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EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Simon**

Respondent: **Genesis Education Trust Ltd**

Heard at: **East London Hearing Centre**

On: **10-12 December and 13 December 2019 (in chambers)**

Before: **Employment Judge Lewis (sitting alone)**

Representation

Claimant: Mr C Barklem (Counsel)

Respondent: Mr F Evans (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that:

1. **The Claimant's claim for automatic unfair dismissal under s.103A of the Employment Rights Act 1996, dismissal for making a protected disclosure, fails and is dismissed;**
2. **The Claimant's claim for unfair dismissal contrary to s.94 of the Employment Rights Act 1996 fails and is dismissed.**

REASONS

1 The Claimant was employed by the Respondent as a finance officer, from 7 September 2007 having been transferred under TUPE from St Margaret's C of E Primary School on 1st April 2018. She was dismissed on 23rd of May 2018.

2 By a claim form presented on the 23 September 2018, following a period of early conciliation from 24 July to 24 August 2018, the Claimant brought a complaint of

unfair dismissal. The Respondent defended the claim on the basis that the Claimant was fairly dismissed for gross misconduct.

Case management

3 At a preliminary hearing before Employment Judge Ferguson on 6 February 2019 the Claimant was granted permission to amend her claim to include a claim for automatic unfair dismissal under section 103A of the Employment Rights Act 1996, dismissal for having made a protected disclosure. The alleged disclosure the Claimant relies on is an email of 9 January 2018 from her to Ruth Ejvet alleging that the Claimant had overheard a conversation about staff contracts being found and indicating that they would be shredded.

4 The issues for the tribunal were identified at paragraph 18 of the case management summary sent to the parties on 8 February 2019 following that preliminary hearing.

Procedural matters and case management

5 The Claimant produced a schedule of loss in accordance with the directions made at that hearing. This was contained in the bundle of documents prepared by the Respondent. The schedule of loss included claims, under the heading non-financial loss, for injury to feelings and aggravated damages amounting to some £18,000 in total. At the start of the hearing I drew the parties' attention to the statutory provisions and handed them a copy of *Dunnachie v Kingston-upon-Hull City Council [2004] 3 All ER 1011*, which confirmed that damages for injury to feelings and/or aggravated damages were not available as remedies for claims under s103A. The Claimant confirmed that she had found another job on 4 September 2018 and was no longer seeking reinstatement or engagement and that her claim amounted to claim for a basic award in the sum of £2,533.50 and a compensatory award for lost income and loss of statutory rights in the sum of £384.

6 The Respondent had prepared a bundle contained in two lever arch files and consisting of some 374 pages with additional inserted pages. The Claimant had prepared her own bundle which was contained in three files which she said contained documents that she wanted the tribunal to see. The Respondent's position was that it had analysed the list of documents provided to it by the Claimant and had included those that were relevant in the hearing bundle it had prepared and the vast majority of the remaining documents were not relevant or not directly relevant to the issues. The Claimant's witness statement consisted of 111 paragraphs over 59 pages, much of it dealing with matters relating to events prior to the academisation of the school and various complaints that the Claimant had in respect of the academisation and the treatment of herself and the headteacher, at the time Mrs Ruth Ejvet. The Claimant's Counsel was asked to indicate which of those paragraphs were relevant to the issues that I had to decide and any indicate any documents referred to in the relevant parts of the Claimant's statement that were not contained in the Respondent's bundle and was invited to do so by the morning of the second day of the hearing in advance of the Claimant giving her evidence.

7 On the second day the Claimant had prepared a slimmed down bundle of documents she considered to be relevant but her Counsel had not had an opportunity

to confirm whether those were indeed relevant. I indicated that if any documents were referred to by the Claimant in the course of her evidence, or if there were documents referred to in the relevant paragraphs of her witness statement that were not in the hearing bundle, then those should be identified and we would add them to the bundle even if that meant handing them up during the course of her evidence. In the event, reference was made to only one additional document. In the course of his cross-examination of Mrs Ejvet Respondent's Counsel referred to a document that she had written which it transpired was also within the documents the Claimant had prepared but had not referred to; Mrs Ejvet was asked about and gave evidence in respect of that document.

Protected disclosure

8 The Claimant relied on an email that she sent to Ruth Ejvet at 21:15 on 9 January 2018 as a protected disclosure. The Claimant alleges that the email was about shredding documents and tended to show that a criminal offence (perverting the course of justice or fraud) had been committed, that legal obligation had been breached (obligations under TUPE) and/or that those matters were being concealed. The email was sent from the Claimant's personal email account to Mrs Ejvet's personal account and copied to an account in the name "nejvet". The subject was "Staff contracts" and the content of the email was as follows:

> "Hi Ruth
>
> Sorry to hear you still feeling unwell.
>
> This information is just to confirm a conversation I overhear on Friday 5th January 2018 between Sandra Moey Sue Newman and David Hungerford about staff contracts.
>
> Sandra came out from your office and said to David she had found the missing staff contracts and she will have to shred them later. Sue informed Sandra she had a list of the staff who had signed the new contracts. David said we will deal with this matter later.
>
> can say Elaine and Bev were in your office when the contracts were found.
>
> Marcia"

9 It was common ground that the email relied upon by the Claimant as a protected disclosure was also the email relied on by the Respondent in dismissing her for misconduct. The Respondent denied that the dismissal was for having made a protected disclosure: the reason for dismissal was misconduct, for having fabricated the contents of that email. The allegation was identified in the disciplinary proceedings as "Allegation 2" and was set out in the following terms:

> "That you communicated with a suspended employee and fabricated a scenario that indicated members of the senior leadership were destroying evidence in the investigation as follows:

alleging that members of SLT were shredding contracts to prevent disclosure to the suspended employee thus alluding to them being blameworthy of gross misconduct;

offering to testify that the CEO and COO were present when this alleged misconduct took place when this clearly was not the case"

10 The Respondent denied the Claimant's email was a protected disclosure, that she had a reasonable belief that it tended to show a relevant failure under section 43B and that it was made in the public interest. The Respondent also denied that if the disclosure was a qualifying disclosure that it was made in compliance with section 43C of the Employment Rights Act 1996.

Witnesses

11 The tribunal heard from Carlene Reid who appended the statement of the investigating officer Kerry Munden; Alicia Anderson, the chair of the disciplinary panel, David Huntingford the interim headteacher; Elaine McDonald-James' who was a witness at the disciplinary hearing,; and Canon Ademola, the chair of the disciplinary appeal panel, on behalf of the Respondent and from the Claimant, Mrs Ruth Ejvet and Mrs Fiona Sapiano on behalf the Claimant. Claimant's Counsel also handed up a skeleton argument on the first morning of the hearing

Findings of fact

12 The Claimant was suspended on 26th of February 2018 by the interim head teacher Mr Huntingford, in order for the Respondent to investigate an allegation that she had breached confidentiality with regard to financial information. The Claimant's suspension was confirmed by letter dated 27 February 2018 [46-47]. Mr Huntingford suspended the Claimant following a conversation he had with Carlene Reid who at that time was employed by the Local Education Authority to provide HR advice to the school. Mrs Reid accepted that the National Society Guidance: Grievance and Disciplinary Procedures 2004 document in the bundle at page 120a onwards was a contractual document. That document deals with suspension paragraph 4, [p.120K]:

"4.1 In cases of misconduct or gross misconduct, it may be considered necessary to suspend an employee pending an investigation. The headteacher or the chair of the governing body may suspend an employee. In practice this should only be done following consultation with the Diocesan Board and LEA…

4.2 Suspension is a neutral act, not a disciplinary penalty, and carries no assumption of guilt, although it is seldom seen as such by onlookers. Careful consideration should be given to the case before an employee is suspended. If the alleged offence is a dismissible offence, suspension will normally apply.

4.3 Suspension should only be applied where the circumstances of the case make it unacceptable for the employee to remain in school while the facts are ascertained.

Circumstances in which suspension occurs include:

(a) where children are considered to be at risk;

(b) where the allegations are so serious that dismissal for gross misconduct is possible;

(c) where it is necessary for the conduct of the investigation to proceed unimpeded.

4.4 Where suspension is under consideration, an interview should be arranged. This can be at very short notice, if the situation is serious.

4.5 An employee called to such an interview must be advised that s/he may be accompanied by a **companion**. It must be made clear that the interview is not a formal disciplinary hearing but is the purpose of putting forward a serious matter which may lead to suspension and further investigation.

4.6 The employee must be given as much information as possible about the allegation and about the reasons for the suspension. The employee must be given an opportunity to make representations concerning the suspension. A short adjournment may be considered if requested by the employee prior to response.

4.7 Written confirmation of the suspension must be dispatched within one working day and should include;
[the document then sets out a number of matters that should be included]

13 It has not been suggested that a member of the Diocesan Board had been consulted before the suspension. The Claimant alleges this is a breach of the contractual procedure and pointed to two further breaches, namely that there was no interview where she was given the right to be accompanied and that she was not given as much information as possible for the reasons for the suspension.

14 David Huntingford wrote to the Claimant on 27 February setting out the reasons for the suspension. The Claimant was invited to a fact-finding meeting on Friday 22 March at the school, following an email from the Claimant's union representative the meeting was rescheduled for Thursday 1 March and a new invitation letter was sent. That meeting was postponed due to the Claimant being unwell and on 5 March a further letter was sent rescheduling the meeting for 16 March. However, during the investigation, a number of further allegations came to light and the meeting scheduled for 16 March was cancelled and a new letter dated 19 March was sent rescheduling the meeting for 27 March. This letter outlined three allegations against the Claimant [pages 59 to 60]. Allegation 1 and allegation 3 were not upheld at the disciplinary hearing and it is only allegation 2 with which this tribunal is concerned.

15 The relevant background to the allegation was that the headteacher, Mrs Ejvet, whom the Claimant had worked alongside for some 10 or 11 years, was at that time suspended from work and facing disciplinary proceedings. Those disciplinary

proceedings arose from audits that had taken place in the summer of 2017 and involved a number of serious allegations including, failing to declare an interest when awarding contracts worth in the region of £500,000 to a building company owned by her husband and her brother-in-law; of particular relevance to this case is the fact that one of the allegations faced by Mrs Ejvet was that the school had failed to keep a Single Central Record (SCR) and that a number of staff files were missing contracts. It was in this context that the disciplinary allegations were made against the Claimant, she was suspected of passing on confidential information to a suspended employee [Mrs Ejvet] and providing her with misleading financial information.

16 The Claimant attended a disciplinary investigation meeting with her union representative and was asked a number of questions by Kerry Munden, [those questions are set out page 63 of the bundle]. Minutes of the investigation meeting signed by Miss Munden were at pages 64 to 69. Prior to the disciplinary investigation meeting with the Claimant Miss Munden had interviewed David Huntingford and Sandra Moey who both denied the substance of the allegation made by the Claimant in her email sent to Ruth Ejvet on 9 January.

17 At the hearing before me it was suggested that those denials were not as complete as they might have been, however the note of the meeting with Mr Huntingford records that he stated he has never at any time been through the cupboard with Sandra and he expressed that 100% he had no involvement in shredding of any document or paperwork from the lockable cupboard in the headteacher's room or that he would have said this. Mr Huntingford repeated his denials in his evidence. Ms Munden's statement records that Sandra Moey was asked if she had been involved in the discussion regarding shredding confidential materials and in carrying out this action she explained that never at any time and she been through the cupboard with David Huntingford which is what the Claimant appeared to be alleging and expressed hundred percent she had no involvement in shredding of any document or paperwork from the lockable cupboard in the Headteacher's room.

18 Kerry Munden also minuted the content of a conversation on 16 March 2018 with Graham Moss who was the chair of the Genesis Education Trust in which he informed her that the Claimant's emails had been relied upon by Mrs Ejvet in response to the disciplinary allegations against her [58A]. And that emails had been sent to and received by RE [Ruth Ejvet] despite being told she should not be contacted along with other pieces of information which Mr Moss believed had come via the Claimant. Mr Moss forwarded the emails to Kerry Munden on 18 March 2018. Miss Munden also interviewed Elaine McDonald-James (EJ) [61-62] on 22 March 2018.

19 At the disciplinary investigation meeting Ms Munden put the allegations to the Claimant and asked a number of questions prepared in advance [63]. The Claimant repeatedly stated that she didn't know that RE had been suspended and simply thought she was off sick. Mrs Reid who attended the meeting to provide HR support recalled that the Claimant denied having contacted RE until she was presented with the two emails at which point she changed her tack. The Claimant maintained throughout the disciplinary, at the appeal and in her witness statement to the tribunal that she had not been aware that it was RE who was the person who had been suspended and about whom the enquiry as to whether she was prepared to be a

witness had been made until after she had sent her to emails on 9 January. She was anxious to have it understood that she did not know that it was RE who was the subject of the disciplinary when she sent the emails. This was not accepted by the Respondent.

20 Following the investigatory meeting the Claimant was given an opportunity to comment on the minutes [64-69] her comments are at 69A-69C. Ms Munden produced an investigation report [70-76] in which she set out her findings in respect of each of the allegations, the relevant findings for the purposes of this claim being that:

> Marcia Simons was aware of the suspension of a member of staff and had been told that they will not be contacted
> That protocol was breached and emails from a personal account were sent to a suspended member of staff
> That the emails sent to a suspended member of staff fabricated a scenario that indicated members of the Senior Leadership were destroying evidence relating to shredding staff contracts
> That the emails offered to testify that the CEO and COO were present when his alleged misconduct took place when this clearly was not the case.

21 The disciplinary hearing took place on 11th and 18th May. The Claimant was represented by her trade union representative. The chair of the disciplinary panel was Mrs Felicia Anderson also on the panel were Mrs Houston, Diocesan governor and Mr Idaho, Foundation governor. The panel heard from the investigating officer Kerry Munden and from witnesses, including Mr Huntingford and Susan Newman who been implicated by the Claimant in the conduct in respect of allegedly finding and discussing shredding contracts. The Claimant's representative was given an opportunity to ask questions of the witnesses. Mr Huntingford and Mrs Newman denied any conversation about contracts taking place Mr Huntingford denied that he would authorise shredding of a contract, commenting that he certainly did not authorise shredding of contracts and pointed out that he was then a newly appointed headteacher only two days into the job. Mrs Newman denied hearing anyone talking about shredding contracts and stated that that was not within her role.

22 The Claimant repeated her position that she had not contacted RE up until 9 January. The panel were told that staff were specifically told not to communicate with a suspended member of staff. Mrs Reid said that all staff have been told not to make contact with a suspended member of staff. This was disputed by the Claimant and on her behalf by her union representative. She maintained she only knew that the head was off sick and denied that she was present at the staff meeting which told staff about the suspension. The Claimant was asked questions by the panel and given an opportunity to address the case against her. At the end of the evidence and presentation of cases both sides summarised their case. The Claimant's character witness' statements had been produced and placed before the panel. The Claimant repeated her assertion that it was not her intention to suggest that members of staff were blameworthy or guilty of gross misconduct.

23 The panel's conclusions were set out in its decision letter dated 22 May 2018 [99-100]. The panel considered three allegations, it did not uphold allegations 1 and 3 but found against the Claimant on allegation 2. They found that by making allegations against the Senior Leadership and sharing misleading information with the suspended employee and a third party (Mrs Ejvet's husband) that the Claimant had irreparably broken the school's trust and confidence; they found that this constituted gross misconduct. The Claimant was informed that she had the right of appeal and should write to Graham Moss, Chair of Directors, Genesis Education Trust within 10 days if she wished to appeal.

24 The Claimant appealed. She complains that she was not given the address of the Chair of Directors, however her appeal was accepted. Her letter of appeal [100F-100G] raised a number of procedural matters and disputed a number of factual matters. At the appeal hearing she produced a written document [100C and 100 D].

25 In that document the Claimant stated her reason for contacting the head was she thought RE would need to know the members of staff had been in her office looking for staff contracts (and therefore her office might not be how she left it on her return). She maintained that she was not fabricating her account and states,

> "I was not accusing anyone of gross misconduct and it certainly was not my intention to blame anyone for their actions. …
> If I had been referring to the SLT as being blameworthy I may have reported their actions to the Governors, but I thought I had acted reasonably by notifying the Head (RE), I did not think of escalating this matter as I was not blaming anyone of misconduct."

26 In advance of the appeal hearing Mr Moss sent a letter dated 10 July [101M] stating that he was seeking written confirmation of the time and date of a meeting where the interim headteacher informed staff that Ruth was not on sick leave but had been suspended by GET. There was then some correspondence about the introduction of further evidence on both sides, relevant to the issue of whether the staff had been informed that RE had been suspended or was off sick. The appeal meeting was held on 17 July and reconvened on 31 July 2018. The Claimant was again represented by her union representative.

27 Miss Anderson presented the management case and their conclusion: they found that making allegations against senior staff members to a suspended staff member subject to disciplinary process to be a serious breach of trust. The Claimant was able to put her case and the disputed contentions were squarely put before the appeal panel.

28 The appeal panel's decision letter is at page [116 to 119] dated 6th of August 2018. Canon Ademola gave evidence confirming the content of that letter and the Panel's reasoning. The decision made by the disciplinary panel was upheld by the appeal panel.

29 I am satisfied that the appeal panel reviewed all the information presented in the disciplinary hearing along with the supplementary information presented in the appeal hearing and considered the grounds of appeal.

30 The outcome letter was subjected to criticism by Claimant's Counsel. However, reading the document as a whole, it is clear that the panel had considered the evidence and points raised by the Claimant and had rejected them: describing them as being contradictory and not altogether plausible. They found that the Claimant ought to have known that she had no reason to contact the previous headteacher or her husband; they did not accept that she believed that her line manager was still the previous headteacher and found that contacting RE amounted to a refusal to recognise the current management of the school. They rejected the additional evidence from the Claimant, finding that it did not support her allegations. The panel did not accept her explanation for contacting the previous headteacher; they found that by linking the presence of the CEO and the COO to the discovery of contracts in her email to the suspended headteacher, she was attempting to bring them into disrepute. The panel agreed with the statement made by Miss Anderson that trust and confidence was compromised in her position and upheld the decision to dismiss.

Whether the Claimant had a reasonable belief that the disclosure was made in the public interest

31 The Claimant maintained throughout that she had been unaware that RE had been suspended. She maintained her position that she believed that RE was off sick. She acknowledged that Ms Ryder, the interim head from September to December 2017, had informed staff not to contact RE. The Claimant was asked about the sequence of emails on 9 January [pages 43 and 44]. she accepted that the timing given on those emails reflected the order in which they were sent: the first email was sent at 19:38 (page 43) with the subject “information”, and read as follows:

> “Dear Ruth
>
> Just to advise you I was approached by Bev Hall on Friday 5 December 2917 [sic] at 2:30pm and was asked if I would be a witness for a member of staff disciplinary hearing. I was not informed who the member of staff was, I asked the 3 times who the staff member was and I was told I will not know who it is until I agreed to be a witness and I will be informed on Monday who the staff member was.
>
> Bev clearing [sic] said I do not have to be a witness if I did not want to be, she seems very agitated and was happy with my questions.
> Kind regards
> Marcia”

the second email (both emails were sent to the same addresses) starts:

> “Hi Ruth
>
> sorry to hear you’re still feeling unwell…”

32 The Claimant’s explanation for sending the first email was that she wanted to know whether Mrs Ejvet had also been approached to be a witness for the unnamed person. She was at considerable pains to emphasise that she was unaware that

Mrs Ejvet had been suspended. When asked why the second of the two emails referred to having heard that Mrs Ejvet was still feeling unwell (the tribunal having heard evidence from Mrs Ejvet that she was feeling unwell again at that date in the run up to the date of her disciplinary hearing on 12 January) the Claimant sought to explain this by saying because she had not had contact with Mrs Ejvet for some time and she understood that she was unwell, despite this being the second in a series of two emails.

33 The Claimant denied receiving, or reading, an email from Mrs Hall earlier on 9 January informing her that the person subject to the disciplinary was Ruth [Ejvet]. The Claimant claimed she had not read it until the next day as she had finished work at 3.30pm on the day it was sent. The Respondent did not believe her explanation and came to its conclusion based on the timing of a subsequent work email sent by the Claimant to Karen Millen the same day at 16:54.

34 The tribunal was provided with a further document [42A] dated 9 January 2018 which is a reply from the Claimant to Mrs Hall on 9 January at 16:58 in response to Mrs Hall's email at 16:51 referring to Ruth. The Claimant's reply states: "thank you for getting back to me and informing me which member of staff it is".

35 The Claimant alleged that this was a manufactured email and that it was not from her; she pointed to the automatic signature and said she didn't use a signature like that. She did not dispute the provenance of an earlier email [147A] sent at 14:55 on 8 January to Beverley Hall confirming that she would be a witness (for the then un-named person) which also has the same automatic signature.

36 The Claimant's own document [69A to 69C], namely her amendments to the minutes from the investigatory meeting on 27 March, contradicts her case before the tribunal. The Claimant described this document as being her notes of corrections to the minutes which she had sent to her union representative at the time. In respect of the minute at 1.1.3 she states

> "I contacted RE only on this date after BH asked me if I wanted to be a witness for RE no other time I have made contact with RE, this was after BH emailed me on 9.1.2018 informing me who the staff member was, before this point I was informed not to contact RE which I never did".

37 The Claimant was also at pains to point out both at the disciplinary and in evidence before the tribunal that she was not accusing any of the people involved in the conversation on 5 January of any wrongdoing, and that this was the Trust's implication not hers.

The relevant law

Ordinary unfair dismissal

38 The right not to be unfairly dismissed is conferred by section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed the question of whether any such dismissal was unfair turns upon the

application of the test in section 98 of the Employment Rights Act 1996. The material part of that section are as follows:

> "98 general
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held
>
> the reason relied on here is conduct, a potentially fair reason under subsection (2)(b).
>
> …
>
> (4) where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the 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.

Automatic unfair dismissal – protected disclosures

42 Section 43B of the ERA (inserted by the Public Interest Disclosure Act 1998 and as amended by section 17 of the Enterprise and Regulatory Reform Act 2013 provides:

> "(1) In this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following –
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> …

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

39 In ***Parsons v Airplus international Ltd*** UK VAT/0111/17/JOJ Her Honour Judge Eady QC identified the following points to be made as to whether or not a disclosure is a protected disclosure, at paragraph 23:

23.1 This is a matter to be determined objectively; see paragraph 80, ***Beatt v Croydon Health Services NHS Trust*** [2017] IRLR 748 CA.

23.2 More than one communication might need to be considered together to answer the question whether a protected disclosure has been made;

23.3 The disclosure has to be of information, not simply the making of an accusation or statement of opinion; ***Cavendish Munro Professional Risks Management Limited v Geduld*** [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information? ***Kilraine v London Borough of Wandsworth*** [2016] IRLR 422 EAT.

And at 24

"As for the words "*in the public interest",* inserted into section 43B(1) of the ERA by the 2013 Act, this phrase was intended to reverse the effect of ***Parkins v Sodexho Ltd*** [2002] IRLR 109 EAT, in which it was held that a breach of legal obligation owed by an employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean, however, that a disclosure ceases to qualify for protection simply because it may also be made in the workers own self-interest; see ***Chesterton Global Ltd v Nurmohamed*** [2017] IRLR 837 CA (in which the earlier guidance to this effect by the EAT ([2015] ICR 920) was upheld)."

43 Her Honour Judge Eady QC went on at paragraph 25 to set out the guidance from Underhill LJ in paragraphs 27 to 30 of ***Chesterton*** and at her paragraph 26 notes "more specifically, where the disclosure relates to something that is in the workers own interest: [quoting again from ***Chesterton***

"37 … Where the disclosure relates to a breach of the workers own contract of employment (or some other matter under section 43B(1) where the interest in question is personal character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case…"

[27] … Section 103A of the ERA provides:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

This requires an enquiry into what facts or beliefs cause the decision-taker to decide to dismiss.

And at [28] "A further issue that may arise when determining what was the reason for dismissal, is sometimes referred to as the question of separability: the ET may need to resolve whether the real reason (or principal reason) for the dismissal was the protected disclosure itself *or* the manner in which that disclosure was made. "

She then sets out the guidance in paragraphs 49 through to 54 in ***Panayiotou v Chief Constable of Hampshire Police*** [2014] IRLR 500, and lastly at paragraph 29 quotes paragraph 94 of ***Beatt***.

24 In determining the question of whether the Claimant was dismissed for making a protected disclosure I have to decide objectively whether the disclosure relied on was a protected disclosure. I also have to decide objectively whether the Claimant believed that the disclosure was made in the public interest and if so, whether the Claimant's belief was reasonable.

25 In the circumstances of this case I also have to decide whether a qualifying disclosure was made in accordance with section 43C or G.

26 In the circumstances to decide those questions involves an assessment of the Claimant's credibility.

27 In the context of the ordinary unfair dismissal claim I am not to substitute my view of the Claimant's guilt or innocence in respect of the allegations but assess that of the reasonable employer ***Iceland Frozen Foods Ltd v Jones*** [1982) IRLR 439 and to apply the guidance in ***BHS v Burchell*** [1978] IRLR 379. I have to decide what was the reason for the dismissal; the Respondent relies on misconduct: whether the employer held a genuine belief in the misconduct relied upon, whether that belief was based on reasonable grounds following such investigation as was reasonable in the circumstances. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty, see ***Sainsbury's Supermarkets Ltd v Hitt*** [2003] IRLR 23.

The Claimant's skeleton argument

28 Paragraph 2 of the Claimant's skeleton argument, under the heading "The real reason for dismissal" sets out that, "The Claimant considers that she was dismissed because she stood up to the Trust and because she knew too much about unusual financial dealings that the Trust was trying to do (e.g. changing the name of the HSBC account). She considers that the respondent was paranoid that this knowledge could help the case that Ruth Ejvet (RE), the former headteacher, was pursuing against the Trust."

29 Paragraph 3 continues, "For this reason, she suggests that the Trust was seeking any way to remove the Claimant and even considered issues of capacity and competence in their investigation."

30 Under the heading "Automatically unfair – whistleblower protection" at paragraph 13, the Claimant's case is set out in the following basis: "

> The claimant made a protected disclosure of information that, in her reasonable belief, tended to show that a criminal offence, a breach of a legal obligation or deliberate concealment had occurred, was occurring, or is likely to occur:
>
> 14 She overheard a conversation in which missing employment contracts had been found but were to be shredded. She was concerned that this was wrongdoing in itself including the Respondent trying to circumvent TUPE by getting employees to sign new contracts under the Respondent's new terms. She genuinely believed disclosure was "in the public interest".
>
> 15 She disclosed to RE by way of two emails [as identified earlier only one email is relied on as a protected disclosure) on 9 January (page 43 and p44) RE was the headteacher of the school and therefore represent the employer. Under the grievance policy it is right to disclosure [sic] to the headteacher (p120. AP). RE was off sick but in previous sickness absences (including long-term ones), RE had made it clear to the Claimant and other staff that RE could be contacted for important matters… The Claimant was unaware that RE might have been suspended by the respondent and not aware that she should not contact RE. Therefore, the Claimant reasonably believe that RE had legal responsibility for this type of issue.
>
> 16 Further, she was unable to disclose to any other of the management because they were either implicated in the events, or if not, they were too closely connected with those who were, which case they would not take her information seriously or would use against her.

Conclusions

Protected disclosure – automatic unfair dismissal

Qualifying disclosure

31 The Claimant's case on qualifying protected disclosure was confused. In submission it was suggested that she was relying on suspicion that a criminal offence had been committed, reference was made to Canon Ademola becoming a signatory to one of the school's bank accounts. It was not suggested that talking about shredding contracts was a criminal offence per se. The Claimant also suggested that in fact what the Respondent was doing was failing to comply with its legal obligations under TUPE and deliberately concealing evidence of that failure. Claimant's Counsel suggested to a number of witnesses that she could have misheard or misunderstood what was going

on and therefore had a genuine belief that a discussion had taken place about shredding documents. Their answers were that this was not plausible, nor was it the Claimant's defence in the disciplinary, and if that was the case why did she not take her concerns to a member of the senior management team, to a governor or to a senior member of the Trust.

32 The Claimant was asked why she did not take any concerns to a member of the senior management team such as the interim head who had only been in post for two days, or to a governor, or to a member of the Trust. The Claimant could not provide a clear answer. She suggested the Trust and senior management were implicated but was anxious to point out that she did not say she had no confidence in the Trust, just that she had little confidence in them. The Claimant maintained that she considered Mrs Ejvet still to be her line manager despite accepting that she was aware she had been off from the school since September 2017 and had been replaced, albeit on a temporary basis, by firstly Mrs Ryder and then Mr Huntingford.

33 When pressed as to the public interest that the Claimant believed was at stake, no clear answer was provided. It was eventually suggested that it was in the public interest that the school was governed properly and members of its senior management did not go about destroying or shredding employment contracts.

34 I have considered the evidence and have concluded on the balance of probabilities, that the Claimant was aware that Mrs Ejvet was suspended, and that she was facing disciplinary proceedings. I am also satisfied that the Claimant was aware that one of the allegations that Mrs Ejvet was facing in her disciplinary proceedings was that there were no contracts on a number of staff files.

35 I am satisfied that no conversation took place about shredding staff contracts as described by the Claimant. Mrs Fleetwood explained that covering letters with draft contracts were prepared and were in the office but that those contained a number of errors and had to be redone. Even if this is what the Claimant overheard being discussed, I do not find that that is the same as shredding existing contracts from staff files in order to issue new ones in an attempt to evade TUPE provisions. The Claimant's belief that that is what was taking place, if genuine, was simply not a reasonable one. Had she spoken to any of the people involved this would have become obvious. I find that the Claimant's reason for sending the email to Mrs Ejvet was to provide Mrs Ejvet with information that she thought would be of help to her in her disciplinary proceedings. This is consistent with her second email on 9 January refers to being "able to confirm". I do not accept the Claimant's explanation that that was simply a figure of speech.

36 I do not find that the Claimant had any public interest in mind when she made the disclosure to Mrs Ejvet. She was simply thinking of Mrs Ejvet's response to the disciplinary allegations. The Claimant confirmed on a number of occasions that she was not accusing any of the individuals involved of wrongdoing or implicating them in misconduct, this is inconsistent with the contention put forward in these proceedings that she was a whistleblower.

37 Nor do I find the Claimant's assertion that she considered Mrs Ejvet still to be her line manager, and therefore the appropriate person to make disclosures to under

the code of conduct, to be credible. There was considerable evidence put forward at the appeal that it was well known amongst the staff in the school, not just teaching staff, that serious allegations had been made against Mrs Ejvet and that she had been suspended. The Claimant's denial was simply not credible.

38 I do not find that the Claimant made her disclosure in accordance with section 43C or 43G of the Employment Rights Act 1996, nor do I find that she made it in the public interest or holding a reasonable belief that it was made in the public interest. The disclosure relied upon does not qualify as a protected disclosure, the claim under s103A ERA is dismissed.

Ordinary unfair dismissal

39 The Claimant sought to raise numerous criticisms of the process by which she was suspended, the disciplinary proceedings and the appeal. I remind myself that I am to assess the Respondent against the standard of a reasonable employer. This is not a standard of perfection. Nor is it the case that any or every breach of a contractual procedure will amount to an unreasonable approach.

40 The Claimant's suspension did not comply with the contractual provisions set out above. However, she was not questioned about the allegation in the absence of her representative or companion. The policy was clear that where conduct could potentially lead to dismissal, which applied in the Claimant's case, that suspension would normally be appropriate and in this case the Respondent also relied on preserving the integrity of the investigation and any evidence. It was not suggested that had the policy been followed to the letter there would have been any different outcome. I do not find that the fact that the failure to follow the contractual provisions in respect of her suspension rendered the process unfair when assessed against the range of responses open to a reasonable employer.

41 It was accepted that new allegations were introduced during the course of the investigation. The Claimant was informed of these promptly and given an opportunity to address each of the allegations. I am satisfied that it was made clear to the Claimant what the allegations were; that she had every opportunity to meet those allegations and put her case at the disciplinary and at the appeal. I find that that the decision reached by the disciplinary panel was one that was open to it on the information before it. I also find that it considered each of the allegations on their own merits, only upholding one of the allegations.

42 The Claimant's counsel criticised the decision of the panel on the basis that the reasons given in the minutes were not exactly the same as those in the outcome letter. I am satisfied that the reasons set out in the outcome letter were in the mind of the panel at the time, that they reflected the evidence that had been put forward to it by the investigating officer and by the Claimant and that they reached conclusions that were open to them on the evidence before them. Criticism was made of the decision to dismiss and of the decision on appeal on the basis that they mixed up allegations, including those relating to breach of confidentiality and bringing the Trust into disrepute. I am satisfied that each panel set out sufficiently its reasons for finding Allegation 2 to have been made out and that the Claimant had thereby committed an act of gross misconduct and irreparably broken the respondent's trust and confidence

in her. Dismissal letters and appeal outcome letters should not be approached with a formality of an indictment, nor should they be taken out of their context.

43 It was suggested that the Claimant did not have an opportunity to mitigate. I have not fund this submission to be made out on the evidence. The Claimant was given ample opportunity to put forward mitigation and any explanation or extenuating circumstances at the disciplinary hearing and a further opportunity at the appeal.

44 The Claimant's criticisms of the process were aired in her appeal and considered by the appeal panel.

45 I do not find there was any unfairness in the procedure such as render it outside the range of reasonable responses.

46 I find that the decision to dismiss was one that was open to the Respondent in the circumstances having formed a genuine belief in the Claimant's misconduct, based on reasonable grounds following an investigation that was reasonable in the circumstances.

47 The claim for unfair dismissal fails and is dismissed.

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Employment Judge Lewis
Date: 26 February 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE