



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE HARRINGTON  
(sitting alone)

**BETWEEN:**

Mrs C Ashton Claimant

and

Brockhill Park Performing Arts College  
Respondent

**ON:** 25 November and 16 December 2020

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Miss N Hausdorff, Counsel

## **Judgment**

The Claimant was automatically unfairly dismissed pursuant to Section 103A of the Employment Rights Act 1996. The principal reason for her dismissal was her making of a protected disclosure.

## **REASONS**

These reasons are provided pursuant to an email request received from the Claimant on 28 December 2020. An earlier email was received from the Claimant on 18 December 2020. This referred to a single factual matter in the case, namely with whom the Claimant had had discussions about the role of invigilator in the summer of 2008. In the event, this email was not seen by the Employment Judge until 22 December 2020 and has not been responded to by the Employment Judge.

The reasons for my Judgment are as follows:

### **Introduction**

- 1 By an ET1 received on 17 June 2019 the Claimant, Mrs Carole Ashton, brings claims of unfair dismissal, public interest disclosure detriment and dismissal and automatic unfair dismissal, against the Respondent, Brockhill Park Performing Arts College [3-14]. The Claimant was employed by the Respondent as a teaching assistant and learning mentor until August 2008 and then, as an exams invigilator, from September 2008.
- 2 At a Preliminary Hearing on 8 January 2020 [27] the Claimant's claims were identified as follows:
  - 2.1 Unfair dismissal – section 98 of the Employment Rights Act 1996 ('ERA 1996');
  - 2.2 Automatic Unfair Dismissal –
    - (i) the Claimant says that the reason or principal reason for her dismissal was that she made a Protected Disclosure on 13 February 2019 when she wrote to the Respondent raising concerns about the safety of the matting on the examinations hall floor (section 103A ERA);
    - (ii) the Claimant says the reason or principal reason for her dismissal was that she brought to the Respondent's attention circumstances which she believed were harmful or potentially harmful to health or safety.
  - 2.3 Protected Disclosure Detriment – section 47B ERA – the Claimant says that the Respondent's failure to schedule her to work was a detriment she was subjected to on the ground that she made a Protected Disclosure.
- 3 The issues in this case were set out at Appendix B of the Preliminary Hearing Orders [30].
- 4 At the full merits hearing on 25 November and 16 December 2020, the Claimant represented herself. The Respondent was represented by

Miss Hausdorff of Counsel. I heard oral evidence from the Claimant and Mrs Patricia Kemp and, for the Respondent, from Mr Charles Joseph, the Respondent's Senior Vice Principal. Each witness provided a written witness statement. In addition I was referred to a trial bundle paginated 1 - 80. Both parties made closing submissions and the Respondent also provided written submissions. I am grateful to both parties for presenting their cases in a focused way and assisting the Tribunal with the hearing of this case remotely.

- 5 For the avoidance of doubt, the numbers appearing within square brackets in this judgment refer to pages within the trial bundle.

### **Findings of Fact**

- 6 The Claimant was employed by the Respondent from 1991 performing a number of roles including that of teaching assistant and learning mentor. On 18 July 2008 the Claimant wrote a letter to the Respondent concerning the continuation of her employment. The Claimant referred to retiring in order to take better care of her health [34].
- 7 It is agreed by the parties that the Claimant's employment as a teaching assistant / learning mentor came to an end on 31 August 2008. Whilst there is a P45 in the bundle that refers to this employment [35], the Claimant has told me in evidence that she did not receive this and I accept her evidence on that point.
- 8 At the time of ending her employment as a learning mentor, the Claimant had discussions with the Respondent about continuing to work at the Respondent School as an examinations invigilator. I accept the Claimant's evidence that it had been agreed between the Respondent and the Claimant, prior to the summer break in 2008, that she would take on this role. In addition to the Claimant's evidence on this issue, I have also noted the letter written to the Claimant dated 1 September 2008 [36]. I consider that it is entirely consistent with the prompt sending of that letter, that discussions had been had between the parties in the summer of 2008 and prior to this letter being drafted and sent. The letter is phrased in terms of an 'offer' of employment. However the Claimant was not required to provide references or to have fresh CRB checks.
- 9 A contract referring to the position of Exam Invigilator is found in the bundle at page 37. Whilst this contract was signed in June 2010, somewhat later than when the Claimant commenced the role, the date of commencement is recorded as September 2008.
- 10 The parties agree that the paragraph in the contract referring to hours of work, accurately reflects the arrangement between the parties. In short, hours were agreed with the Examinations Officer, Miss Nicola McQuisten, for each examination period during the academic year.

- 11 The Claimant worked regularly as an invigilator, through the years from 2008. Whilst she did not always work during the Easter exam period, she did work in the relevant summer months. For example, the Claimant has recorded that she worked 48 days in 2016, 45 days in 2017 and 43 days in 2018. This record is not disputed by the Respondent. The Claimant's P60s, also in the bundle, provide further confirmation of regular levels of work undertaken across the years [72-77]. The invigilator team, comprising approximately 15 invigilators, was organised to cover the various rooms in which exams took place at the Respondent school. Normally within each room, one of the invigilators would lead the other invigilators and take the lead, for example, on the distribution and collection of exam papers. This was an informal arrangement rather than a formal differentiation between the invigilators within the team. There was not, for example, a formal role referred to as 'lead invigilator'. The Claimant regularly led the team of invigilators in the rooms in which she worked, in the way described.
- 12 On 5 February 2018 the Claimant had an accident whilst at the Respondent premises. This is recorded in an Accident Report form, which notes that the Claimant slipped and hit her head [38]. An ambulance was called. It is agreed by the parties that on this day the Claimant had walked up the drive from the School, for the purpose of having a cigarette break. Mr Joseph has sought to place some reliance upon this incident and has referred to the Claimant breaching the Respondent's policies by this action – namely, failing to sign out before leaving the School premises and smoking in view of the students.
- 13 Within the bundle is the School's No Smoking Policy, which requires staff not to smoke in sight of students, on or near the school site [37R]. The Claimant has told me that she was unaware that there was any requirement for her to sign out when walking up the drive on her break, and that she was not smoking in the view of students. In the event, she did not in fact light up her cigarette on that day.
- 14 In his evidence, Mr Joseph told me that a PE teacher had reported this matter to the site manager who, in turn, had reported it to Mr Joseph. Mr Joseph described it in these terms, *'people had been smoking and students had had sight of it'*. The incident was not the subject of any formal record, investigation or documenting in any other way beyond the accident report form. Further, Mr Joseph had very little detail about the matter, for example what class or persons were said to have witnessed the Claimant smoking. Mr Joseph also confirmed to me that the people in the group with the Claimant at the time, were also not identified. Neither the Claimant nor any other suspected member of the group, taking their break, were spoken to about the issue of smoking and signing out. Mr Joseph described in his witness statement that the Claimant was *'seen smoking immediately adjacent to our school entrance on the School site in front of pupils on 5*

*February 2018*'. However Mr Joseph's oral evidence clarified that there was no report from any identified individual that the Claimant had actually been seen smoking.

- 15 Following her accident in February, the Claimant worked a further 41 days in 2018 [66]. This included days in April, May, June 2018.
- 16 The next relevant matter is said to have happened during the Spring and Summer of 2018. It is at these times that the Respondent alleges that the Claimant was observed standing motionless whilst working as an invigilator and not responding to students' queries promptly. The Claimant denies that this happened. Mr Joseph told me that he had observed the Claimant being less responsive to student demand and that some students had been given the wrong examinations paper. As with the February 2018 incident, there is no formal record of these issues made at the time and Mr Joseph is unable to provide any details as to the dates this is said to have been observed, the precise context of the behaviour which is said to have been of concern and the details of when incorrect papers were handed out. The Claimant denies that there were any issues about her capability or conduct in performing the role of exam invigilator.
- 17 Having considered the evidence on this matter carefully, I am satisfied that it is more likely than not to have been an incident when incorrect papers were handed out. The Claimant has accepted that this did happen on some rare occasions when there had been a mistake made as to which particular paper the students were to sit. In such situations the Claimant was handing out the papers handed to her and, as such, the error was not hers. Beyond this however I am not satisfied that the Claimant performed her role in the Spring and Summer of 2018 in anyway which caused significant concern to the Respondent, such that her suitability to continue working was questioned. In reaching this conclusion I have referred to the following matters:
  - 17.1 Firstly, there was never any conversation with the Claimant where the Respondent raised any concerns, even informally, about the Claimant performing the role of exams invigilator;
  - 17.2 Secondly, no record or note was kept by Mr Joseph or the Respondent generally of any concerns about the Claimant's capability of performing the role of exams invigilator nor is there any documented complaint about her work;
  - 17.3 Thirdly, the Claimant continued to work in the full way she had in previous years. She worked many days in May, June, October, November and December of 2018. There is no evidence to suggest that any steps were taken by Miss McQuisten to reduce the Claimant's working schedule at that stage.

- 18 Mr Joseph says that he did speak with the Principal about the February incident and his concerns about the Claimant, at some point between March and May 2018. I have not heard any evidence from the Principal. Mr Joseph said that he and the Principal came to a general view that the Claimant would be offered less work and her work would be wound down. In explaining this approach Mr Joseph referred to the fact that the Claimant had worked for the Respondent for many years and that whilst he described having '*grave concerns*' about the smoking incident, he had reached the view that they might address these concerns by not having the Claimant working in the summer session. In essence, Mr Joseph described to me that he preferred the approach of not offering the Claimant further work, over that of engaging with the Claimant on the conduct and capability concerns he says that he had. Following this meeting, Mr Joseph said that he then told Miss McQuisten that the Claimant should be given less work. However despite this, Miss McQuisten continued to offer work to the Claimant.
- 19 The Tribunal has carefully considered Mr Joseph's evidence on this matter. I have had to consider whether I am satisfied that it is more likely than not that the conversation took place with the Principal, as described by Mr Joseph. I have concluded that I am not satisfied that it did, for the following reasons:
- 19.1 Firstly, if Mr Joseph had concerns which he has in part described as '*grave*' concerning the Claimant's conduct and capability, I consider that it would have been likely for those to be documented in some way ahead of a formal meeting with the Principal during which he says he raised them. However it is agreed that they were not documented;
- 19.2 Secondly, if there was such a meeting with the Principal, again it is to be expected that this would have been documented in some way – for example, a diary entry confirming the meeting, a note of the meeting, an email confirming what had been said and agreed in the meeting, a written communication to Miss McQuisten to set out the instruction to not offer the Claimant further work. The Tribunal has been referred to no such evidence;
- 19.3 Thirdly, as previously noted the Tribunal has not heard any evidence from the Principal. A key issue in this case is whether the Claimant has been dismissed and therefore any evidence concerning a meeting at which the Claimant's continuing employment was discussed is important and relevant. However no evidence has been called from the Principal who might have been in a position to support Mr Joseph's account on this point;
- 19.4 Fourthly, whilst Mr Joseph says that he instructed Miss McQuisten to wind down the work offered to the Claimant from the Spring of 2018, this is not what is shown to have actually happened. The Claimant's work commitments, at that stage, remained in line with previous years.

It would be surprising for Miss McQuisten to refuse to act in accordance with an instruction given to her by her superior within the Respondent organisation, if such an instruction had been given. Again, Miss McQuisten continues to be employed by the Respondent but has not been called to give evidence.

20 Taking into account all of these factors, I am not satisfied that a meeting happened between the Principal and Mr Joseph, as described by Mr Joseph. Whilst Mr Joseph may or may not have had concerns about the Claimant's performance in her role as exam invigilator, I do not accept that there was a decision taken to gradually wind down the work offered to her from the Spring of 2018.

21 One of the main venues used by the School for the holding of exams is the School sports hall. It is agreed by the parties that when exams are taking place in the hall, temporary matting is laid. This temporary matting seeks to protect the floor and minimise noise. On 14 December 2018 one of the Claimant's colleagues tripped on the matting. This is agreed by the parties (see, for example, paragraph 9 of Mr Joseph's statement '*an exam invigilator tripped on the matting in the School sports hall*'). Following this incident an inspection was carried out of the hall and flooring and then some additional taping of the matting was carried out, in an apparent attempt to stop it from rucking up [41C]. Despite this, the Claimant was of the opinion that the matting was not entirely safe. In her oral evidence to me, the Claimant described that the matting continued to ruck up despite this extra taping and that, following a number of movements on the matting throughout the day, by the afternoon she considered it to be quite dangerous.

22 I accept the Claimant's evidence that following her colleague's accident in December 2018, the Claimant verbally mentioned the problem with the flooring to the Examinations Officer, Miss McQuisten.

23 The Claimant's next attendance at the School was on 11 February 2019. She observed similar issues with the matting despite the additional stretching of the matting and taping, which was carried out. On 12 February 2019 the Claimant wrote a letter to Miss McQuisten about the matting. At the time of writing the letter, the Claimant had the express support of many of her invigilator colleagues. In reaching this conclusion, I accept the oral evidence from Mrs Kemp that the invigilators were aware of the letter and were prepared to put their name to it and I also note the copy of the letter in the agreed bundle, signed by 11 of the Claimant's colleagues [46]. In the letter the Claimant stated that several invigilators had raised concerns '*about the safety of the canvas on the floor of the sports hall during exams*'. The Claimant reports the following,

*'...the canvas continues to ruck up during the course of the day causing people to trip..... we feel that the canvas is no longer fit for*

*purpose and would, therefore, request that an alternative solution be considered if the possibility of serious injury to a student or invigilator is to be prevented in the future. We would appreciate it if this potentially dangerous situation could be resolved as soon as possible.'* [45]

- 24 On 13 February 2019, the Claimant handed her letter to Miss McQuisten, who passed it to Mrs Chilvers, a senior administrator. Mrs Chilvers, in turn, passed it to Mr Joseph. It is noted that, at all relevant times, Mr Joseph had responsibility under the Health and Safety Policy for investigating accidents, whilst accountability lay with the Principal [37K]. Handing the letter to Miss McQuisten was not in line with the Respondent's Whistleblowing Policy [37A-C]. That Policy sets out that the first step an employee should take is normally to raise concerns with the Principal or Chair of Governors [37B]. I accept, as stated by the Claimant in her evidence to me, that the Claimant was unaware of the existence of the Policy in February 2019 when she wrote her letter.
- 25 Mr Joseph told me that the issue of the matting rucking up was well known across the school. In Mr Joseph's view the matting was, as he described it, the best pragmatic solution that *'we could devise for that space'*. He explained that there were many interconnecting sheets of matting which were connected with velcro.
- 26 Following his receipt of the Claimant's letter, Mr Joseph did not discuss the issue with the Claimant nor acknowledge to her that he had received the letter. He told me that he did not consider that a conversation with the Claimant was *'worthwhile'*. Nor did Mr Joseph take any action arising from the letter. He did not talk to the other invigilators about the matter and he stated that he didn't feel that there was *'anything fresh to investigate'*.
- 27 The Claimant attended the School for work on 15 February 2019.
- 28 Following this, the Claimant sent an email to Miss McQuisten on 22 March 2019. She received no response to that email, which was unusual. Over the following few days, the Claimant telephoned Miss McQuisten's mobile phone. It was not answered and although the Claimant left a voicemail message, her call was not returned. The Claimant was not offered work in April 2019 but as she had not routinely worked the Easter examinations session, she was not overly concerned by this. However, the Claimant did not receive the relevant working details for the May/June examinations, which she had always worked. As a matter of fact the Respondent did not provide the Claimant with any work after 15 February 2019.
- 29 On 1 April 2019 she sent a further email to Miss McQuisten asking for her rota for the next working period [49]. Again, the Claimant received no response. Following some advice from ACAS, the Claimant then emailed the School secretary and Mr Joseph on 22 April 2019 [50, 51]. Again, having received no responses to these communications, the



Claimant emailed Mr Joseph on 28 April 2019 [52]. She again received no response. On 2 May 2019 the Claimant emailed the Principal but this email was not responded to either [53].

- 30 As a matter of fact, the Respondent did not communicate with the Claimant, having received her letter on 13 February 2019 and following her working at the College on 15 February 2019. Mr Joseph told me that he did not communicate with the Claimant about her not being offered further work because he didn't want to cause '*hurt feeling or ill feelings*'. It was Mr Joseph's view that to not inform the Claimant that she was not to be offered any further work and to ignore her attempts to communicate with the Respondent was the best approach to take and had regard to the fact that the Claimant had been a long standing employee.
- 31 On 10 May 2019 the Claimant wrote to the Clerk of the Governors [54]. She informed the Clerk that she had commenced the Early Conciliation process as she had had no communication from the School and felt she had to take the matter further. Again she did not receive a response.
- 32 On 13 May 2019, the invigilator team attended a team meeting, which was routinely held at the start of the examinations period. The Claimant was not invited to attend. At that meeting, Miss McQuisten was asked directly why the Claimant was not in attendance and Miss McQuisten responded that she could not talk about that. When Mrs Kemp tried to discuss the issue again with Miss McQuisten, Miss McQuisten became upset and walked away in tears.
- 33 On 12 June 2019 the Claimant wrote a further email to Mr Joseph asking why she was no longer considered suitable for invigilating work [56]. Again, she received no response.
- 34 Sometime between July and August 2019, a new contract was sent out to the invigilators. It is agreed that the Claimant was not sent a copy of this document. Mr Joseph confirmed in his evidence that he took the decision that he wouldn't send out the new contract to the Claimant.
- 35 The Claimant wrote a letter to Mrs Landers dated 12 October 2019. This letter did receive a short reply referring to the fact that the case was now with the Employment Tribunal Service [58, 59].

### **Legal Summary**

- 36 A person's employment by a particular employer is presumed to have been continuous unless the contrary is shown (section 210(5) ERA 1996). There may be circumstances of successive contracts, for example, where the nature of the job or the terms and conditions of employment change so significantly that one contract is terminated and a new one is substituted. Employment under successive contracts with

the same employer will be continuous employment so long as there is no gap that breaks continuity between the contracts. In particular, a series of individual contracts may be continuous so long as the employee is retained under a contract of employment during at least part of each week in question.

37 An employee has the right not to be unfairly dismissed by his employer (section 94 of the ERA 1996). Where the question arises as to whether there has in fact been a dismissal at all, the burden of proof falls on the employee to show a dismissal. The Tribunal must consider whether it was more likely than not that the contract was terminated by dismissal. There can be situations in which there are no direct words at all on either side but it is nonetheless argued that a dismissal can be inferred from the actions of the parties. For example, in Kirklees Metropolitan Council v Radecki 2009 ICR 1244, CA the Court of Appeal held that removing an employee from the payroll, whilst he was suspended and negotiating a compromise agreement, was a sufficiently unequivocal statement of the employer's intention to terminate employment.

38 Sections 98(1) and (2) of the Employment Rights Act 1996 ('the ERA 1996') set out the potentially fair reasons for dismissing an employee. The list includes a reason related to the conduct of the employee and the capability of the employee. If such a reason is established, the determination of whether such a dismissal is actually fair then rests on an application of section 98(4) of the ERA 1996. Section 98(4) of the ERA 1996 deals with the fairness of dismissals. It reads in part as follows:

'(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 understanding) 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 the equity and the substantial merits of the case.'

39 In respect of the meaning of 'reasonable' I refer to the guidance from the EAT in Iceland Frozen Foods Ltd v Jones [1983] ICR 17. The EAT stated that the correct approach in answering the questions posed by Section 98(4) of the ERA 1996 was as follows:

- (a) The starting point should always be the words of section 98(4) themselves.

- (b) In applying this section the Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether the members of the Employment Tribunal consider the dismissal to be fair.
  - (c) In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.
  - (d) 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 and another quite reasonably take another.
- 40 The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses, which a reasonable employer might have adopted. If the dismissal falls within a band then the dismissal is fair. If the dismissal falls outside the band it is unfair.
- 41 The ERA 1996 also sets out a number of circumstances in which a dismissal will be deemed to be unfair automatically – these include where the reason or principal reason for the dismissal is that the employee made a protected disclosure and if the principal reason for the dismissal is that the employee brought to her employer's attention by reasonable means circumstances connected to her work which she reasonably believed were harmful or potentially harmful to health or safety.
- 42 Section 103A ERA 1996 provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or the principal reason for the dismissal is that the employee made a protected disclosure. A claimant may also bring a claim that he or she has been subjected to a detriment on the ground of making a protected disclosure.
- 43 In order for a whistleblowing disclosure to be considered as a protected disclosure, three requirements must be satisfied. There needs to be a disclosure within the meaning of the ERA 1996, that disclosure must be a qualifying disclosure and, it must be made by the worker in a manner that accords with the scheme set out in sections 43C-H of the ERA 1996.
- 44 There must be a disclosure of information. The question of whether there is sufficient by way of information to satisfy section 43B is very much a matter of fact for the tribunal. Section 43L specifically provides that a disclosure of information will take place where the information is provided to a person who is already aware of that information.
- 45 Once a disclosure has taken place, it becomes necessary to consider whether or not that disclosure is a qualifying disclosure. This largely

depends upon the nature of the information revealed. A qualifying disclosure is 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 matters set out in section 43B(1). These include that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and that the health or safety of any individual has been, is being or is likely to be endangered (section 43B(1) ERA 1996). It is important to note that the statutory test is a subjective one – this is because the Act states that there must be a reasonable belief of the worker making the disclosure. The relevant test is not whether a hypothetical reasonable worker could have held such a reasonable belief.

- 46 The Tribunal must also be satisfied that the Claimant had a reasonable belief the disclosure was made in the public interest.
- 47 In a case of automatic unfairness such as under section 103A, the burden of proving the reason or principal reason for dismissal remains on the employer unless the claimant lacks the qualifying period of employment. If the employee claims automatic unfair dismissal under section 103A and ordinary unfair dismissal under section 98, the tribunal must not make inconsistent findings and indeed if it upholds the section 103A claim, it need go no further.
- 48 Section 100(1)(c) of the ERA 1996 provides that an employee is automatically unfairly dismissed if the principal reason for the dismissal is that she brought to her employer's attention by reasonable means circumstances connected to her work which she reasonably believed were harmful or potentially harmful to health or safety. If the employer has an appointed safety representative or safety committee but the employee did not raise the matter with / through this person / committee, it is a requirement under the section that it was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee.
- 49 The concept of the effective date of termination ('EDT') establishes the end of the employee's period of continuous employment. The definition of the EDT is contained in section 97(1) ERA 1996. The question of when the dismissal arises has to be determined on an objective basis. In Newman v Polytechnic of Wales Students Union [1995] IRLR 72 the EAT explained that the EDT has to be determined in a 'practical and common sense manner' having regard particularly to what the parties understood at the time of the purported dismissal. In Kirklees Metropolitan Council v Radecki [2009] IRLR 555, CA the circumstances were such that there was a messy termination without an express dismissal. However it was held that, at the latest, an employer communication stating that the claimant was being taken off the payroll at the end of the month was sufficient to convey termination unequivocally and so to fix the EDT.

**Tribunal's Conclusions**

- 50 The Claimant began her employment with the Respondent in 1991. However for the purposes of this claim it is necessary to consider whether the Claimant's period of continuous employment with the Respondent began then or, as the Respondent contends, from 1 September 2008 when she commenced her new role of examinations invigilator.
- 51 The Respondent relies upon the fact that the Claimant's first period of employment was brought to an end on 31 August 2008 and that a P45 was issued. Further, new starter documents and a contract were issued to the Claimant in her role as an exams invigilator. I have accepted the Claimant's evidence that agreement to her working as an exams invigilator was reached prior to the cessation of her role as a teaching assistant. I also accept, and have found as a fact, that she did not receive a P45 for her role as teaching assistant / learning mentor after the cessation of that role in August 2008. I therefore do not find the existence of that document, in and of itself, determinative in respect of this issue. I refer to the basic principle that employment under successive contracts with the same employer will be continuous employment, so long as there is no gap that breaks continuity between the contracts. The parties are agreed that the end of the first contract was 31 August 2008 and the commencement of the second was September 2008, as set out in the Respondent's letter dated 1 September 2008.
- 52 On that basis, I accept that the Claimant's employment continued through from 1991 on and into her performance of the role of exams invigilator. There was no break in her employment such as to interrupt the continuity of her employment with the Respondent, which commenced in 1991. Rather this is a situation of successive employment contracts and a change in role.
- 53 Next, I turn to the issue of whether the Claimant was dismissed. The Respondent says there has been no dismissal. In his witness statement at paragraphs 14 -17, Mr Joseph refers to the inability of the Respondent to offer work to invigilators on occasion. In paragraph 16 of his statement, Mr Joseph states that when the Respondent has not been able to offer work to invigilators, it does not automatically follow that the School has terminated their employment. However on Mr Joseph's own evidence, it is clear that that was not the situation which applied to the Claimant. It is not the Respondent's case that the Respondent has simply not had work to offer to the Claimant but rather that Mr Joseph took the specific decision not to offer the Claimant further work. This is referred to in paragraph 21 of Mr Joseph's witness statement. He states that he thought it would be a '*kinder option*' if the Claimant was not offered work for the next session after the concerns he had in Spring of 2018.

- 54 As set out in my findings of fact, I have found that the Respondent didn't provide the Claimant with any work after 15 February 2019. In simple terms, the issue is whether the Respondent's failure to provide or offer work to the Claimant from this point amounted to her dismissal.
- 55 There can be situations where there are no direct words at all on either side but it is nonetheless argued that a dismissal can be inferred from the actions of the parties. The conduct of the employer can amount to a sufficiently unequivocal statement of the employer's intention to terminate the employment.
- 56 The Respondent's failure to provide the Claimant with any work beyond February 2019, in circumstances in which she had always worked the summer examinations session for a period of approximately 10 years, coupled with the complete failure to communicate with the Claimant by either telephone, email or letter and the failure to invite the Claimant to attend the team meeting on 13 May 2019, was conduct of the Respondent which amounted to a sufficiently unequivocal statement of the Respondent's intention to terminate the Claimant's employment. That this was the Respondent's intention is further supported by Mr Joseph's acceptance that he had decided not to offer the Claimant further work going forward and that he had decided not to provide the Claimant with a new contract, which was given to all of the other invigilators in the summer of 2019.
- 57 In the circumstances of this case, I am satisfied that the effective date of termination of the Claimant's employment was 13 May 2019. It was the Respondent's conduct up to that point, its conduct on that date as reported back by Mrs Kemp to the Claimant and the failure to invite the Claimant to the invigilators' meeting, that made clear to the Claimant that her employment with the Respondent had been brought to an end. Such conduct was sufficient to convey termination unequivocally and so to fix the EDT. From the Respondent's perspective, omitting the Claimant from the meeting on 13 May 2019 was a clear act by the School that they regarded the Claimant's employment as having come to an end.
- 58 In the context of my findings of fact and these conclusions, I am entirely satisfied that the Tribunal has jurisdiction to consider the Claimant's claims regarding her dismissal. I am also satisfied that the Claimant has presented her claims within the applicable time limits.
- 59 The next issue is the reason for the Claimant's dismissal. It follows from my findings of fact, that I am not satisfied that the reason for ending the Claimant's employment was the matters concerning conduct and capability referred to by Mr Joseph. As a matter of fact the Claimant continued to work, as before, after the Spring of 2018 when these matters were said to arise. There was no noticeable reduction in her work. Further, the importance of the incidents identified by Mr Joseph was, in my judgment, only modest as

demonstrated by there being no formal record of any of the incidents he refers to. In addition, I have already found that the meeting with the Principal regarding these matters did not take place as Mr Joseph reported.

- 60 The relevant circumstance is that the Claimant wrote a letter about the flooring, handed this to Ms McQuisten on 13 February 2019 and that after this, the Claimant was not offered any work following the completion of her previously booked shifts on 14 and 15 February 2019.
- 61 The Respondent submits that there is simply no link between the Claimant's letter and the immediate cessation of providing work to the Claimant after 15 February 2019. As stated, I do not accept the basis put forward by Mr Joseph for the Respondent's decision to stop providing work to the Claimant. On the evidence before me I have concluded that it is more likely than not that the reason for the Claimant's dismissal was the contents of her letter dated 12 February 2019, handed in on 13 February 2019.
- 62 I am satisfied that the information set out in the letter of 12 February 2019 amounted to a disclosure of information that the health or safety of any individual has been or is likely to be endangered. The information disclosed was that despite repeated attempts being made by the site staff to address the situation, the canvas flooring continued to ruck up during the day and cause people to trip [45]. This was not an unfounded allegation it was information that despite further actions being taken, the flooring still rucked up and was considered by the Claimant to be a danger. It conveyed facts, in so far as the Claimant considered the situation to be. I accept that this was the Claimant's reasonable belief and I accept that the disclosure was made in the public interest.
- 63 The Respondent has raised various arguments that the letter does not amount to a protected disclosure and I have considered each of those submissions. For the avoidance of doubt, I do not accept that the Claimant didn't follow the Whistleblowing Policy because she, herself, accepted that the matter she was raising did not reach the threshold of a protected disclosure. I entirely accept the Claimant's evidence, as set out above, that the Claimant was simply unaware of the policy. I also do not accept the contention put forward by the Respondent that the letter cannot amount to a disclosure because the broad issue of the flooring was already known to the Respondent. It is entirely possible to have a situation where an employee reasonably believes there is an issue which shows that the health and safety of an individual is being or is likely to be endangered, that this has already been made known to an employer but which the employee regards has not been addressed adequately by the employer. In that situation, the employee does not necessarily fail to make a protected disclosure because the content of what he discloses is broadly known to the employer.

- 64 The Respondent also challenges whether the Claimant had a reasonable belief that the health or safety of any individual had been, was or was likely to be endangered. The Respondent says that because extra taping of the matting was being carried out, the Claimant could not have had a reasonable belief that it remained a concern to health and safety as required. I do not accept this argument. The Claimant has told me in a straightforward and clear way that there were a large number of desks and chairs placed on top of the flooring in the hall and that the multiple movements continued to cause a problem with the rucking up of the matting. The fact that there continued to be a problem is supported by the multiple signatures on the later copy of the Claimant's letter. I am entirely satisfied that the Claimant had a reasonable belief as required by the relevant provisions of the Employment Rights Act 1996.
- 65 I have previously set out my conclusion that the reason the Respondent stopped providing the Claimant with work was because she sent the letter dated 12 February 2019. In this way, I do not accept the Respondent's case that its reason for ending the Claimant's employment was because of conduct and / or capability issues. I accept the Claimant's contention that the reason for her dismissal was sending this letter.
- 66 Accordingly, in my judgment the Claimant was automatically unfairly dismissed pursuant to section 103A ERA 1996. The principal reason for her dismissal was because she had made a protected disclosure.
- 67 The Claimant has also brought a claim for automatic unfair dismissal pursuant to section 100 of the Employment Rights Act 1996. Due to my conclusions set out above, I have not found it necessary to consider that claim nor those of detriment and ordinary unfair dismissal any further.
- 68 The Tribunal will proceed to consider the issue of remedy at a further hearing date to be agreed with the parties.

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Employment Judge Harrington  
5 January 2021



