on 21 September 2021 in the workshop with Student A</u>:

(i) the email from Student A's mother; and

(ii) the witness statement taken as part of the investigation and presented to the Disciplinary Hearing from Ms Munroe-Harrison and Kulvinder Dhinsa about a subsequent conversation they overheard between the Claimant and Ms Poorman. Ms Munroe-Harrison says that, in that conversation on 29 November 2021, the Claimant said that "*black people were not the only ones hard done by and they should get over it*", and that "*there were other cultures and communities that experienced hardship*". Similarly, Ms Dhinsa's interview notes record that she heard the Claimant say "*black people need to get over it, they were not the only ones to be hard done by*". While the evidence from Ms Munroe-Harrison and Ms Dhinsa does not directly 'speak to' what the Claimant said on 21 September 2021 (neither was present in the workshop on that date), their evidence to the Respondent was that the Claimant expressed *the same views* as those Student A's mother alleges the Claimant said on 21 September 2021, and that makes the account of Student A's mother more likely to be correct.

The Tribunal notes that the witness statement taken from Ms Poorman at the time of the Respondent's investigation into Allegation 4 records that Ms Poorman did not recall what was said in this conversation, which seems improbable if the Claimant said what each of Ms Munroe-Harrison and Ms Dhinsa claim. However, the Tribunal notes that Ms Poorman was described by the Claimant in his oral evidence as a friend, which could explain the conflicting accounts and why it was reasonable for the Respondent to prefer the recollections of Ms Munroe-Harrison and Ms Dhinsa over that of Ms Poorman.

The Tribunal also understands that (apparently for the first time in oral evidence to the Tribunal) the Claimant suggests that Ms Munroe-Harrison and Ms Dhinsa could have been confused when he *described the allegation made against him* to Ms Poorman, mistakenly interpreting his description as an expression of his own views. The Tribunal's experience of the Claimant is that it can often be difficult to stop him sharing his views and answer questions put to him, and so we think that if Ms Munroe-Harrison and Ms Dhinsa heard the Claimant initially set out Allegation 2 (which we expect he did describe), he would have gone on to express what he actually

thinks about the underlying subject of race and slavery. We therefore consider that – given the Claimant agrees he spoke to Ms Poorman about the allegation - Ms Munroe-Harrison and Ms Dhinsa would have heard the Claimant express his views on the subject.

In relation to Allegation 3: that the Claimant verbally abused Student C on 26 November 2021

122. In the Second Investigation Meeting the Claimant said that he did not recall saying the words "*piss off*" to Student C on 26 November 2021 specifically, he said he does have some students who continually turn up and do no work, do not bring the correct equipment with them and disturb the other students. The notes from the Second Investigation Meeting record the Claimant as saying, by way of general comment rather than specifically on 26 November 2021, that "*I then tell them to go home*", and that he "*said to them that if they do not want to do the subject to piss of [sic] and do something else*".

123. Similarly, in the Disciplinary Hearing the Claimant said "*that sometimes they do use language, and he may have said "piss off" but it is not constant; and they end up with more profanity from students than they gave out to them*".

124. These are sufficient admissions on the part of the Claimant for the Respondent to have reasonably concluded that the Claimant did tell Student C to "*piss off*" on 26 November 2021.

In relation to Allegation 4: that the Claimant breached the instruction given to him in the First Investigation Meeting to maintain confidentiality about the disciplinary investigation when, on 29 November 2021, he talked to Ms Poorman in the staff room about Allegation 2

125. We find that the Respondent did have reasonable grounds for believing the Claimant to have done this, as he admitted this. In the Second Investigation Meeting when he said he had "*possibly*" done this, but he was more definitive in the Disciplinary Hearing, when he confirmed that he had done it.

126. Consequently we conclude that the Respondent had reasonable grounds for believing the Claimant guilty of misconduct in relation to all four Allegations.

Question 3: At the time when the Respondent formed that belief, had it carried out as much investigation into the matter as was reasonable in the circumstances?

127. Given the Claimant's admissions in relation to Allegations 1(a), 1(b), 3 and 4, no more investigation was required of those.

128. We do not consider that, at the time when Mr Pemberton-Billing took the decision to dismiss the Claimant, he had carried out as much investigation into the matter as was reasonable in the circumstances.

a) The Tribunal has identified flaws with Ms Percival's investigation:

(i) There were no interviews conducted with any of the students, or with the class teacher, Tom Hill. As it happened, because the Claimant admitted behaviour that supported clear findings in relation to Allegations 1(a), 1(b) and 3 (and Allegation 4, though that did not relate to the Claimant's interactions with students), there was no need to interview others about those – but while the Claimant was very unclear about what occurred on 21 September 2021 as regards Allegation 2, he repeatedly said that he was not racist, and he failed to clarify what was in fact said. This is when the Respondent should have interviewed Mr Hill, Student A (with appropriate parental or other support), and potentially other students present (again, supported as appropriate);

(ii) When interviewing Stephanie Mackay, another witness present at the incident involving Student B, Ms Percival appears to have told her what happened, rather than consistently asking her open questions, e.g., "*JP advised SM that she had been tasked with investigating allegations against a member of staff and she wanted to talk through an incident with SM that had been brought to her attention with involved a student, Jeff Smith and Laurie Barker… JP said that JS told LB to shut [up - sic] and asked whether SM had heard this*". The effect of doing so is clear from the notes – Ms McKay starts off by saying that she was unsure whether she heard the Claimant tell Ms Barker to shut up, but once Ms Percival tells her it happened Ms McKay goes on to say, as recorded in the notes, that "*she thinks that [the Claimant] was talking and [Ms Barker] said something and [the Claimant] told her to shut up*". In fact, the Respondent did not investigate or discipline the Claimant for how he is alleged to have spoken to Ms Barker, so this instance of leading a witness is less significant than it might otherwise have been - but it should have prompted questions from Mr Pemberton-Billing about the quality of the investigation conducted by Ms Percival. Again, because the Claimant admitted many of the allegations against him the flaws in Ms Percival's approach do not affect those, but Mr Pemberton-Billing had more reason to instruct that further, and better, investigation be conducted with Student A about Allegation 2 given the Claimant consistently denied that allegation; and

(iii) It is clear from the notes of the interview Ms Percival conducted with Ms Barker that Ms Barker felt pressured (by a different colleague, not Ms Percival) into providing a statement about what happened in the Multicraft workshop on 12 October 2021 in relation to the Claimant. Again, given that the Claimant seemed to admit what happened in relation to Student B, that pressure does not have significance as regards Allegation 1(b), but it adds to concerns about the safety of relying on Ms Percival's investigation in relation to the disputed Allegation 2.

129. The Tribunal notes that the letter in which Mr Pemberton-Billing explained his reasons for concluding that it was appropriate to dismiss the Claimant for gross misconduct indicates that that decision was based on his cumulative findings that *all* of the Allegations were made out.

130. However, the decision to dismiss the Claimant was revisited as part of the appeal process, chaired by Mr Mayhew-Smith. Mr Mayhew-Smith's conclusion on Allegation 2 was expressed in different terms to that of Mr Pemberton-Billing. The appeal outcome letter stated:

"*I am not 100% sure whether you said that 'black people should get over slavery' which witnesses asserted, as you disputed this specific form of words. However, you made it clear in your discussion of this subject that you felt that slavery was not an issue exclusive to black people and that you opposed all forms of slavery, regardless of the ethnicity of its victims.*

This comment denies the fundamental link between race and enslavement and the historic experience of slavery suffered by black people as a race…

I do not believe that you understand that this view is racist and offensive, despite a number of discussions through the investigation and hearing process, but it certainly is. It does not exemplify a sound understanding of racial issues and the discrimination endured by black people for centuries that we are striving to overcome in the policies and practice of our colleges. That you do not understand the impact of your words may have had on the people around you, and the appropriateness of expressing these, is also highly concerning in itself."

Mr Mayhew-Smith therefore reached a 'conclusion' on Allegation 2 which did not relate to what happened on 21 September 2021 at all, but to:

a) the Claimant's views on race generally;

b) his attitude to the propriety of expressing those views to staff and students; and

c) his lack of appreciation of the impact his words may have had to the people around him

(the **Reframed Allegation 2**).

131. The Tribunal finds that Mr Mayhew-Smith had reasonable grounds for his conclusion on Reframed Allegation 2 – as it was based on what the Claimant said in the course of the two investigatory meetings, the Disciplinary Hearing and the Appeal Hearing (the Claimant agreed that the notes of these meetings were accurate, in the case of some those, after his comments were added). The degree of thoroughness required for an investigation to be reasonable takes account of the particular circumstances, including the degree of confidence it is reasonable to have about whether the facts alleged occurred (*Gravett*), and the gravity of the charges and their potential effect upon the employee (*A v B*). Here, the Claimant's admissions as regards the Reframed Allegation 2 mean that the investigation conducted by the Respondent was, by the time of the conclusion of the appeal, reasonable. The Reframed Allegation 2 did not require further investigation because the Claimant had, in each of the two investigation meetings, the Disciplinary Hearing and the Appeal Hearing discussed:

    a) his views on race generally (as opposed to what was said on 21 September);

    b) talked about the fact that he did not see any issue with expressing those views to staff and students (a position he maintained despite challenges from Ms Percival, Mr Pemberton-Billing and Mr Mayhew-Smith); and

    c) Ms Percival, Mr Pemberton-Billing and Mr Mayhew-Smith talked about the hearer's ability to understand the views he was expressing (e.g., students with EHCPs) and the potential for his views to cause offence (to students and staff).

    The Claimant did not need another opportunity to do so in order for Mr Mayhew-Smith to be in a position to reach a reasonable view on Reframed Allegation 2.

132. In any event, while Mr Pemberton-Billing's decision was based on all four allegations being made out, and the combination of all four were found by him to constitute misconduct for which he considered summary dismissal an appropriate sanction, Mr Mayhew-Smith concluded that either Allegation 1 or Allegation 2 on their own were sufficient to justify dismissal. The Appeal Outcome Letter included the following:

    "*whilst I do not believe that two of the allegations constitute gross misconduct in their own right [the earlier parts of his letter make clear this is a reference to Allegations 3 and 4], I believe that the four allegations taken together do constitute gross misconduct.*"

133. Therefore, even though the Tribunal considers that the investigation into Allegation 2 as originally formulated, without having interviewed Mr Hill or the students, not to be reasonable, the Tribunal finds that at the time the decision to dismiss was confirmed by Mr Mayhew-Smith the Respondent's investigation was reasonable either:

    a) Because the investigation into Reframed Allegation 2 was reasonable; or

b) Because Mr Mayhew-Smith considered Allegation 1 sufficient *on its own* to justify summary dismissal, and the investigation into Allegation 1 was as much as was reasonable (and, as per the case of *Tayeh*).

134. Consequently, the Respondent had carried out as much investigation as was reasonable in all the circumstances by the time Mr Mayhew-Smith took the decision to confirm the Claimant's dismissal at the time of the appeal outcome.

Question 4: Did the Respondent otherwise act in a procedurally fair manner?

135. As noted in relation to question 3, the Tribunal had some concerns with the investigatory process carried out by the Respondent, but those concerns have no meaningful impact for those Allegations which the Claimant either directly admitted (part of Allegation 1 regarding questioning students, and Allegation 4) or where he admitted *generally* displaying the behaviour concerned even if he could not remember doing so on the particular occasion such that it was reasonable for the Respondent to conclude that he had done so on the occasion alleged (i.e., the part of Allegation 1 relating to language used with students, and 3).

136. Allegation 2, in the terms on which it was communicated to the Claimant (being about what was said to Student A on 21 September 2021 about race and slavery) was not sufficiently investigated. The conclusion reached by Mr Mayhew-Smith in relation to Reframed Allegation 2, and that *was* sufficiently investigated, because it was based on what the Claimant said and did in the course of the disciplinary and appeal processes. However, that was not the allegation the Claimant understood he was facing.

137. The case law is clear that when considering whether the Respondent acted in a procedurally fair manner, not every procedural defect will render a dismissal unfair – the focus is on whether the flaw(s) identified by the Tribunal are so significant as to amount to overall unfairness (*Sharkey*).

138. Here, by the time of the conclusion of the appeal, any unfairness would concern the Claimant not having been forewarned that Allegation 2 was being changed – from being about what was said on 21 September 2021 to Student A, to the Reframed Allegation 2.

139. What is abundantly clear is that the Claimant had ample opportunity to challenge each of those three concerns throughout the process the Respondent undertook. Indeed, this more general approach taken by the Reframed Allegation 2 was the one that the Claimant himself took when responding to Allegation 2. He did not focus on what he said on 21 September 2021, which he seemed not to recall. Instead, he repeatedly expressed his 'take' on:

a) Whether he held racist views;

b) Whether it was appropriate for him to discuss those views with students and staff; and

c) Whether he appreciated the impact his expression of his views could have.

140. This is evident from the notes of both investigation meetings, the Disciplinary Hearing and the Appeal Hearing, even though, until the point at which the appeal conclusion was being communicated the focus of the allegation was specifically about what was said on 21 September 2021 to Student A.

141. In addition, it was the Claimant's own evasiveness about what he said on 21 September 2021, but his great openness about the three matters listed above, that meant that Mr Mayhew-Smith was unable to form a firm view on Allegation 2 as originally formed, and which caused him to alter the allegation in the way he did. In that situation, it was not reasonable to expect the Respondent to start the investigation or disciplinary process over again – it had more than ample evidence on Reframed Allegation 2 from what the Claimant in fact said to Ms Percival, Mr Pemberton-Billing and Mr Mayhew-Smith. The Respondent did not need to speak to Mr Hill, Student A or any of the Claimant's other students to reach a fair conclusion on Reframed Allegation 2.

142. In these circumstances, we conclude that the Respondent acted in a procedurally fair manner overall.

143. If we are wrong about the Respondent having acted overall in a procedurally fair manner as regards the second allegation (Allegation 2 or Reframed Allegation 2), and if we (following the *Tayeh* case) consider the procedural fairness of Mr Mayhew-Smith's conclusion to uphold the Claimant's summary dismissal based on Allegation 1 alone, we find that the Responded *had* acted in a procedurally fair manner as regards Allegation 1. The Claimant had numerous opportunities to 'have his say', and had seen copies of the complaints relating to Allegation 1(a) and 1(b). His admissions as to his own conduct, either on the occasions alleged or more generally, meant further investigation by the Respondent (e.g., by interviewing the students concerned, Mr Hill or other students) was not necessary. At the time when Mr Mayhew-Smith formed the belief that Allegation 1 was made out, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.

Question 5: Was the Respondent's response – of dismissing the Claimant – within the range of reasonable responses available to it?

144. As the *Graham* and *British Leyland* cases cited above illustrate, the exercise for the Tribunal is to refrain from stepping into the shoes of the decision-maker, and we have not done so. Rather, it is for us to identify the range of reasonable responses available to the Respondent to the situation it found itself in with the Claimant and conclude whether the actions it took were within that range. Section 98(4) of the 1996 Act directs that when considering this question, account should

be taken of the circumstances, including the size and administrative resources of the employer.

145. Here, Mr Pemberton-Billing and Mr Mayhew-Smith both took account of the Claimant's more than seven years of service, and his clean disciplinary record. Moreover, Mr Mayhew-Smith took account of "*the good work [the Claimant had] done with many students*".

146. The Tribunal agrees with them, that the seriousness of the misconduct found by the Respondent was such that even with those mitigations factored in, dismissal was within the range of reasonable responses available to the Respondent. The Respondent had considered alternatives to dismissal, the only potentially viable one really being training (to try to get the Claimant to change his practices as regards differentiation, taking account of the content of EHCPs, his expression of his views on race, and his use of language with students), but the Claimant had shown that he was wedded to his views, and that *he* did not believe that he would change his mind (he referred to reserving his right to challenge any training provided to him – and that was a pointed comment, expressing resistance to rethink his stance on these matters). In such a situation, dismissal was within the range of reasonable responses.

147. We find that dismissal was within the range of reasonable responses, whether the Respondent was relying on the combination of all four Allegations or just Allegation 1 (together with Allegations 3 and 4).

Automatically unfair dismissal

148. In light of the above conclusions, the Tribunal finds that the Claimant's dismissal was not automatically unfair, because the reason or the principal reason for his dismissal was not any or all of the following:

a) The fact that the Claimant had made one or more protected disclosures;

b) The fact that the Claimant was a representative of workers on matters of health and safety at work by virtue of his duties as a Workplace Organisers and attendee of the Respondent's Health and Safety meetings; and/or

c) The fact that the Claimant was, in the context of making the Disclosures, taking part in the activities of an independent trade union in his role as the GMB representative on the Respondent's Health and Safety Committee.

Detriment (other than dismissal) on grounds of having made protected disclosures

Did each of the Disclosures disclose information?

149. The Respondent agrees that they did.

Did the Claimant believe the disclosure of information was made in the public interest?

150. The Respondent does not dispute that they were.

Was that belief reasonable?

151. The Tribunal considers that it was:

a) In the case of Disclosures 1 and 2, the Claimant reasonably considered that conveying to the Respondent that he believed that the health and safety of members of staff working in, and students attending, the carpentry workshop, had been, was being or was likely to be endangered by the dust levels was in the interest of those staff members and students. Moreover, he considered the risks to the Respondent from a liability and reputational point of view could be managed by its being aware of Disclosure 1, and it was also reasonable to for him to believe that that was in the public interest.

b) In the case of Disclosure 3, the Claimant reasonably considered that the health and safety of members of staff working in, and students attending, the brickwork classes, was furthered by the information he disclosed, and he considered the risks to the Respondent from a liability and reputational point of view could be managed by its being aware of Disclosure 3.

152. Each of the Disclosures was made in the reasonable belief of its public interest.

Did the Claimant believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered?

153. Yes, the Tribunal finds that he did. This was clear from his oral and written evidence, and the Respondent did not question this either.

Was that belief reasonable?

154. In relation to Disclosure 3, the Respondent does not appear to dispute that the Claimant's belief was reasonable, given that it sought quotes from a number of potential suppliers to respond to the risks the Claimant identified, and indeed did engage one of those suppliers to carry out remedial work. The Respondent would not have spent the money it did to do that if it did not consider the Claimant's belief reasonable.

155. By contrast, the Respondent contends that the Claimant's belief that Disclosures 1 and 2 were in the public interest was not reasonable in light of the views it obtained from external consultants that the dust/ventilation levels were acceptable. The Claimant agreed that those external consultants did not perceive the health and safety risks of the dust in the carpentry workshop in the same way

as he did, but he considered them to be wrong, or the wrong people to ask. However, in oral evidence the Respondent (in the person of Mr Mayhew-Smith) acknowledged the potential for different people with knowledge and experience of the matters concerned to reach different views, and he attributed the Claimant's continuing belief that there were risks associated with the dust/ventilation levels in the workshop to that difference. He did not criticise the Claimant for holding the view he did, he just said that he did not think the Respondent needed to do more given the professional views it had obtained. Mr Mayhew-Smith expressed great respect for the Claimant's work on the Health and Safety Committee, and gratitude for the work the Claimant put in to help that Committee particularly during the time of the Covid-19 pandemic. The Tribunal noted these, and considered these matters pointed to the objective reasonableness of the Claimant's belief that the health or safety of any individual had been, was being or was likely to be endangered (consistent with the approach to reasonableness in the *Stockman* case).

156. We therefore concluded that all three Disclosures were qualifying disclosures and, because they were made to the Respondent as his employer, they were protected disclosures.

Did the Respondent, in September 2021, reassign the Claimant from carpentry to plumbing and brickwork without consultation or agreement?

157. This is Disputed Fact 2 and, for the reasons set out above, we find that the Respondent did reassign the Claimant from Carpentry to Plumbing and Brickwork without consultation or agreement.

By doing so, did the Respondent subject the Claimant to detriment?

158. As per the case of *Shamoon*, this is assessed taking account of the point of view of the Claimant – and he certainly regarded the change of his assignment from carpentry to plumbing and brickwork as detrimental (as shown by his grievance about it). We also consider that perspective to be reasonable (as per *Jeremiah*). The Claimant enjoyed the carpentry aspect of his work more than the others, and it is perfectly reasonable that he would regard that being taken away from him as detrimental.

If so, was it done on the ground that he made a protected disclosure?

159. As described in the 'relevant law' section above, it is sufficient for these purposes if the protected disclosure "*materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*" (*Fecitt*), which

required an examination of the mental processes (conscious or unconscious) of the decision-maker (*Knight*).

160. The Claimant said that Ms Muncie was the decision-maker as regards his change of timetable in September 2021, as did Mr Miller. Ms Muncie's evidence was confused on this point, as she said both that:

a) timetables were written by the Head of Department or Deputy Head of Department, who reported in to her; but also

b) when determining that the Claimant should be assigned to brickwork and plumbing instead of carpentry, "*My concern was around manual handling for [the Claimant]*", and when the source of this concern was explored with the Employment Judge, Ms Muncie pointed to a specific paragraph in the May 2021 OH report. This reference to "***my*** *concern*" (emphasis added) is a strong indicator that she in fact took the decision.

161. The Tribunal considered the second point more persuasive – it was clear from the evidence of the Claimant and Mr Miller, and from Ms Muncie's evidence about her reading of the OH report, that she took the decision to reassign the Claimant.

162. As per *Knight*, then, our examination should centre upon Ms Muncie's (conscious or unconscious) reasons for doing so in order to consider whether this complaint is made out.

163. Ms Muncie offered three reasons for the reassignment of the Claimant:

a) The fact that the OH report and manual assessment indicated that he should be assigned "light duties", which she did not think could be accommodated in the carpentry department but could in plumbing and brickwork;

b) The Respondent's needs meant that the Claimant, who has skills across multiple disciplines and whose contract was not in terms that anchored him in a particular team, could be moved to Plumbing and Brickwork, unlike others; and

c) The complaints from Students B and C and from the mother of Student A meant that it was easier to reassign the Claimant away from Carpentry to avoid the difficulties of trying to ensure the Claimant was not teaching those students until the investigation was completed.

164. The Tribunal did not find any of these convincing:

a) When asked to direct the Tribunal to the relevant passage in the May 2021 OH report that required the Claimant to be assigned to "light duties", Ms Muncie could not do so. While she referred to a manual handling assessment, when she was asked to take us to that in the Bundle she said that no such manual handling assessment had been carried out. What is clear, from the terms of the May 2021 report, is that the OH assessed him as "*fit to resume work*". A phased return was recommended for the first

three weeks, but that time was long passed by the time of the Claimant's reassignment in September 2021 (the report was dated 5 May 2021). OH did recommend that a moving and handling risk assessment be carried out on his return to work, but as previously noted, it was not. The OH report provided no basis for reassigning the Claimant. Furthermore, the Claimant and Mr Miller's evidence was clear that Plumbing and especially Brickwork involved considerably more physical work than Carpentry, which was not a point that Ms Muncie addressed in her evidence.

b) The Respondent did need a Carpentry workshop assistant, because it hired an agency worker to do the work that had been assigned to the Claimant previously. The Employment Judge asked Ms Muncie whether a different agency worker could instead have been engaged to support plumbing and brickwork, but Ms Muncie did not explain why that did not happen.

c) The complaints against the Claimant were only brought, or seen (in the case of the email from Student A's mother) *after* the Claimant's timetable was changed in September 2021. In addition, it turned out that moving the Claimant away from the carpentry work did not stop his contact with any of the three students who had raised (or whose parent has raised) complaints about him, as those students were in the Multicraft class that the Claimant retained following his reassignment. So this third reason also did not explain why Ms Muncie reassigned the Claimant from Carpentry to Plumbing and Brickwork.

165. The Tribunal was left to determine why the Claimant had been reassigned with a total absence of plausible explanation from the relevant decision-maker.

166. While section 48(2) of the 1996 Act sets out an expectation that the employer should be able to identify and evidence the ground or grounds on which it acted, the Claimant does not 'win' by default if it fails to do so (*Ibekwe*). The absence of a plausible explanation from Ms Muncie, though, means that the tribunal may, but is not required to, draw an adverse inference from facts as found by the Tribunal (*Osipov*).

167. It is clear that the reassignment pre-dated Disclosure 3, so it was not done "*on the grounds of*" Disclosure 3.

168. Ms Muncie was directly asked by Mr Crow in re-examination whether she had made changes to the Claimant's timetable because he had made Disclosure 1 and Disclosure 2, and Ms Muncie denied that.

169. Ms Muncie did sit on the Health & Safety Committee as a member of the Respondent's management team at times, as shown by minutes in the Bundle. However, she did not commence employment with the Respondent until 2019, so some time after the Claimant started to raise the matters he did in Disclosure 1 and Disclosure 2 (though it is agreed he repeatedly raised those matters,

including up to his dismissal on 31 March 2022). At the time of the reassignment, the Claimant had been raising these concerns for more than five years, and for more than two years after Ms Muncie had line management responsibility for the department the Claimant worked in.

170. The Tribunal found the evidence from Mr Pemberton-Billing and Mr Mayhew-Smith persuasive that they welcomed the Claimant's enthusiasm and active engagement and challenge with health and safety matters as part of his trade union role. We do not consider there a basis for inferring that either of them placed any pressure on Ms Muncie because of Disclosure 1 or Disclosure 2 to 'force the Claimant out'.

171. As noted above, the matters giving rise to the complaints against the Claimant had not come to pass, or to light, by the time of the reassignment, so those do not provide the impetus for Ms Muncie acting as she did.

172. However, the Tribunal does consider it significant that:

a) the Claimant had had a significant period of sickness absence from July 2020, not returning to work until May/June 2021 (in part, due to lockdown and his vulnerability to Covid-19);

b) the Claimant and Mr Miller gave evidence to the effect that Brickwork was a far more physically-demanding role than Carpentry; and

c) Ms Muncie sat on the Respondent's Health and Safety Committee.

173. In the absence of a plausible explanation from the Respondent for the reassignment, the Tribunal considers it appropriate to draw an inference that Ms Muncie's motivations for reassigning the Claimant were:

a) a concern that he would take further extended absence; and

b) Disclosures 1 and 2.

The Tribunal considers that Ms Muncie thought that making the Claimant unhappy with the assignment to Plumbing and Brickwork, and potentially making him acknowledge that he could not do the physical demands of the Brickwork role, would encourage him to leave the Respondent's employment, thereby avoiding the risk of the Claimant in the future having a further period of long-term absence, and avoiding having to deal with the Claimant's repeated concerns about the dust levels in the Carpentry workshop (i.e., Disclosures 1 and 2).

174. The complaints about the Claimant, when they came in, added to the reasons to encourage him to leave.

175. In the absence of a better explanation from her as to why she acted as she did, we think that initially, the combination of the Claimant's sickness absence, his age and ill health, together with his being an obdurate character, meant that there was a desire on her part to encourage him to leave. When the complaints came in about the Claimant, those would have added to the reasons why Ms Muncie

wanted the Claimant 'out'. Consequently, we find that Disclosures 1 and 2, being protected disclosures, were a material influence on the decision to reassign his duties from majority-carpentry to no carpentry and majority plumbing and brickwork.

Conclusions

176. For the reasons set out above, the unanimous judgment of the Tribunal is that:

a) The Claimant's complaints of:

(i) unfair dismissal; and

(ii) automatically unfair dismissal,

are not well-founded and each is dismissed; and

b) The Claimant's complaint of protected disclosure detriment is well-founded and succeeds.

Employment Judge Ramsden

Date: 16 May 2024