EMPLOYMENT TRIBUNALS

Claimant: **Ms. P Hussain**

Respondent: **Calderdale College**

Heard at: **Leeds by video link**

On: 4, 5, 6, 7, 8 and 12 January 2021

Deliberations: 13 January 2021

This was a remote hearing by CVP video link which was agreed in advance by the parties.

Before:

Employment Judge Shepherd

Members:

Mr K Lannaman

Mr W Roberts

Representation:

Claimant: In person

Respondent: Mr Rudd, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.
2. The claim of detriment on grounds of making a protected disclosure pursuant to section 47B of the Employment Rights Act 1996 is not well founded and is dismissed.
3. The claim of unfair dismissal pursuant to section 98 of the Employment rights Act 1996 is not well founded and is dismissed.

REASONS

1. The claimant represented herself and the respondent was represented by Mr Rudd.

2. The first day of this hearing was designated as a reading day. On the second day, the first day of oral evidence, there were technical problems as the first witness John Rees was unable to connect properly he had to leave the respondent college and go to his home address. It then became apparent during the cross examination of the first witness that the report on the allegations of malpractice was so heavily redacted that it was difficult to follow. An unredacted copy was provided but the claimant then needed time to go through this in order to prepare questions. Also, there were references to at least 19 appendices and they were not included in the bundle in this format but had been spread throughout it. There were also documents that were illegible. The claimant said that she had sent PDF copies that were legible to the respondent's solicitor just before Christmas. In the circumstances the hearing was adjourned and the parties were to liaise and provide a reconstituted bundle of documents. Mr Rudd was to coordinate this with his instructing solicitors and would then be in contact with the claimant. This was wholly unsatisfactory and delayed the hearing. Both parties should have dealt with disclosure and ensured that the bundle was in an appropriate format. It is noted that the claimant is a litigant in person.

3. On the third day of the hearing the evidence of John Rees was completed together with that of Amanda Tingle. The next witness scheduled to be heard was Julia Gray. The claimant said that, as things had become complicated; her husband has tested positive for Covid–19 and she had been contacted by the track and trace authorities. Her husband had to self-isolate and she had not had the opportunity to prepare questions for Julia Gray. It was suggested that Sonia Sterling be called to give evidence as her cross examination was likely to be shorter. The claimant said she was still not prepared. The Tribunal offered to allow her further time to prepare and start Sonia Sterling's evidence later in the afternoon. The claimant still said that she would not be prepared. Mr Rudd agreed that it would not be appropriate to pressurise the claimant in the circumstances and it was agreed that the Tribunal would hear Sonia Sterling's evidence the following morning.

4. The Tribunal heard evidence from:

John Rees, Principal;

Amanda Tingle, Head of Maths and English;

Denise Cheng-Carter, Deputy Principal – Finance and Resources;

Sonia Stirling, Vice Principal – Curriculum;

Julia Gray, Vice Principal Quality and People Services;

Perveen Hussain, Claimant;

Tina Twibill, Former Special Educational Needs Coordinator.

5. The Tribunal also had sight of a written witness statement from Maxine Beckmann, Regional Support Officer, University and College Union. Mr Rudd said that he had no questions to ask Maxine Beckmann and, in those circumstances, the contents of her statement were accepted as uncontested.

6. The names of people referred to throughout the hearing who were not witnesses or had attended the hearing, have been anonymised.

7. The Tribunal had sight of a bundle of documents which was numbered up to page 553. A number of further documents were admitted during the course of the hearing. These were unredacted copies of documents already within the bundle and policies of the respondent, City and Guilds and JCQ (Joint Council for Qualifications). These documents were considered by reference to their internal numbering. The Tribunal considered those documents to which it was referred by the parties.

8. The issues to be determined by the Tribunal were discussed at the commencement of the hearing. They had been identified at a Preliminary Hearing before Employment Judge Smith on 11 August 2020 as follows:

1. Automatic Unfair dismissal.

What was the reason or principal reason for the Claimant's dismissal?

2. Ordinary unfair dismissal.

The Claimant relies upon the following, and only the following, matters which she said was unfair on which the Tribunal will need to determine:

2.1. Did the Respondent fail to consider adequately or at all when deciding to dismiss the Claimant that her ill-health was, the Claimant contended, work-related?

2.2. Was it unfair that the Claimant's line manager Amanda Tingle was involved in the Claimant's sickness management when she was a subject of the Claimant's grievance over bullying and harassment and exam malpractice.

2.3. Do any of the above, if proven render the dismissal unfair having regard to section 98(4) of the Employment Rights Act 1996?

3. Protected disclosure detriment

Was the Claimant subjected to the following action or inaction namely: -

3.1. Threatened by the investigating officer, Ms Gray on or about 03 May 2019 that if she approached colleagues to obtain witness statements to support her contention of exam malpractice she would be subject to disciplinary action.
3.2. Did Ms Gray fail to interview the following support workers identified by the Claimant namely Ms SH and Ms JD.

3.3. Did Ms Gray fail to have regard to the learner records identified to her by the Claimant as relevant to her protected disclosure namely records for Mr NB, Mr B, Ms AC and Mr DH.

3.4. Was the investigation conducted by Ms Gray and Mr Rees manipulated whether consciously or subconsciously so as not to support the Claimant's protected disclosure?

3.5. In relation to the second third and fourth point the Claimant says the detriment she suffered was that by failing to investigate properly she was perceived to be a person who lacked honesty and integrity.

3.6. Do any of the above points, if proven, amount to a detriment?

3.7. If so, was the Claimant subjected to a detriment on the ground of her protected disclosure?

9. Questions of time limits were raised by the respondent's representative at the commencement of hearing. The time issues were with regard to the detriment claim. The claimant said that the point had not been pleaded. It was explained to the claimant that these were issues that would go to the jurisdiction of the Tribunal. There is a three-month time limit on claims brought pursuant to section 47B. The claimant was told that the Tribunal may need to consider them and she would need to be prepared to give evidence in this regard.

10. During the course of the claimant's cross examination of the respondent's witnesses she raised issues with regard to the involvement of other witnesses – Denise Cheng–Carter, Sonia Stirling and Julia Gray, in parts of the procedure when they had also been involved earlier. She was informed that these were new allegations and had not been identified in the issues. The Tribunal and the respondent needed to know the case it had to determine and defend. The claimant said that she did not wish to make an application to amend but these issues were relevant to the general reasonableness and fairness of the dismissal and her treatment.

Findings of fact

11. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions. Where the Tribunal heard evidence on matters for which it makes no finding, or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the Tribunal's findings are also set out in its conclusions in an attempt to avoid unnecessary repetition and some of the conclusions are set out in the findings of fact.

11.1. The claimant was employed by the respondent from 28 March 2006. At the time of the termination of her employment on 21 February 2020 she was employed as a Main Grade Lecturer (MGL) in Maths and English.

11.2. The respondent is a further and higher education college in Halifax, West Yorkshire.

11.3. The claimant raised issues with her Trade Union, University and College Union (UCU) in July 2018. She indicated that she had:

> "… witnessed certain instances of cheating and some of my learners have miraculously passed their exam having been referred to another tutor."

11.4. Maxine Beckmann, UCU Regional Support Official, wrote to the claimant asking whether she had spoken to the UCU's College Branch Chair and offered to discuss it with her and raise the issue with the College management team.

11.5. The claimant returned to work in September 2018 and began teaching an adult class which came under a Curriculum Manager, HP, against whom she had represented a colleague in a disciplinary hearing in which that manager's behaviour had been heavily criticised by the claimant. The claimant said that there were a number of incidents over the next few months which, taken together, formed a pattern of bullying and harassment. This culminated on 18 October 2018 when the claimant said she was humiliated in front of her learners.

11.6. The claimant attended her GP on 2 November 2018 and was signed off sick with work related stress. The claimant was absent from work from that date.

11.7. On 2 April 2019 the claimant raised a grievance. It is appropriate to set out the substance of this grievance which was as follows:

> "On the 5/6 of June 2018, I was informed by RS, JP and Amanda Tingle that my learners were being referred to LM (another lecturer) As we were not going to achieve our target.
>
> During the course of working with LM and the following few weeks. I observed the following breaches of exam regulations:
>
> - One learner was told not to press exit when he finished because LM would go through the exam before submitting it.
> - Teaching was taking place in G15 whilst learners were doing exams in the same room.
> - Learners with readers in G15 were in the same room as others doing their exams and/or being taught
> - On 13 June 2018 – Amanda Tingle instructed TSU to load exams onto the computer in D14, in order to avoid going through the Exams Department when arranging exams for our Department.
> - On 10 of July 2018, JP took a laptop out to the house of CE, who had not been attending college since before Christmas 2017. This is contrary to the exam regulations. Furthermore, I do not believe CE passed without help.
> - On 13th of June 2018, RG, accompanied KC to an intensive maths session with me in the morning. She made no attempt to engage in the session. RG then read for her in the exam and she miraculously passed with a score of 89%, having never attended a FS maths session all year.
> - Those learners who have EHC's find it very difficult to focus in class let alone learn, understand, retain, recall and apply their maths skills to the exam. Four of these learners passed. I do not believe these learners passed without help.
> - Hand-picked readers are routinely used to help learners, rather than just read for them -One progress coach was told her learner HAD to pass.
>
> Not only do these incidents breach exam regulations but they are also contrary to the College Values of Honesty and Integrity and they are definitely contrary to my own faith and beliefs my dignity, self-respect and confidence have been crushed and the integrity of the qualification I teach has been irreversibly compromised.
>
> These events along with the bullying and harassment that I have suffered from HP have resulted in terrible distress for me. I have been advised by my GP not to attend work and have been suffering from extreme stress. I have detailed these, as per the bullying and harassment policy in a separate letter."

11.8. The claimant also sent an email setting out a complaint of bullying and harassment referring to events in September and October 2018 in respect of the behaviour of HP. There was mention of Amanda Tingle but the allegations were against HP.

11.9. The claimant also raised issues with City & Guilds, the examining body, who wrote to John Rees, the College Principal on 16 April 2016. They requested that Mr Rees, as Principal, should carry out an investigation and provide a detailed report.

11.10. On 29 April 2019 an Occupational Health report indicated that the claimant had been absent from work due to work-related stress from 28 November 2018. It was stated:

> "From a work perspective, it is likely that Mrs Hussain will not make a decision regarding her return to work until the outcome of the investigation is known. At this point, a return to work should be considered. It is likely that she would have difficulties returning to the area under the managers with whom she has the outstanding complaint."

11.11. Julia Gray, Assistant Principal, was appointed to investigate the allegations of exam malpractice and Sonia Stirling, Vice Principal–Curriculum, was appointed to investigate the allegations of bullying and harassment.

11.12. Sonia Stirling provided the claimant with the outcome of the bullying and harassment investigation in a letter dated 15 May 2019. It was indicated that she had listened to everything the claimant said, considered written documentation and conducted interviews with eight members of staff. The allegations raised by the claimant were set out and the conclusions were that there was no evidence of bullying and harassment.

11.13. On 21 May 2019 Julia Gray wrote to the claimant providing the outcome of the grievance investigation. It was indicated that 10 members of staff and a range of learners had been interviewed. There were detailed findings in respect of each of the claimant's allegations which were not upheld.

11.14. On 22 May 2019 the claimant appealed against the decision not to uphold the allegations, that the investigating officer had not considered the application of the bullying and harassment policy correctly. The investigating officer had overlooked key evidence and could not have made a reasonable decision without due consideration of the above factors.

11.15. On 31 May 2019 the claimant appealed against the decision not to uphold her grievance in relation to exam malpractice. This was on the grounds that the investigation officer had overlooked key evidence, the investigating officer had found something to be true without evidence. The investigating officer had displayed bias in her decision-making and the investigating officer could not have made a reasonable decision without due consideration of the above factors.

11.16. On 21 June 2019 the claimant was informed that her post, together with others, was at risk of redundancy as a result of restructuring.

11.17 On 22 July 2019 the claimant was informed that she had been offered suitable alternative employment as an MGL Functional Skills within the restructured Maths and English Department.

11.18. On 27 July 2019 the claimant accepted the role in writing that had been offered and she indicated that her present sick note lasted until 7 September 2019.

11.19. Denise Cheng-Carter investigated the claimant's appeals. She provided an appeal outcome letter in respect of the bullying and harassment allegations on 1 July 2019. The findings from the original investigation were upheld. It was found that the bullying and harassment policy had been applied correctly, no key evidence had been overlooked and that decisions were arrived at with full consideration of all the evidence, interviews, statements and facts.

11.20. Denise Cheng-Carter also heard the claimant's appeal against her exam malpractice grievance and sent a letter to the claimant providing the outcome on 1 July 2019. The letter went through the grounds of appeal and concluded that the findings of the original grievance hearing were upheld.

11.21. A report was provided to City and Guilds with regard to the allegations of exam malpractice.

11.22. On 22 July 2019 the City and Guilds Manager, Investigation and Compliance wrote to John Rees indicating that she had reviewed the investigation report and associated documents in relation to the incident of potential malpractice. It was stated:

> "I can confirm, in agreement with your findings, it has been concluded that there is no evidence to suggest that malpractice has occurred and the allegations by a former member of staff have not been substantiated. We accept the conclusion of your investigation report…"

11.23. The letter went on to go through the detailed findings of the investigation report. It was also stated:

> "When reviewing your investigation I have also taken into consideration the additional information, which has been provided in relation to Perveen Hussain who raised the allegations with City & Guilds. These included:
>
> - The majority of learners advised their original teacher, Perveen Hussain, did not support them and they were able to progress towards the qualification once the tutor was changed
> - Perveen Hussain was under performance management prior to leaving the company in February 2019, at which point she approached Calderdale College for a settlement. She advised that she was willing to 'park' the allegations if a settlement was made
> - It was felt by Calderdale College that Perveen Hussain did not appropriately behave or support learners with additional needs"

11.24. On 27 August 2019 an Occupational Health report was provided which included:

> "I am unable to determine if Mrs Hussain will be able to provide a regular and efficient service in the future, however, past absence is a good indicator of future absence where the problem is not self-limiting. In my opinion, Mrs Hussain is likely to have difficulties returning to work in the same area and under the managers with whom she has had the complaint, however, she states the functional skills department is the only area she would be able to work within. If mediation is an option in this case, I feel this may be beneficial for all concerned."

11.25. Amanda Tingle became Head of English and Maths and the claimant's line manager on 2 September 2019 following the restructure.

11.26. On 5 September 2019 the claimant attended an Absence Case Management meeting with Amanda Tingle. The Occupational Health report was discussed with the claimant. There was discussion of support that could be provided to the claimant.

11.27. On 23 September 2019 Amanda Tingle wrote to the claimant referring to the meeting on 5 September 2019 and stating:

> "We discussed a number of support mechanisms at the meeting:

– Support – as you will be aware Functional Skills now sits within the Maths and English department and regular team meetings will take place to allow individuals to share good practice and raise concerns as a team on a regular basis. An ACM has been assigned direct day-to-day responsibility for those staff within functional skills so support is always available.

– Mediation – this was discussed as a mechanism to help improve working relationships. I hope you had time since the meeting to reflect on the benefit of taking this up and I would be grateful if you could update me on your thoughts on undertaking mediation between key members of staff and yourself.

– The Occupational Health advisor encouraged you to engage with Cognitive Behavioural Therapy (CBT) – the College advised that we would support you with 4 CBT sessions. You did not want to take up this offer of support at our meeting however, I wanted to confirm to you that this support is still available to you and if you have or do change your mind in relation to taking this up then please let Jenny Burke, HR Business Partner know so this can be arranged for you.

– You stated that you are taking steps yourself to improve your mental health well-being which is important. I am keen to ensure the College is supporting you with this. If there is anything we can explore to help you further in this regard please let me know.

– You raised areas of concern in relation to the demands of the work being unrealistic and the paperwork involved in the role. When you return to work, I will meet with you regularly throughout your phased return to work to discuss in more detail those concerns and help you employ strategies to manage the demands of the role better."

11.28. On 7 October 2019 a further Occupational Health was provided this stated, among other things:

"Mrs Hussain continues to experience heightened anxiety and depression during her absence including palpitations, sleep disturbance, overthinking, concentration and memory problems. She visited her GP at the beginning of September 2019 and continues with no medication, as is her choice, and would prefer to continue with her own coping strategies. She has again completed a standardised Anxiety and Disability questionnaire with me today and this indicates that she continues to experience high levels of heightened anxiety and moderate levels of depression. We have again discussed steps that can be taken to help promote mental health well-being. These include exercising on a regular basis to help manage the excess adrenaline and cortisol associated with heightened anxiety, as this should help to promote a better quality sleep; eating well; and increasing positive social activities. I have also discussed Cognitive Behavioural Therapy (CBT) with Mrs Hussain again today, but she continues to understand the reason why this is affecting her mood and anxiety and feel she is better dealing with

this herself as until the underlying problems with college resolved her mood and anxiety is not likely to change significantly.

On our previous assessment, Mrs Hussain advised that the previous 5 months have been "very traumatic" and has raised her anxiety and stress levels. I completed the HSE stress indicator concerns: demands; control; managers support; ; relationships; and managing change. I understand that Mrs Hussain attended a meeting on 5 September 2019 to discuss the report and findings. She tells me that she was accompanied by her union representative and that the meeting was chaired by someone who unfortunately was one of the persons associated with the complaints. Mrs Hussain today states that she feels this didn't go well, as she felt this was a difficult meeting and doesn't feel that anything has been resolved which would enable her to return to work at this point. She continues to feel that she would be unable to return to work as her anxieties remain heightened following the grievance process and outcome and, in my opinion, it is likely that she would remain absent from work for a further period of time. I understand that mediation has been offered but because she feels this wouldn't change the situation with regards to working with the same people and has therefore declined the offer…

In my opinion, Mrs Hussain remains temporarily unfit to return to work due to her ongoing mental health problems. She has implied that she is likely to have difficulties returning to work in the same area and under the managers with whom she has had the complaint. If the business is able to offer any redeployment options within the College in light of the position she finds herself in, I'm sure this would be considered. I have discussed the five outcomes of sickness absences with Mrs Hussain today. In light of her implied difficulty in returning to working under the same managers.…

If performance or attendance remains a concern and all reasonable adjustments and deployment options have been explored, this should be addressed to the management and not occupational health route. Mrs Hussain has been advised that the recommendations in this report are not mandatory and that management need to consider these recommendations to determine whether their implementation are reasonably practicable where adaptations are required to enable her to do the job for which she is employed, and the adaptations are not reasonably practicable, redeployment options should be considered. Mrs Hussain is aware that the employer is not required to manufacture a job where one does not exist.

I would like to review Mrs Hussain again in 4–6 weeks with your consent. If you could allow a 60 minute appointment, I would be grateful."

11.29. The claimant attended a Long-Term Absence Case Management meeting with Amanda Tingle, Head of English and Maths on 5 November 2019.

11.30. The claimant was accompanied by her trade union representative. During the course of that meeting there was reference to the Occupational Health report and the notes show Amanda Tingle asked the claimant if she had any idea of support that required. The claimant said that she did not perceive that there was anything that could be put in place. Amanda Tingle referred to the Occupational Health report's mention of redeployment and asked what the claimant's thoughts were on that. The claimant referred to having a law degree and having done admin in the past but she did not want to do that. She had worked in Functional Skills for a lot of years and that's what she did.

Amanda Tingle then asked the claimant "are you telling me you don't want us to consider redeployment for you?" The claimant replied "yes". The claimant's trade union representative is noted to have said:

> "Perveen you really need to consider this. If you can't return to functional skills and don't want redeployment they will terminate your contract. That's the decision you either return to functional skills or be redeployed. The college can only pay you for six months full pay and six months half pay."

Amanda Tingle asked the claimant if she wanted some time out to talk. The claimant said:

> "No, I want to get this over with I have nothing to say to you Amanda."

Amanda Tingle said:

> "We have to look at the impact of your continued absence, you have been off 12 months and it's having an impact on the students, your colleagues and the cost of agency staff."

11.31. The claimant was asked if she understood the options available to her and she said that she did and understood that the respondent had a process to follow.

11.32. Amanda Tingle said:

> " Perveen I have tried to support you in returning to work, but you are saying you can't return to work in Functional Skills with me as your line manager, you don't want to consider redeployment options and therefore decisions need to be made. Is there anything you would like to add before the meeting ends?"

The claimant replied "no."

11.33. The claimant said that she had not been in the right state of mind and should have been given more time as the next meeting was arranged for 8

November 2019. The decision to move to a formal Long-Term Absence was made at the meeting on 5 November 2019.

11.34. The Tribunal is satisfied that the claimant had refused offers of CBT, mediation and consideration of redeployment and indicated that she would not return to her position in Functional Skills without a change of those managing her. She was represented at the meeting. In her cross-examination of Amanda Tingle she accused her of dismissing the claimant. However, Amanda Tingle did not make the decision she had prepared a report recommending that a formal absence hearing should take place.

11.35. On 5 November 2019 Amanda Tingle wrote to the claimant. The letter referred to the meeting and stated:

> "At the meeting, we discussed the following:
>
> - The Occupational Health report dated 7 October 2019 where you stated that nothing has changed since our last meeting, the underlying issues are still there, and you do not perceive that there is any support that can be put in place by the College to enable you to return to work.
> - We talked about whether redeployment could be an option; however, you said you did not want to be considered for this as you had worked so long in Functional Skills and this is where your skills lie.
>
> We made you formally aware that should you not be fit to be able to return to your substantive post or be redeployed into a suitable alternative role, a decision would need to be made as to whether your job role can continue to be kept open. Therefore, the next step in this absence management process would be to invite you to an Absence Hearing where it ultimately may become necessary from a business perspective to consider termination of your employment."

11.36. Amanda Tingle prepared an Absence Management Review Report dated 8 November 2019. This referred to the meetings following Occupational Health reports and stated:

> "Despite my attempts to engage Perveen in the Absence Management policy process, and explore how Calderdale College can assist Perveen and offer the necessary support to facilitate a return to work as outlined in the Occupational Health report dated 7 October 2019, this is not been possible. Perveen's concerns about working with those she has raised grievance against remain, both myself and the Assistant Curriculum Manager in Maths and English remain in post and Perveen has been open and honest in the fact that she doesn't feel she could work with us. With no redeployment option currently available in the only area Perveen feel she can work in, there are no adjustments that will enable Perveen to return to work."

11.37. In a letter dated 8 November 2019, the claimant was invited to attend a Long-term Absence Review Hearing to be chaired by Sonia Stirling, Assistant Principal. The claimant indicated that she would be unable to attend the hearing and asked that her short statement would be accepted in lieu of her attendance. This stated:

> "I am finding it hard to forgive or forget the way that I have been treated. The investigations into my complaint and grievance were not carried out fairly. Witnesses I put forward were not spoken to or were simply ignored. The evidence I put forward was ignored. Yet everyone else's statements were taken as the truth.
>
> I was bullied, harassed and publicly humiliated in front of my learners and yet College refused to uphold my complaint. My confidence in myself and what I teach has been severely knocked. The integrity of the qualification I teach has been totally undermined. It took a great deal of courage to raise the issue of malpractice I did this as a matter of principle and because in all conscience I could not go on ignoring it. I feel that I have raised some extremely serious issues but these have not been investigated honestly.
>
> The fact that my complaints have not been investigated properly has been devastating for me. This is evidenced by the Occupational Health reports that you have. At this moment in time, I do not feel able to return to work with the people who were the subject of my grievance, let alone suggest a way forward from this impasse."

11.38. On 21 November 2019 Jonathan Hambling, Head of Human Resources, wrote to the claimant indicating that the date of the hearing had been rearranged and, if the claimant did not feel able to attend the rearranged hearing he would ensure that her statement was read out at the meeting and given to the chair. It was also indicated that the claimant's union representative was still able to attend the hearing as long as the claimant provided written confirmation that she would like them, in her absence, to act on her behalf.

11.39. On 4 December 2019 Sonia Stirling wrote to the claimant providing notice of termination. It was stated:

> "You have been absent from work since 2 November 2018 until now. You have not met your contractual obligations under the College's Absence Management policy of maintaining an acceptable attendance level to perform your duties as a Main Grade Lecturer. As I'm sure you can appreciate this continuing absence has a significant impact on the Functional Skills team and on our students' teaching and learning.
>
> I believe significant and substantial support has been offered but there continues to be no prospect of your returning to work. You do not wish to consider redeployment opportunities. You have also stated that you do

believe this is also a significant impediment to you returning to work. I am satisfied that all procedures over the past 12 months have been adhered to.

I am therefore formally issuing you with 12 weeks' notice that your contract of employment with Calderdale College will be terminated due to incapability on ill-health grounds and your continuing absence from work."

11.40. The claimant appealed on 10 December 2019. She stated:

"This decision appears to ignore the facts which cause my initial sickness absence from work due to work-related stress. That situation has not been satisfactorily resolved and hence it has caused me further trauma as is evidenced by the Occupational Health report of 3rd September and 7th October 2019. The College is aware of the cause of my sickness absence and there is no evidence that this has been taken into account in the College's decision-making. Likewise, in breach of policy there is no evidence that the College has investigated or considered what alternative work was available to me to facilitate my return to work before taking the decision to terminate my contract of employment.

I raise some extremely serious issues but College took a very defensive stance and completely failed to investigate matters in a full, fair and unbiased manner. The investigating officers did not apply College Policies correctly. They overlooked key evidence and displayed bias and came to unreasonable decisions.

It was unfair and unreasonable for Amanda Tingle to be involved in the management of my sickness absence given her close proximity to my complaint of exam malpractice and my complaint of bullying. There was a clear conflict of interest here which has resulted in significant procedural unfairness. It has been extremely difficult for me to engage with her during the absence management process. For the past few months I've not been able to see any way forward from this impasse. However, I have, at all times, been completely honest with Amanda about my feelings.

I believe I have suffered a detriment as a result of my decision to blow the whistle. The decision to terminate my contract of employment is not fair in all the circumstances. I have nearly 13 years of continuous service in which I have never had more than a handful of sick days. Even when I needed a shoulder operation, I chose to have it in the summer holidays so that I would not have to take time off work.

This decision also appears to ignore the facts stated in the Occupational Health reports which clearly state that it is directly due to the grievance process that my mental health has deteriorated so significantly."

11.41. An Absence Review Appeal Hearing took place on 14 January 2020. The claimant asked that the hearing should take place in her absence.

11.42. On 17 January 2020 Denise Cheng-Carter, Deputy Principal, Finance and Resources wrote to the claimant providing the appeal outcome. This letter went through the grounds of appeal and the findings and included:

> "…The college understands that the reason for your absence has been due to work-related stress. The college conducted detailed investigations into your grievances and I can assure you that the correct processes were followed adhering to College policy.
>
> I therefore conclude that, due to the attempts to engage with you to explore the recommendations in the Occupational Health reports on several occasions, and the fact that the college investigated the grievances fully and in line with college policy and procedures, the reasons for your absence have been taken fully into account...
>
> Line management has explored reasonable adjustments with you in the absence meetings and alternative employment within the college has been offered to you. During a restructuring July 2019 of the Functional Skills department, all Functional Skills employees were placed on the college redeployment register exploring options for suitable alternative employment. As you yourself were at risk of redundancy you were placed on this register. Following conclusion of the consultation you were offered a Functional Skills teaching post of which you accepted.
>
> In November 2019 redeployment was explored by your line manager at an informal absence meeting. You confirm that you had other qualifications such as a Law Degree and admin experience. However, you confirmed and were clear at this meeting that you did not want your line manager to consider redeployment, as you wanted to remain teaching functional skills.
>
> I therefore conclude that there is evidence that the college has tried to engage with you and offer suitable alternative work to yourself, but you declined this on two separate occasions. The first time following the restructure when you accepted a functional skills role as redeployment and secondly during absence meetings when line management tried to explore your other skills and experience…
>
> Amanda Tingle became involved in the management of your sickness absence from September 2019, after your previous manager left the college. Your grievances were fully investigated following both college policies and procedures and were brought to conclusion following an appeal in June 2019. Angela Tingle became your line manager from September 2019, and I believe it was fair and within college procedure for her to take over the management of your absence. Both grievances had fully concluded by the time Amanda Tingle took over the management of your absence, so no conflict of interest would be present from the time Amanda Tingle began to manager absence.
>
> I therefore conclude that as both grievances had reached the conclusion and college procedures had been fully exhausted that there was no conflict of interest from July 2019 onwards.…

> I therefore conclude that the concerns and grievances you raised did not put you at any detriment, and the reasons for termination stipulated in the letter dated fourth December are fair and reasonable in light of the length of your absence, the support offered and the ongoing impact to our students.
>
> I conclude that the grounds of appeal raised by you have been addressed and answered to enable me to reach a decision. I have read very carefully the submission you made and have concluded that there is no new evidence that would require me to interfere with, or overturn the findings of the Absence Review Hearing Chair…"

11.43. On 4 June 2020 the claimant presented a claim to the Employment Tribunal. She complained of unfair dismissal and dismissal and detriment for making a protected disclosure.

The Law

Unfair Dismissal

12. Capability is a potentially fair reason for dismissal under S.98.(2) of the Employment Rights Act 1996. It is for the employer to show the reason for dismissal and if it does show that the reason was a potentially fair reason the tribunal will then go on to determine whether the dismissal was fair in the circumstances pursuant to S.98(4).

In cases of capability dismissals involving ill health the tribunal will consider whether the ill health relates to the employee's capability and whether it was a sufficient reason to dismiss. Further, the Tribunal should take heed of the Employment Appeal Tribunal's guidance in Iceland Foods Ltd v Jones [1982] IRLR 439. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done for that of the employer, but should rather consider whether dismissal had been within "the band of reasonable responses" available to the employer.

In the case of BS v Dundee City Council [2013] CSIH 91 the EAT stated that it is important for employers to consider:

(a) The nature of the illness;
(b) The likelihood of it recurring;
(c) The length of past absences and the intervening periods of attendance;
(d) What reasonable adjustments have been offered and what could be offered, such as alternative work; and
(e) The impact of the absences on the business and other employees.

13. With regard to compensation for unfair dismissal, one of the factors that a Tribunal has to consider is whether, there was a likelihood that a dismissal would still have occurred if the dismissal had been fair pursuant to *Polkey v. AE Dayton Services Limited [1988] ICR 142.*

Employment Rights Act 1996

14. **47B Protected disclosures**

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

43A Meaning of "protected disclosure"

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

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.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

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

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith--

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to--

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

Claim for Automatic Unfair Dismissal Section 103A 1996 Act

15. Section 103A

> "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".

The burden of proof lies with the respondent to establish the reason for dismissal. If the reason is established it will normally be for the employee who argues that the real reason for dismissal was an automatically unfair reason to establish some evidence to require that matter to be investigated. Once that has been done the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal.

16. In the case of Eiger Securities LLP v Korshunova UKEAT/0149/16/DM Slade J referred to the distinction between automatically unfair dismissal by reason of making a protected disclosure and detriment on the ground of making a protected disclosure as follows

> "The Claimant's claim for "ordinary" unfair dismissal under ERA section 98 had been struck out as she did not have the necessary qualifying period of employment to bring such a claim. A claim for unfair dismissal for making a protected disclosure requires no qualifying period of employment and is brought under ERA section 103A. Section 103A provides:

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

17. The tribunal was referred to the Court of Appeal decision in Royal Mail v Jhuti [2018] IRLR 251 in which Underhill LJ stated:

> "… For the purpose of determining 'the reason for the dismissal' under s98(1) the Tribunal is obliged to consider only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss (that may be subject to possible qualifications discussed below; but they are marginal and not relevant to the present case). Section 103A falls under Pat X of the 1996 Act and it must be interpreted consistently with the other provisions governing liability for unfair dismissals."

18. **Detriment**

Section 47B

> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the workers made a protected disclosure.

19. A complaint that a worker has been subjected to a detriment for making a protected disclosure must be presented to an Employment Tribunal before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, or, where the act or failure to act is part of a series of similar acts, the last such act or failure to act – section 48(3)(a) ERA. A Tribunal has the power to extend the time limit for a reasonable period if it is satisfied that it was not reasonably practicable for the complaint to have been presented in time – section 48(3)(b) ERA.

20. Different tests are to be applied to claims under ERA sections 103A and 47B (1). Thus, for a claim under ERA section 103A to succeed the ET must be satisfied that the reason or the principal reason for the dismissal is the protected disclosure whereas for a claim under ERA section 47B (1) to be made out the ET must be satisfied that the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's detrimental treatment of the Claimant."

21. Section 103A, automatic unfair dismissal by reason of making a protected disclosure, and section 47B (1), a right not to be subjected to a detriment on the ground of making a protected disclosure, are in different Parts of the ERA, Part IX and IV respectively and use different language. The consequences of these differences for the tests in establishing claims for unfair dismissal under ERA section 103A and being subjected to detriment under ERA section 47B(1) were authoritatively determined by the Court of Appeal in Fecitt v NHS Manchester [2012] IRLR 64, a claim under ERA section 47B (1). These differences were explained by Elias LJ in paragraph 44 in which he held:

> "I accept, as Mr Linden argues, that this creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it seems to me that it is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law. As Mummery LJ cautioned in Kuzel v Roche Products Ltd [2008] ICR 799, para 48, in the context of a protected disclosure.
>
> Unfair dismissal and discrimination on specific prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs a risk of complicating rather than clarifying the legal concepts**."**

22. The Tribunal had the benefit of oral submissions together with outline written skeleton submissions from Mr Rudd, on behalf of the respondent. The claimant provided written submissions. Each party was provided with the opportunity to comment on the other's submissions. The submissions are not set out in detail but both parties can be assured that the Tribunal has considered all the points made even where no specific reference is made to them.

Conclusions

23. The Tribunal has considered the issues that have been identified and agreed as those to be determined and its conclusions in respect of those issues are set out as follows:

1. Automatic Unfair dismissal

What was the reason or principal reason for the Claimant's dismissal?

24. The claimant was dismissed following the Absence Review Meeting on 29 November 2019. The decision to dismiss was made by Sonia Stirling. The claimant had been absent from work since 2 November 2018. The Occupational Health report stated that the claimant continued to experience heightened anxiety and moderate levels of depression.

25. It was stated, in the letter of dismissal, that the claimant had been offered support but there continued to be no prospect of the claimant returning to work. The claimant had not wished to consider redeployment opportunities and she had stated that she did not feel able to return to work with colleagues in her department.

26. The Tribunal is satisfied that the claimant's long-term absence and no prospect of return to work was the reason for dismissal.

2. Ordinary unfair dismissal.

The Claimant relies upon the following, and only the following, matters which she said was unfair on which the Tribunal will need to determine:

2.1. Did the Respondent fail to consider adequately or at all when deciding to dismiss the Claimant that her ill-health was, the Claimant contended, work-related?

2.2. Was it unfair that the Claimant's line manager Amanda Tingle was involved in the Claimant's sickness management when she was a subject of the Claimant's grievance over bullying and harassment and exam malpractice.

2.3. Do any of the above, if proven, render the dismissal unfair having regard to section 98(4) of the Employment Rights Act 1996?

27. The claimant's long-term ill health was as a result of the issues she had raised and that she felt unable to return to work with other employees against whom she had raised grievances. This was clear in the Occupational Health reports and the certificates provided by the claimant's GP. Sonia Stirling made it clear that she was fully aware of the reason for the claimant's absence. When this was raised in the appeal Denise Cheng Carter acknowledged that the respondent understood that the reason for the absences was due to work-related stress.

28. Sonia Stirling gave consideration to the final Occupational Health report dated 7 October 2019 in which it was indicated that the Occupational Health Nurse advisor would like to review the claimant again in 4 – 6 weeks. There was no prospect of the claimant returning to work. The Occupational Health report of 7 October 2019 stated that, if performance or attendance remained a concern in all reasonable adjustments and redeployment options had been explored, this should be addressed through the management and not the occupational health route. The claimant made it clear that she was not willing to return to work. In those circumstances, there was little point in obtaining a further Occupational Health report.

29. With regard to Amanda Tingle's involvement, she became the claimant's line manager after both the grievances and their appeals had been completed. Neither the claimant or her trade union representative objected to Amanda Tingle's involvement at any stage prior to the dismissal. Maxine Beckmann referred to concerns about HP participating in the selection panel for new roles but she raised no objections to the participation of Amanda Tingle until after her dismissal.

30. Amanda Tingle was the claimant's line manager – the grievances and appeals had been completed – the absence management was a separate issue. Amanda Tingle was unaware that the claimant suggested she was the subject of her bullying and harassment or exam malpractice grievances. There was little mention of

Amanda Tingle in those grievances and she said she had no difficulties with the claimant. It was reasonable for her to conduct the absence review meetings. Amanda Tingle made no recommendation with regard to dismissal. in all the circumstances, it was reasonable for Amanda Tingle to deal with the claimant's absence management

31. The claimant had been off work for over 12 months. She had been offered support with Cognitive Behavioural Therapy, mediation and redeployment. The claimant had indicated that she did not wish to consider redeployment or any support with regard to her medical issues.

32. The claimant was accompanied by her trade union representative at the absence review meeting with Amanda Tingle. No objection was made to Amanda Tingle dealing with the absence management and the Tribunal is satisfied that it was reasonable and appropriate for her to be involved as the claimant's line manager. Amanda Tingle was unaware of any allegations against her with regard to the claimant's grievances, both of those grievances had been concluded and appeals had taken place sometime before. There is a clear note of the claimant's trade union representative indicating to her that if she could not return to work in Functional Skills and didn't want redeployment the respondent would terminate the claimant's employment. The claimant was fully aware of the situation and it was reasonable for her to be invited to a formal absence review hearing to be heard before Sonia Stirling.

33. The Tribunal is satisfied that the dismissal was within the band of reasonable responses available to the respondent.

3 Protected disclosure detriment

34. The Tribunal has considered the limitation issues. The claim was presented to the Tribunal on 4 June 2020. The notification to ACAS was on 27 February 2020 and the date of issue of the Early Conciliation certificate was 19 March 2020.

35. In the notes of the Preliminary Hearing Employment Judge Smith recorded as follows:

> *"*It was not clear to me when I reviewed the papers whether the Claimant was also pursuing a complaint of ordinary unfair dismissal. She is, albeit on the quite limited grounds, which I have recorded in the issues appended to this order.
>
> She also contended she was subject to a detriment in respect of her protected disclosure. Initially the Claimant contended the detriment was the dismissal. I explained to the Claimant that could not be a detriment and was already encapsulated by her claim of automatic unfair dismissal. By reference to the claim form the Claimant was able to identify what she said were detriments. In essence the Claimant contended that the investigation was either consciously or subconsciously badly carried out so her protected disclosure would not be

> upheld and that in turn was a detriment to her because it implied that she was a person who lacked honesty and integrity. Given what the Claimant said as regards the detriment, which had not been clear to the Respondent, I granted the Respondent leave to amend, if appropriate, its response."

36. In those circumstances, it has been found that the claim to the Tribunal included the claim of detriment on grounds of making a protected disclosure. The detriment being the allegations of a threat made by Ms Gray on 3 May 2019 and with regard to the investigation.

37. The investigation report was provided to City and Guilds on 19 June 2019 and acknowledged by City and Guilds on 22 July 2019. The claimant's grievance in respect of exam malpractice and appeal was concluded on 20 June 2019.

39. The claimant said that the respondent had not pleaded the limitation point. However, if a Tribunal finds that a claim has been issued outside the time limit it has no jurisdiction to hear the claim.

40 The claimant's claims of detriment were substantially out of time. The allegations are with regard to the investigation which concluded on 21 May 2019 when the claimant was given the outcome. The appeal outcome letter was provided on 1 July 2019. The claims of detriment were at least eight months out of time.

41. The claimant was represented by her trade union. She was also a trade union representative herself for approximately 12 months. She had a law degree and was a qualified solicitor but she said she was not an employment law expert. It was reasonably practicable for proceedings to be brought within the three months' time limit. In an email dated 2 April 2019 the claimant had made allegations of detriment and referred to detriment on grounds of her race and trade union membership. The claimant referred to her health but there was no medical evidence that she was medically incapable of bringing a claim.

42. Time limits are not procedural niceties which can be waived. These time limits are mandatory. It is stated in the legislation that the Tribunal shall not consider a complaint if it is presented outside the time limits. This is a question of fact.

43. A claimant's complete ignorance of her right to bring a claim may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. In Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53 Lord Scarman commented that where a claimant pleads ignorance as to his or her rights the Tribunal must ask further questions:

> "What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?

44. The time limit in question is the same as the time limit for unfair dismissal. Where the claimant is generally aware of his or her rights, ignorance of the time limit will rarely be acceptable as a reason for delay. This is because the claimant who was aware of his or her rights will generally be taken to have been put on enquiry as to the time limit. In Trevelyans (Birmingham) Limited v Norton 1991 ICR 488 the EAT held that where a claimant knows of his or her right to complain (of unfair dismissal), he or she is under an obligation to seek information and advice about how to enforce that right. Failure do so would usually lead the Tribunal to reject the claim.

45. The claimant had the benefit of Trade Union representation at the time of the alleged detriment. She knew, or should have known, of her right to bring a claim of detriment. She had a law degree and had been a Trade Union representative herself. The claimant is an intelligent woman and there is no evidence to show that she was unable to make enquiries with regard to the appropriate time limits.

46. It was reasonably practicable for the claimant to present a claim for detriment within the three-month time limit. In those circumstances, the claimant claims of detriment are out of time and the Tribunal has no jurisdiction to hear them.

47. Even though the Tribunal has concluded that it has no jurisdiction to hear the detriment claims it has gone on to consider what its findings would have been if it had jurisdiction.

48. The respondent accepted that the claimant's grievance relating to an allegation of exam malpractice was a protected disclosure.

Was the Claimant subjected to the following action or inaction namely:

3.1. Threatened by the investigating officer, Ms Gray on or about 03 May 2019 that if she approached colleagues to obtain witness statements to support her contention of exam malpractice she would be subject to disciplinary action.

49. Julia Gray wrote to the claimant on 3 May 2019. She referred to the meeting when it had been made clear that the matters raised were confidential. The claimant had contacted more than one member of the college staff and divulged the nature of the investigation. She was told that this was in breach of the stipulation at the start of the meeting and the grievance policy itself. The email said that it was an instruction to cease contact with colleagues with the express purpose of disclosing the investigation into alleged malpractice and that further breaches would result in disciplinary action.

50. This resulted from the claimant having sent emails to other members of staff which referred to investigations of exam malpractice. In one email dated 2 May 2019 the claimant had stated:

> "I remember you read for DH and told me how poor he was. Well, a few weeks later he passed. You and I know that he was not capable of passing on his own.
>
> I wondered if you would be prepared to talk to Julia Gray about the time you read for him. I didn't want to give your name to her without checking with you first."

51. The Tribunal is satisfied that it was reasonable for Julia Gray to write to the claimant instructing her to cease contact with colleagues. The email from the claimant to the colleague was a breach of confidentiality and a leading question to a potential witness. The email from Julia Gray was an instruction not a threat and a reasonable and appropriate action for an investigator to take.

3.2.Did Ms Gray fail to interview the following support workers identified by the Claimant namely Ms SH and Ms JD.

52. Julia Gray carried out a thorough investigation. She interviewed learners identified by the claimant. She could not interview all of them as some had left the respondent and could not be contacted. She received contact from Ms JD. Ms JD was a support worker and the information she could provide was not relevant to the intellectual capacity of the named learners but rather the support that learners required to access education. Julia Gray said that she also had contact with Ms SH**.** She had not retained the email exchange and had been unable to find it. Julia Gray was a clear and credible witness. She said that she could not remember why she didn't take matters further with Ms SH. However, she said that Ms SH could not tell her anything of relevance to the investigation. The Tribunal is satisfied that the investigation was reasonable.

53. The Tribunal is satisfied that Julia Gray was of the view that the support workers would not provide any information relevant to the investigation. This was a reasonable view and the Tribunal is satisfied that there was a thorough investigation and that Julia Gray spoke with the teaching staff and the learners she could contact. There was no evidence that the two named support workers could provide relevant evidence.

3.3.Did Ms Gray fail to have regard to the learner records identified to her by the Claimant as relevant to her protected disclosure namely records for Mr NB, Mr B, Ms AC and Mr DH.

54. Julia Gray did consider the learner records. She produced a spreadsheet in respect of the learners identified by the claimant. A substantial amount of time was spent going through the records of individual learners during this hearing. There was evidence shown of incremental improvements in the learners' progress. The records were considered and the conclusion reached in the investigation was that there was

no exam manipulation. The investigation was reviewed by City and Guilds. The Manager, Investigations and Compliance stated that:

> "I have now had the opportunity to review all of the available evidence and I am satisfied that the investigation report provides clear and comprehensive findings into these allegations and has fully addressed each aspect of the allegations raised to you."

There was a reminder provided that permission for undertaking examinations at a learner's home address should be recorded in writing.

3.4. Was the investigation conducted by Ms Gray and Mr Rees manipulated whether consciously or subconsciously so as not to support the Claimant's protected disclosure?

55. The claimant was unhappy with the outcome but was it a thorough investigation which dealt with the claimant's concerns in detail.

56. During the cross examination of John Rees the claimant raised issues with regard to how the investigation had been arranged and carried out and the connection between the respondent and City and Guilds. The Tribunal had sight of the City and Guilds' Managing cases of suspected malpractice in examinations and assessments policy.

3.5 In relation to the second, third and fourth point, the Claimant says the detriment she suffered was that, by failing to investigate properly, she was perceived to be a person who lacked honesty and integrity.

57. The City and Guilds' Managing Cases of Suspected Malpractice in Examinations and Assessments policy provides:

> "4.1.1.
>
> Once notification of malpractice has been received, City & Guilds will determine whether it is appropriate for the Head of Centre to undertake the investigation into the allegation/incident or whether the Investigation & Compliance Team will undertake the investigation.
>
> Centres must not undertake internal investigations into suspected malpractice without first notifying City & Guids Investigation & Compliance Team."

58. City & Guilds had indicated that it was their preference for John Rees, as principal of the college to carry out an investigation and provide a report. It provided that if it was necessary to delegate the investigation to another member of staff, that person:

> "…should not only be at an appropriate level of authority, but must also be independent and not connected with the section, team, members of staff named in the allegations "

59. John Rees discussed this with Jonathan Hambling, Head of HR and Organisational Development, and determined that Julia Gray would be the most appropriate person to undertake the investigation. She was the Assistant Principal for Quality and met the criteria for independence and had the appropriate experience and qualification.

60. The Tribunal is satisfied that there was a thorough and reasonable investigation. It was not manipulated either consciously or subconsciously so as not to support the claimant's grievance. The claimant was concerned about the reference to her having been under performance management. The respondent's Performance Management Policy states that many issues of performance can be, and should be, resolved without recourse the formal employee performance procedure.

61. The claimant's teaching had been subject to an intervention. It was reasonable for this to be considered as informal performance management. Julia Gray had informed City and Guilds that the claimant was under performance management. She was not subject to formal performance management but the Tribunal is satisfied that the reference to the claimant being under performance management was not a detriment to the claimant.

62. The reference to performance management does not necessarily impugn the claimant's honesty and integrity. The Tribunal is satisfied that there was no evidence that the claimant's honesty and integrity was in doubt.

3.6. Do any of the above points, if proven, amount to a detriment?

3.7. If so, was the Claimant subjected to a detriment on the ground of her protected disclosure?

63. With regard to issues 3.6 and 3.7, the Tribunal is satisfied that the claimant was not subjected to a detriment on grounds of her protected disclosure. The claimant had raised genuine concerns about exam manipulation. However, all her concerns were reasonably investigated and it was found that there was no exam manipulation. Julia Gray interviewed a large number of teaching staff and learners and considered the records appropriately. The findings of the

investigation were reviewed by City and Guilds and found to provide clear and comprehensive findings into all the allegations.

64. The Tribunal has sympathy with the claimant. She raised a protected disclosure. She had genuine concerns about serious matters which were in the public interest. As a result of raising these concerns she has suffered from work-related stress and was unable to return to work with the colleagues against whom she had made allegations. The dismissal on grounds of capability by reason of long term absence was not unfair. The investigation was detailed and reasonable and the claimant was subject to no detriment by the respondent. It is unfortunate that the claimant has lost her employment. However, in the circumstances, her claims against the respondent for unfair dismissal, automatic unfair dismissal and detriment on grounds of making a protected disclosure are dismissed.

Employment Judge Shepherd

Date: 20 January 2021.