EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr I Sen	v	**United Colleges Group**

HEARING

Heard at: Watford **On: 21/22/23/24 May 2018**

Before: Employment Judge Tuck
Ms M Harris
Mr D Bean

Appearances:

For the Claimant: **In Person**
For the Respondents: **Mr E Kemp, Counsel**

JUDGMENT

1. The claim of unfair dismissal fails and is dismissed.

2. The claim of automatically unfair dismissal for making a protected disclosure fails and is dismissed.

3. The claim of automatically unfair dismissal for taking part in the activities of an independent trade union at an appropriate time fails and is dismissed.

4. The claimant's claim for detriment on grounds related to Trade Union activities fails and is dismissed.

5. The claim for victimisation fails and is dismissed.

6. The claimant's claim for wrongful dismissal fails and is dismissed.

REASONS

Claims and issues

The complaint(s)

1. By a claim form presented on the **21 July 2017**, the claimant brought complaints of unfair dismissal, automatically unfair dismissal, detriment short of dismissal because of Trade Union activities, victimisation and wrongful dismissal.

2. A Case Management Hearing took place before Employment Judge Palmer on the 17 October 2017 and a detailed list of issues was prepared. They are found in the bundle at pages 63 - 66 and we have had regard to those issues. It was apparent to us that while not in the list of issues the claimant was at various times asserting that the reason for his dismissal was because of his Trade Union activities. Such a claim is out with the scope of s.146 of the Trade Union More Reform (Consolidation) Act 1992 with detriment for Trade Union activities. At the conclusion of the evidence we considered of our own volition whether we ought to permit an amendment to the ET1 on the basis that an additional legal label ought to be added to the facts already pleaded. We bore in mind that the claimant is a litigant in person and whilst he has some experience of acting in Employment Tribunals, he has no legal qualifications. As we had heard detailed evidence as to the reason for the dismissal, Mr Kemp sensibly did not object to us permitting such an amendment. In these circumstances we have considered an additional claim as to whether the reason or principle reason for dismissal was that the claimant had taken part, or proposed to take part in the activities of an independent trade union at an appropriate time contrary to section 152 TULRA.

Evidence

3. We were provided with a file containing a cast list, chronologies from each of the parties and witness statements from the following who gave all evidence to us on oath or affirmation:-

    3.1 Mr Andrew (Andy) Cole, former Principal and Chief Executive of the College of North West London;

    3.2 Ms Anna Openshaw-Lawrence, Group Executive Director;

    3.3 Ms Joanne (Jo) Taylor, Head of HR and Staff Development;

    3.4 Mr Neil Deller, Director of Curriculum;

    3.5 Mr Eamon McCarroll, Group Executive Director of Finance;

    3.6 Mr Indranil (Indro) Sen, the claimant.

4. We were provided with four lever arch files from the respondent and two further lever arch files from the claimant. The latter were overwhelmingly but not entirely contained in the former.

5. Having told the parties of our intended approach we read such documents as we were referred to in the written witness statements or which we were taken to in cross examination.

6. We set out below our findings of fact not in relation to every piece of evidence we heard but on matters which were relevant to the issues which we have to determine.

7. At the outset of the hearing we set a timetable to ensure that the hearing could be completed within the time allocated and are grateful to Mr Sen and Mr Kemp for enabling the hearing to be completed within that allocation. Whilst the claimant initially expressed a desire to cross examine the respondent's witnesses for a total of 12 hours, of the 11 hours of tribunal time available for all evidence, he was allocated 9 hours and Mr Kemp was allocated two hours.

8. In closing we were handed notes from both the claimant and written submissions from the respondent and each of the parties referred us to authorities which we set out below.

The facts

9. The claimant commenced employment at the respondent college as a Maths Lecturer in September 2004. At all material times he reported to Mr Mark Stacey who in return reported to Ms G Woodward. Ms Openshaw-Lawrence is senior to Ms Woodward.

10. Since July 2008 the claimant has been a Branch Secretary for the University and Colleges Union at the respondent college. During the period between July 2008 until his dismissal in February 2017, he frequently assisted union members with workplace problems and on a number of occasions represented individuals in their Employment Tribunal proceedings against the college.

11. The evidence of Ms Openshaw-Lawrence (which we accept) is that until the summer of 2016 she and the senior management team of the college had understood the claimant to be carrying out any representation in tribunal proceedings in his role as a Union Representative.

12. In November of 2015 there was an issue between the parties as to whether the claimant should be permitted time off to assist an ex-employee Mr M. S.. Employment Judge Bedeau had taken the view that the claimant ought to be released by the college in order to represent the claimant and so the respondent permitted that, although it did lead to their having to make an application to adjourn the hearing because of the disruption it would cause to the claimant's students as there was insufficient cover at that time.

13. In April 2016 the claimant had been supporting a former college employee in the Employment Tribunal and a Wasted Costs Application was made by the respondent against the UCU. The claimant's response to that was to tell the

respondent he was not acting in a union capacity but as a workplace colleague and as an individual undertaking 'private work'. There is no suggestion that the claimant was being paid to represent individuals but it was not in his role as an employee of the college and not in his capacity as a union official that he was carrying out the representation.

14. We accept the evidence of Ms Openshaw-Lawrence that this came as a surprise to the respondent - not least because they would not have made a costs application against the UCU had they have appreciated that the claimant was not acting in the capacity of a Union Official.

15. Two cases against the college were listed for hearing before the Employment Tribunal in the autumn of 2016; that of Mr CB. and of Mr LF.. The claimant was representing both.

16. On the 30 August 2016 on her return from summer holidays Ms Openshaw-Lawrence wrote to the UCU Regional Officer, Ms Una O'Brien, asking whether the claimant was representing those two individuals as a UCU Representative or simply as a "workplace colleague". Ms O'Brien replied on the 31 August saying that neither of the cases were being carried out on the basis of the claimant being a UCU Representative and said that it was not in any capacity to do with the union.

17. On the 31 August the claimant sought time off from the respondent to attend a UCU London Regional Officials Team Meeting on the 23 September. He sent this email to Mark Stacey copying in Ms Openshaw-Lawrence and Ms Una O'Brien. On the 1 September Ms Openshaw-Lawrence instructed the claimant's line managers to grant the request because it was "a proper Trade Union duty". She went on to say:-

> "On the other issue I'm going to wait for him to request the time off"

18. It is clear to us that the other issue referred to the Employment Tribunal of Mr CB. which had been listed for the 3 to the 11 October.

19. On the 6 September having received no application for time off, Ms Openshaw-Lawrence emailed the claimant stating that they had not received a request for time off, that the hearings of the two individuals fell within term time and were scheduled to run for a total of around ten working days and that she wanted to give him prior notice that she and the college would not release the claimant from his contractual duties to enable him to act as a representative at those hearings. She said that she was giving that information at that time (at the beginning of September) so that he could make alternative arrangements for the two individuals.

20. The claimant has said that he did not see that email of the 6 September until either the 19 or 23 September. In any event he did not reply to it until the 23 September at which point he said that he had always been allowed to take unpaid leave on previous occasions and that he was shocked to have been told at this juncture that he would not be permitted time off and that he asked for a reconsideration of that decision.

21. On the 26 September Ms Openshaw-Lawrence replied and said that she and the college until recently had believed he had been acting as a Union Representative and that his actions of preparing cases in college time had not been consistent with him acting in a personal capacity, a matter which she may be considering further. In any event she made it clear that the entirety of the hearings were not going to be permitted as unpaid leave and that he would be released for work only for the period when he was required to be present to give oral evidence to the Employment Tribunal. At that juncture it was anticipated that that would mean that he would need to be released from work on the 3 and 4 October and that was granted.

22. The claimant's response to that on the 27 September was again to ask for a review. He thought that the case of Mr CB. may 'go short' and last just for 4 days and said that there were sufficient cover hours to cover his unpaid leave. He also forwarded that correspondence to the Employment Tribunal albeit not making any application to the tribunal.

23. In response to this, the respondent's solicitors wrote to ask the tribunal whether the hearings which had been listed would go ahead in the absence of Mr Sen. Employment Judge Southam on the 30 September caused a letter to be written stating that as no application to postpone the hearing had been made the hearing remained listed and that there was no issue for the Employment Tribunal to decide.

24. On Sunday 2 October the claimant sent a number of emails. At around 11.30 in the morning he sent emails to Ms Indira Karunadhara who was covering his classes on Monday 3 and Tuesday 4 October. By 11.28am he had sent materials to her to be provided to his classes, not only for the Monday and Tuesday but also for Wednesday 5 October, Thursday 6, Friday 7 and Monday 10 October.

25. He emailed his manager much later that afternoon (17.54 hours) asking for permission for unpaid special leave between the 3 and the 11 October 2016.

26. The claimant in evidence said that he did not arrange cover for his classes when off, but he might find out what options were available to Mr Stacey and suggest them to him. We note that Mr Stacey in the Disciplinary Hearing said that it was important that it was he who arranged all cover as there are things to balance and judge especially as people do not like providing cover. It is apparent to us that the claimant had arranged his own cover for the 5 to the 11 September by Sunday morning on the 2 October.

27. Pausing there; going into the Employment Tribunal on the 3 October the claimant had permission to attend the tribunal to give evidence. It was anticipated that that would be on the 3 and/or 4 October. We are satisfied that it was very clear to him that his permission to be absent from work was limited to the period that when he was needed to give oral evidence. The account of the claimant has been inconsistent as to whether he was planning on the 3 October to attend for two days in order to present the evidence of Mr CB. in chief and give his own oral evidence knowing that he had permission for just two days of absence, or whether he was intending to disregard the management instruction to return to work after giving his evidence, and to stay throughout the hearing. In his oral

evidence the claimant suggested that he thought he might receive a direction from an Employment Judge that he ought to be released by the college (as he had received in November 2015). In an email of the 5 October he expressed surprise that he had not been suspended on the 4 October indicating that he might have thought that this would provide him with time away from work to continue the representation.

28. Returning to the chronology of what happened; as to what occurred at the outset of that hearing on 3 October 2016, it is recorded in a letter of the same date from Ms Openshaw-Lawrence to the claimant, and was confirmed in her evidence before this tribunal. Firstly, the Judge asked the college if the claimant had permission to take leave and counsel for the college said that the claimant did not have that permission. Secondly, the Judge asked if the claimant wanted to apply for a postponement of the hearing and the claimant said that he did not. Then thirdly the Judge asked if the claimant intended to be at the tribunal for the duration of the hearing and the claimant confirmed that he did so intend. The Judge added that the consequences of that would be a separate matter and was not for him.

29. During the cross examination of Ms Openshaw-Lawrence, the Employment Judge asked the claimant twice to put his positive case if he disagreed with the accuracy of those matters; he did not challenge them. The claimant was told on a third occasion that the tribunal would be minded to accept Ms Openshaw-Lawrence's evidence in this regard if he did not dispute the three matters described in the paragraph above, which were set out in bullet points. He did not challenge them therefore, we accept that this is an accurate record of what happened on the morning of the hearing. This is also consistent with the emails that were being sent between Ms Openshaw-Lawrence who was in attendance at the tribunal and Ms Jo Taylor who was at the college and not in attendance. At 10.23 hours on the 3 October Ms Openshaw-Lawrence emailed:-

> "This is crazy, Sen hasn't asked for a postponement and has asked Mark this morning for the time off. He has told the tribunal that he will be here the whole time but he doesn't have the authority."

30. Ms Openshaw-Lawrence at 10.25 replied with the letters "OMG!" At 10:27 Ms Openshaw-Lawrence e-mailed:-

> "What are we going to do? Just showing the panel the CCTV then they will read. This is crazy, how can he just say he intends to be AWOL?"

At 11.02 Jo Taylor sent the following reply:-

> "He absolutely knows as all staff do that he must get approval before taking any time off. We can't physically stop him from attending the ET Hearing but as you say he is AWOL if he attends past Tuesday … this is a serious case of insubordination and he has knowingly disregarded a management instruction and breached his contract of employment. He is paid to be a teacher and teach, he is not employed as a lay representative.
> "It will be horrible but if he attends past Tuesday, I can't see how this isn't a disciplinary situation and a potential gross misconduct issue, however, Graham/ Will might have a view on this too. If we go down the disciplinary route, which I can't see how we can't, then I think we need to get some help on. What do you think?"

31. The letter of 3 October was emailed to the claimant that evening and expressly stated, having set out the bullet points described above, that he did not have permission to take unpaid leave save for when giving evidence. At that point it was anticipated that that would be the 6 October. Ms Openshaw-Lawrence went on to warn the claimant:-

> "If you are indeed absent on these dates you should expect to be investigated in accordance with the college's disciplinary procedure, a potential outcome of which maybe your dismissal for gross misconduct should a case against you be found."

32. The claimant at one point disputed as to whether he had been warned of the potential consequences of remaining at the hearing when he did not have permission so to do but it is clear that it was expressed in the clearest possible terms in the said letter.

33. The claimant told us that he did not read the letter of the 3 October until 4.20 in the morning of the 5 October. We find this surprising given that he was checking his emails to see if Mark Stacey (who he had emailed on the 2 October for permission for special leave) had granted it or not. In any event the claimant certainly read the email on his account before attending the tribunal on Wednesday 5 October.

34. Despite agreeing in cross examination that he had been absent without authorisation and had committed an act which was potentially gross misconduct, in closing submissions the claimant returned to a previous position of arguing that he had not been absent without authorisation. In relation to the 5 October he said he was "under the jurisdiction of the Employment Tribunal".

35. It was anticipated he might give evidence on the 6 October, in the event he did not do so until the 7 October. On Monday the 10 October the claimant's evidence (which we accept) is that the tribunal told the parties that they would telephone them if they were going to give judgment on that day. The claimant waited at home for a call from the tribunal considering himself still to be under the jurisdiction of the tribunal.

36. At 19.51 hours on Monday 10 October Ms Openshaw-Lawrence emailed the claimant suspending him with immediate effect on full pay. Four reasons were given for that suspension; (i) being absent without authorisation from Monday 3 to Monday 10 October despite having been told repeatedly that he did not have permission for the leave, (ii) disobeying a reasonable management instruction by unilaterally deciding not to come into work on those dates, (iii) breaching the college's special leave procedures and (iv) displaying serious insubordination by taking it upon himself to arrange cover for his lessons between the 5 and 10 October despite having being told he did not have permission to take leave on those dates.

37. The claimant's case before us is that the potential working hours of the college can extend to 9.15pm, indeed he taught an evening class on certain days albeit

not on Mondays. The claimant was suspended, he says, at 19.51 hours still being within the working hours of the college and therefore he thought that his absence from work during the day of the 10 October ought to be considered as leave because of a suspension not because he was absent without authorisation.

38. We consider this argument to be entirely mischievous. The claimant did not work Monday evenings, he had missed a full day of his duties whilst being on hand to represent Mr CB should the need arise. There was quite simply no proper basis to suggest that his non-attendance at work on the day of Monday 10 October was because he was suspended.

39. By letter of the 14 October the claimant was invited to a disciplinary interview. This was initially scheduled to take place on the 21 October. From this point onwards the claimant had repeatedly sought to delay the dates upon which hearings took place.

40. An investigatory hearing, conducted by Neil Deller, the Director of Curriculum took place on the 7 November. Mr Deller was selected to conduct this investigation because he was relatively new to the college and had had very limited interaction with the claimant before and it was therefore considered that he would be more independent than people who had a longer history of dealing with the claimant. Mr Dellar was assisted by Ms Taylor in an HR capacity.

41. On the 19 October Ms Woodward who was in the line management of the claimant, emailed HR and Finance (and Mr McCarroll in his capacity of having responsibility for finance within the college) asking for a temporary replacement for the claimant during his suspension and concluded that email by saying:-

> "To help minimise this additional cost I would ask that the disciplinary process is implemented in a timely fashion and completed within six weeks."

42. Mr McCarroll on the 20 October approved (from the finance perspective) the temporary replacement being engaged. In cross examination the claimant put to Mr McCarroll that this exchange showed that Mr McCarroll was not being truthful in saying that he had had limited dealings with the claimant before and did not particularly know him.

43. In closing submissions the claimant seemed to suggest that this email from Ms Woodward indicated that *she* had an intention to dismiss the claimant within six weeks. This view seems to have been formed by the claimant because the investigation report which was emailed to him on 20 December, when interrogated for its properties, showed Ms Woodward's staff number alongside the author. The respondent was unable to explain why this was, but was adamant that she had played no part in conducting the investigation or writing the report.

44. The tribunal is unable to see any grounds on which we could draw an inference (from the email to finance seeking cover and from her name being on the 'properties' document of the investigation report) in support a proposition that Ms Woodward's request for a replacement for a short period of time indicated there

was an intention to dismiss him within six weeks. Her email asking for sufficient budget to engage cover seemed to be a routine exchange to ensure the smooth running of the Maths Department during the claimant's absence. Whilst Ms Woodward's staff number appearing on the properties of the investigation report was unexplained, the claimant did not suggest any basis to support a proposition that she was seeking to plot for his dismissal or had any animus toward him.

45. On the 8 November the claimant raised a complaint with the Clerk to the Corporation (which is this college's governing body) arguing that amongst other things that the disciplinary proceedings were ultra vires having not been properly incorporated into the articles and instruments of the governance of the college. Mr Cole said (and this was not disputed by the claimant) that this was an argument that the claimant had raised on a regular basis since 2012.

46. On the 14 November the claimant sent a lengthier complaint in relation to similar matters to Ms Chalk. She replied on the 20 and 29 November making it clear that she would conduct an investigation.

47. On the 1 December the claimant wrote a complaint to the Chair of Governors and Principal of the College complaining that Ms Chalk was not sufficiently independent and was not able to investigate the complaint that he had addressed to her. Also on the 1 December there appeared an article in the Kilburn Times concerning the claimant. This reported that the unions had called for strike action in relation to the claimant's suspension, and the claimant in a quote to the newspaper said that if a planned merger with the City of Westminster College went ahead, students would suffer as they would have to travel too much.

48. Emails on the evening of the 1 December between Ms Openshaw-Lawrence and Ms Taylor having been altered to the existence of that article, led to Ms Openshaw-Lawrence writing:-

> "Bring it on, he has chosen the wrong battle."

49. The Principal on the evening of the 1 December then emailed Ms Openshaw-Lawrence asking that on the next day Ms Openshaw-Lawrence give a briefing to the Chair and Vice Chairs of the corporation:-

> "On background and our planned approach please."

50. That briefing sent the next morning said:-

> "As you will know Sen is the UCU Branch Secretary. For a few years he's been representing staff in tribunals. Where we could, we facilitated time off unpaid as we were of the understanding that he was doing this as a UCU Representative, however, following a tribunal earlier this year it became clear that maybe he was not acting as a UCU Rep but as in a personal capacity. We had a seven day hearing scheduled for the beginning of October and I therefore wrote to the UCU Regional Office at the end of August to clarify whether he was acting as a UCU Representative. She confirmed he was not. I then wrote to him and stated he could not have time off to represent the case in October. In a nutshell, he chose to attend the tribunal and act as a representative despite instructions to the contrary. He was then suspended and an investigation was carried out by Neil Dellar. The outcome of the investigation is that there was a case to

> answer and we were planning a disciplinary hearing in the next weeks. Sen has now been called for Jury Service so this will now take place in the New Year and will be chaired by Eamon."

51. The claimant's complaint of the 1 December 2016 to the Chair of Governors complaining that Ms Chalk could not investigate the ultra vires and other issues, was referred to the Chair of Governors by Ms Openshaw-Lawrence on the 9 December. In the course of that email Ms Openshaw-Lawrence said:-

> "What we are clear about is that this needs to be closed down straightway as we discussed."

52. The Tribunal finds that the respondents did want to 'close down' this set of complaints – i.e. those relating to the ultra vires arguments that the claimant had been raising for a number of years. The Tribunal do not accept that the correspondence indicates a desire or plan to "close down" the claimant, i.e. to terminate his employment.

53. On the 13 December Ms Williams wrote a letter dismissing the complaint that Ms Chalk was not the appropriate person to investigate the matters which had been referred to her.

54. On the 20 December the claimant received an invitation to a Disciplinary Hearing scheduled to take place on the 10 January. The investigation report is dated November 2016 and we accept the evidence of Ms Taylor that the conclusions section had been written by a Mr Dellar in November, and that thereafter she had collated the necessary appendices to produce a full report. She also explained that it was the practice of the Respondent not to send out an investigation report until a date had been set for a disciplinary hearing in order to minimise the uncertainty that the recipient would otherwise experience.

55. The claimant has placed a great deal of evidence on a screenshot of that document with the staff number of Ms Woodward attached to it and as set out above he seems to believe that she may have written it. We accept the evidence of Mr Dellar that the report that we had before us was indeed his report

56. Mr Dellar set out the allegations he had investigated, and set out in appendices what evidence he had gathered. Alongside the interview minutes of his meeting with the claimant, this consisted of notes of a few questions of Ms Openshaw-Lawrence and Ms Stacey and emails that he had gathered together. His report does not seek to analyse that evidence at all, does not seek to draw any conclusions. He makes no findings of fact.

57. In relation to the four allegations that have been set out in the suspension letter, Mr Dellar's report indicated there was a case to answer in relation to each.

    57.1 In relation to the claimant's attendance at the tribunal he said that there were two days that were authorised for attendance as a witness. However Mr Dellar did not seek to analyse which dates attendance was permitted and which dates they were not.

    57.2 In relation to breach of special leave procedure and insubordination in arranging cover Mr Dellar made no findings whatsoever as to what normal

practice was as to arranging cover, and so it was far from clear *how* the claimant was said to have been insubordinate.

58. On the 6 January 2017 Ms Chalk dismissed the complaints she had been tasked to address, inter alia, that the disciplinary proceedings were ultra vires.

59. The disciplinary interview that had been scheduled to take place on 10 January was postponed at the claimant's request. It was scheduled eventually to take place on the 9 February 2017.

60. Three days before that, on the 6 February the claimant raised a grievance setting out allegations of suffering action short of dismissal for his Trade Union activities. That was in the bundle before us from page 232. It was clear on the evidence before us that the claimant's intention in sending this letter was to cause the disciplinary hearing to be vacated, and to have his complaints investigated under the grievance procedure. However, on the 8 February Ms Williams, Chair of Governors, responded saying that the matters within the 6 February letter concerned the forthcoming disciplinary, and would not be considered separately under the grievance procedure. Ms Williams told the claimant that he could raise his complaints during the disciplinary meeting in so far as they were relevant.

61. On the morning of the 9 February the claimant sent an email at 9.43am to the Skills Funding Agency ("SFA"), cc'ing all the senior leadership team of the college including Mr McCarroll and setting out, over some five pages of closely typed text, matters concerning a defrauding of the college by an organisation called KeyRail Training Limited and/or KeyRail Training Solution Limited. This is a matter which had come to light within the college the previous summer. It was a very serious matter.

    61.1 In June 2016 it had been reported to the SFA and also the Police Fraud Squad and the college had engaged the services of KPMG to carry out an investigation into the matter.
    61.2 It seems that the defrauding of the college had led to a situation where redundancies might take place and the claimant in his capacity of Union Representative had engaged in correspondence with the respondent about this. The correspondence was reignited between the 23 and the 30 January with Ms Openshaw-Lawrence.
    61.3 The claimant's email of the 9 February repeats what had been said in the earlier correspondence and was known within the college. The tribunal asked the claimant what was new in this communication which had not been in earlier correspondence; it was not directed to anything.

62. We are satisfied that the claimant did and does have very genuine concerns about the impact on the college that this defrauding had. He is undoubtedly very genuinely concerned about the impact on the students who were affected by it. However, on a balance of probabilities the Tribunal are satisfied that the reason this email was sent on the morning of the 9 February, was in order to give rise to an argument that having raised a complaint against Mr McCarroll, Mr McCarroll couldn't proceed with the Disciplinary Hearing. Mr McCarroll didn't recall whether he had seen this email before the hearing began at 1pm.

63. The 'SFA Whistleblowing letter' was raised at the outset of that hearing by the claimant's Trade Union Representative who said that Mr McCarroll could not proceed because there was a complaint against him. It appears to Tribunal that this submission was misunderstood by those conducting the Disciplinary Hearing and the response that was given related to the claimant's 6 February TULRA Grievance.

64. It is clear that there were lengthy exchanges on 9 February as to whether the respondent's position - that the disciplinary process ought not to be halted to enable a grievance investigation - was correct or not. Both sides took advice. After approximately an hour and a half the respondent stated that it was going to proceed with the Disciplinary Hearing at which point the claimant's Union Rep said that she was not prepared for the grievance points and therefore she and the claimant left the hearing.

65. The claimant's objection to Mr McCarroll sitting conducting the hearing was repeated by email later on the 10 February and Mr McCarroll replied also on the 10 February making it clear that the complaints related to his suspension and finding of the disciplinary case to answer, and therefore would be considered. Again, it is apparent that he was not looking at the SFA letter of 9 February but the TULRA Grievance letter of 6 February. The claimant was told that the panel (Mr McCarroll and Ms Mary Price) would be meeting on the 22 February to deliberate and reach their conclusions.

66. On the 24 February the claimant sent a grievance which he said was under the Equality Act. He raised complaints of victimisation, harassment and direct discrimination. In cross examination the claimant said:-

> "I have two things in my armour: one had not worked (the TULRA complaint) so the second was the same set of facts giving rise to a different action."

67. He was asked whether he had repackaged the same things as protected acts rather than as Trade Union activity. He did not squarely answer that question but said that he considered that the college was seeking to sack him as soon as possible.

68. We note that in the course of that lengthy grievance document the claimant claimed that he was directly discriminated against by Mr Dellar in the disciplinary investigation process and by the conclusions that there was a case to answer having been reached. He alleged that he was also directly discriminated against by Ms Williams appointing a biased investigator. We note that allegations of direct race discrimination had not been raised before this point and have not been pursued since. They are not in the ET1, not in the list of issues, not in the claimant's witness statement and have not been put in evidence to Mr Dellar who attended. There is nothing in the material before us that would indicate that Mr Dellar was in anyway treating the claimant in the way that he did because of the claimant's race.

69. A draft response had been prepared to the claimant's disciplinary charges by the 24 February. This did not mention the receipt of the claimant's 'Equality act grievance' on the 24 February.

70. The disciplinary outcome letter is dated the 28 February 2017 and there is a detailed letter in the bundle before us on page 317 to 327. This letter did address the 24 February "Equality Act grievance". The letter concluded that the claimant was dismissed.

71. Mr McCarroll was pressed at some length by the claimant as to whether there was another meeting with his fellow panel member after the receipt of the Claimant's Equality Act grievance. The contemporaneous email exchanges did not indicate that there was such a meeting – however the Tribunal noted that the emails similarly did not preclude there having been such a meeting and Mr McCarroll on at least three occasions in his oral evidence as adamant that he had had a meeting in order to formulate the views that are recorded in the outcome letter in relation to that Equality Act grievance.

72. The view taken in that outcome letter was that the complaints in large part repeated matters raised earlier, and the allegation at that late stage that race was a factor in the claimant's treatment, appeared to be intentionally disruptive, malicious and a disingenuous attempt to inappropriately bring the previous complaints within the scope of the grievance policy.

73. The claimant submitted grounds for appeal against dismissal on the 10 March 2017. In the course of that lengthy appeal document he stated that he was "not sure whether he had any answer to the dismissal on the basis of the college's decision". The appeal hearing, before Mr Cole, eventually took place in two parts, firstly, on the 25 April and it was then reconvened on the 12 May. The claimant attended that Appeal Hearing representing himself and detailed minutes which consist of some 31 pages were produced. By letter dated 6 June the appeal was dismissed.

The law

74. The Trade Union Law Reform (Consolidation) Act 1992, so far as is relevant, provides:

> **s146 [Detriment] on grounds related to union membership or activities**
>
> (1) [A worker] has the right not to [be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place] for [the sole or main purpose] of—
>
> > (**a**) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
> >
> > (**b**) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, …
> >
> > [(**ba**) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or]

(**c**) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

(2) In subsection [(1)] 'an appropriate time' means—

(**a**) a time outside the [worker's] working hours, or

(**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 the activities of a trade union [or (as the case may be) make use of trade union services];

and for this purpose 'working hours', in relation to [a worker], means any time when, in accordance with his contract of employment [(or other contract personally to do work or perform services)], he is required to be at work.

[(2A) In this section—

(**a**) 'trade union services' means services made available to the worker by an independent trade union by virtue of his membership of the union, and

(**b**) references to a worker's 'making use' of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

….

(5) [A worker or former worker] may present a complaint to an [employment tribunal] on the ground that [he has been subjected to a detriment] by his employer in contravention of this section.

[(5A) This section does not apply where—

(a) the worker is an employee; and

(b) the detriment in question amounts to dismissal.]

152 Dismissal [of employee] on grounds related to union membership or activities

(1) For 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 for it (or, if more than one, the principal reason) was that the employee—

(**a**) was, or proposed to become, a member of an independent trade union, …

(**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—

(*a*) a time outside the employee's working hours, or

(*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 the activities of a trade union [or (as the case may be) make use of trade union services];

and for this purpose 'working hours', in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work.

[(2A) In this section—

(*a*) 'trade union services' means services made available to the employee by an independent trade union by virtue of his membership of the union,

75. We have had particular regard to the following provisions of the Employment Rights Act 1996;

[43B Disclosures qualifying for protection

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

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

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

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

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

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

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

76. In Chesterton Global Ltd v Nurmohamed *[2017] EWCA Civ 979*, *[2017] IRLR 837*, first the EAT and then the Court of Appeal construed the requirement to show that a disclosure is "in the public interest" relatively narrowly, permitting a case to qualify where there are both personal and public interests involved. It was held that 'public interest' (deliberately not defined by Parliament) is to be construed by a tribunal as it stands and applied as a matter of fact, without any 'bright line' rules of law (including on any particular number of employees that must be affected). In so doing, the court suggested four guidelines as follows:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest, though this should not be taken too far.

[43G Disclosure in other cases

(1) A qualifying disclosure is made in accordance with this section if—

…

(**b**) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(**c**) he does not make the disclosure for purposes of personal gain,

(**d**) any of the conditions in subsection (2) is met, and

(**e**) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(**d**) are—

(**a**) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(**b**) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(**c**) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(**e**) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(**a**) the identity of the person to whom the disclosure is made,

(**b**) the seriousness of the relevant failure,

(**c**) whether the relevant failure is continuing or is likely to occur in the future,

(**d**) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(**e**) in a case falling within subsection (2)(**c**)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(**f**) in a case falling within subsection (2)(**c**)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(**c**) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.]

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.

(2) A reason falls within this subsection if it—

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

(**b**) relates to the conduct of the employee,

(**c**) is that the employee was redundant, or

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

[103A Protected disclosure

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

77. The burden of proof is of course on the employer to show a potentially fair reason for dismissal. In a case where the reason relied upon is conduct, the well known guidance emanating from BHS v Burchell provides that it is appropriate to consider whether the employer had a genuine belief in the misconduct, formed after such investigation as was in all the circumstances reasonable, and whether dismissal was within a range of reasonable responses.

78. If the employer does not demonstrate a potentially fair reason, that does not mean that it is appropriate to make a finding that the dismissal was for a prohibited reason, either within section 152 TULRA or section 103A ERA; rather we must consider what the real reason was, as per the guidance in Kuzel v Roche Products Ltd [2008] IRLR 530 and ASLEF v Brady [2006] IRLR 576.

79. Finally, the claimant brings complaints of victimisation. Section 27 of the Equality Act 2010 provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Submissions

80. It would ordinarily be for the claimant to go first in submissions but he was asked whether he would like to go first or second and opted for the latter. Mr Kemp spoke to a note he prepared and provided the Tribunal with the following authorities: Kuzel v Roche Products Ltd (we have considered the Court of Appeal judgment in this case, reported at [2008] IRLR 530), Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588, Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99 and Chesterton Global Limited & Anor v Nurmohamed [2017] EWCA Civ 979.

81. Essentially the respondent submitted that this is a standard case of a conduct dismissal which the claimant has sought to grossly overcomplicate by obfuscation.

82. The claimant in his submissions provide us with a summary of the case of ASLEF v Brady [2006] IRLR 576, EAT. This case reminds us that there may be mixed motives for a dismissal. We must essentially look for the operative cause.

83. The claimant said of the dismissal:-

> "What was the primary reasons? The crucial issue is the planned approach after the 1 December newspaper cutting where I'm reported as saying if a merger goes ahead students will suffer. This is a Trade Union activity."

Conclusions on the issues
Unfair dismissal.

84. We have considered first the claim for 'ordinary unfair dismissal' applying the *Burchell* test.

Reason for dismissal.

85. We are satisfied that the reason for the claimant's dismissal was his conduct, and in particular attending the employment tribunal from 3 -10 October 2016 when he had been told expressly on a number of occasions that he did not have permission to do so. It was this conduct upon which Mr McCarroll based his decision.

Genuine belief?

86. Having heard Mr McCarroll's oral evidence, considered the minutes of the hearing he conducted and scrutinised his decision letter, we are satisfied that he did have a genuine belief that the claimant had committed the misconduct in question. In particular, it was not disputed that the claimant was absent from college between 3 – 10 October 2016, and it was beyond doubt that the permission he had to be absent was limited to the day/s on which he was required to give oral evidence.

After such investigation as was reasonable?

87. We consider Mr Dellar's investigation to have been limited in its scope. He did not reach any conclusions or properly analyse the evidence. However such flaws as there were in that investigation were remedied by Mr McCarroll who conducted a thorough Disciplinary Hearing, including – as is apparent from the minutes taken – asking detailed questions of the witnesses. The claimant chose to absent himself and therefore missed out on the opportunity to challenge that evidence.

88. We have considered carefully whether the investigation was sufficient such that it can be said it was within a range of reasonable investigations. On balance we are satisfied that by the time the decision was being reached - at the conclusion of the disciplinary hearing - the investigations which had been conducted were within that range.

Was dismissal within a range or reasonable responses?

89. The claimant's case (at least on occasion) seemed to agree that he had committed misconduct but thought that the sanction was very harsh. We are satisfied that dismissal for insubordination in the manner that had been demonstrated, was within a range of reasonable responses. This is so particularly where the claimant did not take responsibility for his actions, where his story altered on numerous occasions (particularly as to whether he was always intending to be in the ET for the whole period between 3 – 10 October despite having been told expressly on numerous occasions he did not have permission to do so) and where he expressed no remorse. The respondent could certainly not have confidence that the same action would not be repeated again.

Polkey / contribution.

90. If there was any unfairness in the process and in particular in relation to the investigation of Mr Dellar, we are satisfied that a fair process would make no difference and that the outcome would have been the same. Further or alternatively we think that the claimant by his conduct of ignoring repeated instructions so blatantly in relation to attending the tribunal hearing throughout, was such that he contributed to his dismissal by a 100 percent.

Automatically unfair dismissal for raising a public interest disclosure.

91. In relation to the claimant's claim for automatically unfair dismissal for making a protected disclosure, we have looked first of all at the causation test. The provision of s.103A of the Employment Rights Act says that a dismissal will be automatically unfair if it is for the sole or principle reason of having made a public interest disclosure.

92. The claimant did not really pursue this case in his oral evidence. He did not cross examine the witnesses on it. I put to Mr McCarroll what consideration he had had of the KeyChain document and it was apparent that that had not been part of his reasoning at all. Furthermore, the claimant in his evidence did not say that the sole or principle reason was because of the communication to the SFA in relation to Keychain.

93. Therefore, even if the disclosures were protected (we are not convinced they were but did not consider it necessary to make definitive findings on the issue) they certainly were not the sole or principle reason for dismissal. The reason for decision to dismiss was the claimant's conduct – as set out above. That claim is accordingly dismissed.

Detriment because of Trade Union Activities.

94. As to detriment because of Trade Union activities, we are struck by the fact that Ms Openshaw-Lawrence was expressly permitting the claimant to take time off for what she described as "proper Trade Union activities" on the 1 September 2016. We consider this to be indicative of the fact that there was not (as the claimant alleged) a general anti-union policy within the college.

95. In any event, in the list of issues, the claimant complains that his suspension (and ultimately his dismissal) was engineered in order to prevent him from taking part in activities in representing six named members. He has not given evidence in relation to any of those six members and has not made out his case that he was being prevented or deterred from taking part in any procedures in relation to those individuals.

96. As to the issue of whether the claimant's representation of CB at the Employment Tribunal acted to Trade Union activities, we are clear that within the definition of s.146(2A) of TULRA, the claimant was not providing Trade Union services which are services made available to a worker by an independent Trade Union by virtue of their membership. Accordingly we do not find that the representation of those individuals were Trade Union activities.

Automatically unfair dismissal because of trade union activities.

97. For the reasons given above, we are satisfied that the reason for the Claimant's dismissal was his conduct. This claim is dismissed.

Victimisation.

98. The respondent admitted (and we entirely agree) that the first and second acts listed as protected acts in the list of issues certainly are protected acts and the tribunal is satisfied to accept all six matters listed by the claimant as being protected acts.

99. The claimant complains of five detriments which he alleges he suffered because of having done protected acts: the refusal of time off to represent CB, suspension, disciplinary investigation, dismissal and dismissing his appeal.

100. It is clear that the claimant has sustained each of those detriments. The key question is *why* the claimant has suffered those detriments. Section 27 of the Equality Act says that treatment will be caught by that provision if it is because of the protected acts.

101. We have considered this very careful because the claimant was clearly carrying out a protected act in representing Mr CB in October 2016 and it was for absence whilst carrying out this protected act that he was suspended, investigated and dismissed. Was then the protected act the reason for that detrimental treatment? We cannot find that it was. If we strip out the essential misconduct of it being an unauthorised absence, there is no basis to suggest that the claimant would have been treated detrimentally. For example had he carried out the protected acts of representing the claimants in discrimination claims over half-term, he would not have sustained this treatment.

102. We note also that he has carried out such protected acts of representing claimants on a number of occasions – when he has not been told he had no permission to be absent – and on those occasions he did not suffer any of the detriments of which he now complains. We find that the causative reason for the detriments of which he complains, is his misconduct and not for any protected acts.

Wrongful Dismissal.

103. Having found that there was an act of gross misconduct which entitled the respondent to dismiss, the respondent was entitled to dismiss the claimant without notice and therefore his wrongly dismissal claim fails.

104. At the conclusion of the hearing the respondent indicated that it intends to make an application for costs on various basis. The following orders were therefore made.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Within 14 days on or before the **7 June 2018** the respondent is to write to the claimant and to the Employment Tribunal setting out the basis on which it seeks to apply for costs and setting out details of the costs which it has incurred. In that application it is also to set out for the claimant what evidence it seeks from him as to his means.

2. On or before the **5 October 2018** the claimant is to provide a statement and accompanying evidence as to his means. He may (but is not required) to reply to the application for costs.

3. On or before the **9 November 2018** the parties are to agree a joint bundle for use at the costs hearing and when that is agreed the respondent will serve a copy of it on the claimant.

4. The costs hearings is listed for one day to take place on the **7 December 2018** before the same Employment Tribunal.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

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Employment Judge Tuck

25 / 6 / 2018

Sent to the parties on:

28 / 6 / 2018

For the Tribunal:

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