THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Ms J Forecast**
Ms H Edwards

BETWEEN:

MR V AWOSANMI

Claimant

AND

HADLOW COLLEGE (1)
PAUL HANNON (2)
MARK LUMSON-TAYLOR (3)
JANE SALZER (4)
JESSICA BERRY (5)
NICOLA CADGE (6)

Respondents

ON: **1-11 October 2018**
12 October & 19 November 2018 (In Chambers)

Appearances:

For the Claimant: In Person
For the Respondents: Mr Gregory Burke, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The disability discrimination claim is struck out for want of jurisdiction as the claimant did not meet the definition of a disabled person pursuant to section 6 of the Equality Act 2010 at the relevant time.

2. The claim of harassment is dismissed upon withdrawal.

3. All claims against all respondents fail and are dismissed.

REASONS

1. By claim forms presented on 13 February 2017 and 24 May 2017, the claimant claimed disability discrimination; automatic unfair dismissal (whistleblowing); race discrimination and victimisation. A claim of harassment was withdrawn at the hearing. All claims are resisted by the respondents.

2. The claimant gave evidence on his own account. On behalf of the first respondent (hereinafter referred to as the respondent) we heard from Zoe Smith (ZS), STEM Lead; Eleanor Dacey (ED) Group Head of HR; and the individual respondents (save for Paul Hannon), who also gave evidence on their own behalf.

3. The parties presented a joint bundle of documents comprising 5 lever arch folders running to 2073 pages. The claimant also presented his own additional lever arch bundle, a further 654 pages. References in square brackets in the judgment are to pages within the joint bundle unless prefixed with a “C”, in which case they refer to the claimant’s additional bundle.

4. For reasons of confidentiality, where an individual is referred to in the judgment who was not a party or witness in the proceedings, I have referred to them by initials only, without first naming them. There was a cast list provided at the hearing so the parties will know who they are.

Preliminary Issue

5. The claimant contends that he has depression and anxiety and relies on these as a qualifying mental impairment for the purposes of his disability discrimination complaint. The respondent does not accept that the claimant was disabled at the relevant time - . the period of his employment (11/5/15 -12/1/17).

6. In order to pursue his disability discrimination complaint, the claimant must qualify as a disabled person for the purposes of section 6 of the Equality Act 2010 (EqA).

7. Section 6 provides that a person has a disability if they have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities. The burden is on the claimant to prove that he meets the section 6 criteria.

8. In considering this matter, we have taken into account the joint medical expert’s report and other documents we were taken to; the claimant’s impact statement and oral evidence and the parties’ submissions. We have also had regard to the EqA guidance on matters to be taken into account in determining questions relating to the definition of disability.

9. The parties jointly instructed Dr Salter to prepare a report in respect of the disability claim. Dr Salter is a Consultant in Adult General Psychiatry and expert in the diagnosis and treatment of psychiatric disorder. The claimant told us that he does not agree with key aspects of the report and the tribunal has seen his annotations to the report, Dr

Salter's reply to them and the further questions posed by the respondent. The idea behind an expert is to have an independent specialist in the relevant field provide the tribunal with opinion evidence on matters that are outside its area of expertise. Dr Salter says in his report that his opinions are not solely reliant upon either the objective medical records or the claimant's verbal contribution at interview but also on the inferences he drew from the content of both the subjective and objective accounts, informed by his 32 years' as a psychiatrist. [486]. The claimant fed back his comments to the doctor with suggestions for amendments to the report. The doctor considered these but determined that none of the comments or suggested amendments obliged him to reconsider any of the conclusions or diagnosis set out in his report. [506A].

10. The only additional medical evidence produced by the claimant was a letter from his NHS CBT Therapist dated 28.7.16 plus an outcome graph which he says charts the course of his depression over periods of monitoring. We had no evidence of the CBT Therapist's clinical qualifications but we note that Dr Salter considered this material and took it into account in his report. [460-461, paras 97-98].

11. To the extent that there is a conflict between the claimant's evidence and the expert's, we prefer the evidence of the expert.

12. Dealing with each element of the definition of disability in turn:

    Did the claimant have a physical or mental impairment

    a. The claimant relies on depression and anxiety. Dr Salter does not believe the claimant suffers from depression. He describes the claimant's impairment as "*episodic generalised anxiety disorder*" and opines that the GP's diagnosis of depression in 2014 was inaccurate. [483]. In response to written questions from the respondent, Dr Salter explains that there is an overlap between symptoms of anxiety disorder and depressive disorder and suggests that this is the reason for the GP's mis-diagnosis. In terms of the conflict between the GP's diagnosis and Dr Salter's, we prefer Dr Salter's as he is the expert in the field and we have no evidence of the GP's clinical skill set. We therefore accept that at the relevant time, the claimant was suffering from episodic generalised anxiety disorder. This is recognised internationally as a behavioural and mental disorder within ICD-10 classification and therefore amounts to a mental impairment.

    Was it long term

    b. To qualify as long term, the impairment must have lasted for 12 months, be likely to last for at least 12 months or be likely to last for the rest of a person's life (para 2(1), sch 1 EqA). We are satisfied that the impairment was long term as it is clear from the expert's report that there were recurring episodes of sustained anxiety going back to December 2012, at least. [506B]

    Did it have a substantial adverse effect on normal day to day activities

    c. In his report, Dr Salter says that the claimant's difficulties have not led to a substantial impairment of his ability to carry out normal day to day activities, except in the workplace setting. He says that away from the workplace setting and free from reminders of his difficulties, the is claimant is likely to return to a

low grade, anxious state that occupies the grey area between mild anxiety and normal mental health. [466] Although the claimant disagrees with this now, we note that this is not one of the paragraphs in the report annotated by him at the time.

d. In reply to the respondent's further questions, with the caveat that the Lecturing workplace was beyond his area of expertise, Dr Salter suggested that the type of normal day to day activities which would have been substantial impaired in the workplace would relate to the specific and specialist role of lecturer, including routine daily communication with colleagues about the specialised technical and educational aspects of the role.

e. The EqA guidance says that where activities are themselves highly specialised or involve highly specialised levels of attainment, they would not be regarded as normal day-to-day activities for most people. The claimant accepts that lecturing is a specialised role and that the duties and responsibilities are not normal day to day activities but contends that his interactions with his colleagues are. We consider that the two are intertwined as the claimant's interactions with colleagues were in the most part in the context of the specialised role of lecturer. This is supported by Dr Salter's report where, at paragraph 107 and 108, he refers to the claimant's "*episodic anxious inability to cope and an increased pre-occupation with harassment and persecution in the workplace in 3 consecutive teaching posts*". This suggests that it is the teaching environment that is the issue and away from it, normal day to day activities are not substantially affected.

f. We have considered the claimant's impact statement. At paragraph 9.2 he sets out the effects of his impairment on normal day to day activities. The alleged effect between January and February 2016 of devastation and inability to do anything for 2 months apart from attending CBT contradicts what is said in his GP notes of 12 January 2016 which describe him as sounding "*more animated today and laughing on the phone*" …"*feels this week mood is improving mainly due to being off work which is very stressful*.." The notes go on to say that although the claimant's sleep is still poor, his appetite is better and he feels more hopeful. [501]

g. In his impact statement, the claimant says that his memory is affected by stress and insomnia but the examples that he gives of memory lapses are in our view trivial and well within the normal range of differences between people. Some of the examples were: *forgetting to pay a parking charge*, *missing a medical appointment*, *not remembering his daughter's daily rota on her volunteering job*. [255] Also, we note from the expert's report that the claimant performed perfectly on a short-term memory test when he did not realise that he was being tested [453 para 17]. The claimant also refers in his statement to hallucinations and nightmares but there is no contemporaneous record of this and it is not referred to in the expert's report. We have therefore treated the impact statement with some caution.

13. Taking all the above matters into account, we find that the claimant's mental impairment did not have a substantial adverse effect on his ability to carry out normal day to day activities.

14. Our judgment therefore is that the claimant does not meet the definition of a disabled person under the EqA. We therefore have no jurisdiction to deal with his disability discrimination claims and they are accordingly dismissed.

The Issues

15. The issues in respect of the outstanding claims are set out in an agreed list of issues document (as amended) and are referred to more specifically in our conclusions below.

The Law

Direct discrimination

16. Section 13 EqA provides that a person (A) discriminates against another (B) if because of a protected characteristic, A treats B less favourably than A treats or would treat others.

17. Section 23 provides that on a comparison of cases for the purposes section 13, there must be no material difference between the circumstances relating to each case.

18. "The relevant circumstances" for the purposes of the statutory comparisons are those which the Respondent took into account when deciding to treat the claimant as it did. If the relevant circumstances are to be "the same or not materially different" all the characteristics of the claimant which are relevant to the way his case was dealt with must be found also in the comparator. They do not have to be precisely the same but they must not be materially different. MacDonald v Advocate General for Scotland and TSB Governing Body of Mayfield Secondary School [2003] IRLR 512 House of Lords.

19. Section 136 provides that if there are facts from which the court could decide, in the absence of any other explanations that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

20. The leading authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258 That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved the burden passes to the respondent to prove that it did not discriminate.

21. In the case of Madarassy v Nomura International PLC [2007] IRLR 246 it was held that the burden does not shift to the respondent simply on the claimant establishing a difference in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination."

Victimisation

22. Section 27 EqA provides that 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. The protected acts in question are listed at section 27(2)

23. In determining whether treatment is by reason that the person has done a protected act, the relevant question is to ask why the alleged victimiser acted as they did. In other words, what consciously or unconsciously was their reason. Chief Constable of West Yorkshire v Khan [2001] IRLR 830.

Automatic Unfair Dismissal

24. Section 103A Employment Rights Act 1996 (ERA) provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason is that they made a protected disclosure.

25. Section 43A ERA, define a "protected disclosure" as: "[…] a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

26. Section 43B provides that 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 matters listed in sub-sections (a)-(f).

Findings of Fact

27. The tribunal has limited its findings only to those matters that are relevant to the remaining issues in the case. There are therefore matters within the claimant's 97- page statement and corresponding references in the respondents' statements that have not been referred to in the judgment.

28. The respondent is a specialist land based further education college with 9 sites, including a main campus in Hadlow, Kent.

29. The claimant was employed by the respondent as a Lecturer in Animal Management based at the Mottingham site, South East London. He was initially engaged on a temporary contract through an agency, then as an employee from 11 May 2015 until his dismissal on 12 January 2017.

30. At the start of his employment, the claimant was managed by AD, Team Leader, Animal Management. Following a restructure, the claimant's line management transferred to NC, Centre Manager for the Mottingham site. The claimant and NC had previously worked together at another college and it was the claimant's case that there had been issues between them at the previous college though NC told us that she had been unaware of any personal issues between them.

31. Shortly after his appointment, the claimant was given the role of level 2 Course Manager by Zoe Smith (ZS) Head of Faculty. This was an add-on to his lecturer role and did not involve an increase in pay or status. ZS told us that changes in Course Managers were made on a regular basis depending on need and that it was unusual for a lecturer to be given a Course Manager role straight away on joining. However, the claimant was upset about not having the role, which he said had been discussed at interview, and there was a need for a level 2 Course Manager at the site. As the claimant had taught at level 2 as an agency worker and was known to the students, ZS decided to give him the role. As the number of Course Manager roles were limited, that meant taking the role from another lecturer, KS and giving it to the claimant. Even though the claimant had coveted the role, he put to ZS in cross examination that the reason she had given him KS' role was to set them up against each other to cause conflict so that they would mutually destroy each other, which ZS denied. This was one of many elaborate plots that the claimant accused the respondents of.

32. In Summer 2015, NC was appointed to the role of Outcentre Manager and part of her job specification was that she would have course management responsibilities. As a result, ZS decided to transfer the role from the claimant to ZS. [571]

33. The claimant was notified of the change on 20 July 2015 by AT, Deputy Head of Faculty. The claimant was unhappy with the decision and on the same day sent an email to HS, HR Officer, to complain about it. Although the claimant does not expressly allege discrimination in the email, he gives a strong hint by referring to his dignity at work, human rights, equality, diversity and inclusion and then goes on to say "…*I have full confidence that the College has Zero tolerance for favouritism and discrimination*". [577] This correspondence is relied on by the claimant, and accepted by the respondent, as a protected act for the purposes of his victimisation complaints.

34. On 23 July 15' the claimant met with AT and ZS to discuss his email. The respondent summarised the meeting in an email dated 24 July from ZS to Eleanor Dacey (ED) HR Manager. According to the email, the reasons for the change in Course Manager were explained and the claimant was asked what he meant regarding discrimination. In response he referred to issues with KS and WG, a fellow lecturer, and the site not being as professional as the Canterbury site but he did not expand any further. [588]. The claimant claimed that this was not an accurate representation of the meeting.

35. This was one of many meetings that the claimant would secretly record. His approach was to leave a hidden recording device (usually his phone) to record private conversations that he was not part of, including conversations between students, some of whom were under the age of 18. The claimant has provided transcripts of some of his recordings. These are not agreed by the respondent in material respects and they have therefore provided their own transcripts, as well as a table of material difference between the respective recordings [2035-2048]. We did not listen to the actual recordings, except in one instance. For reasons that we will refer to later in relation to the recording that we did listen to, we have treated the claimant's transcripts with some caution. On that basis, we accept the summary of the meeting of the 23 July as set out in the email of the 24 July, referred to above.

36. The claimant's continued employment was subject to satisfactory completion of a probationary period of no less than 6 months. His performance was to be reviewed with

his line manager and the probationary period could be extended where appropriate. [546]

37. The respondent's guidelines for managing new staff deal with the probationary period. They provide that at the end of the 6-month probationary period, there should be an end of probationary period report prepared by the line manager after discussing the various criteria on the form checklist with the employee [1741]. To pass the probation, the employee must score above average for most items on the checklist and must have had a lesson observation [1742].

38. The claimant's probation review was due on 11 November 2015 but did not take place firstly, because AD had been unable to support him fully due to constraints on teaching cover and secondly, because the claimant had missed his lesson observation; the first time because the observer was ill and the second time because the claimant was off sick.

39. On 27 November 2015, a probation review meeting took place between the claimant and AD and the claimant was informed that his probation would be extended. [711-712] On the probationary report form under the heading "Relationship with Colleagues" the claimant received a "poor" rating. The claimant had a difficult relationship with KS who on 17 October 15' raised a grievance against him alleging harassment and victimisation. Although the grievance was not upheld, the respondent identified issues concerning the claimant's communication with KS and with others. This is illustrated by an email exchange between AD, NC and ZC where concern is expressed about the claimant's attitude not just to KS but also other staff members and students in Mottingham [687]. It is not necessary for us to refer to them all, but examples are the inappropriate tone of the claimant's emails to colleagues, which were often confrontational and accusatory. [606-607, 644, 721], refusal to carry out management instructions [701, 715-716], rudeness towards the duty warden [769-770], chucking an assignment on a desk at which colleagues were sat [695].

40. The claimant's approach to cross examination was to obfuscate and challenge everything, and to portray the respondents in as bad a light as possible. His recurring refrain was that the respondent and its witnesses were liars, that they were all involved in a conspiracy against him and that their documents were forged. For example, he claimed that the reasons put forward by the respondent for not signing off his probation were false and that the decision not to sign off his probation was orchestrated by a number of managers with JB and JS, being the main protagonists. In support of this, he refers to the fact that ZS sent an email the day before asking that concerns about him be documented [710]. We heard from ZS on this point and are satisfied that the request was in the context of concerns that had already been made known to the claimant not having been properly documented. In our view, relying on documentary evidence rather than oral reports alone was an entirely sensible approach for the respondent to take and we do not share the claimant's view that there was something sinister behind this.

41. It is also clear from the documents we have seen and from the evidence we have heard from the respondents, which we accept, that concerns were raised about the claimant's behaviour towards colleagues and that the claimant was aware of these. Therefore, for him to dismiss the suggestion of such concerns as lies and conspiracies is to his discredit.

42. On several occasions, we had cause to question the claimant's evidence because of inconsistencies with his own previous statements or with other contemporaneous documents. For example, when it was put to him that in November 2015, a student had written complaining that in a tutorial about cyber bullying, he had commented that rape was a 2-way thing and that girls should not be wearing short skirts, he denied making the remark. However, in the bundle is the claimant's written response to the complaint given at the time and in it he admits making the remark. [692]. When the tribunal asked him to explain why he was now saying something different on oath, he apologised, stating that it happened in 2015 and he could not remember. We considered that explanation disingenuous. This and other inconsistencies caused us to prefer the respondents' evidence in many instances.

43. On 9 December 2015, at a one to one meeting between the claimant and AD, AD asked the claimant to undertake a stress risk assessment. This was against the background of concerns about his health. On that occasion, the claimant said that he would be wary of doing a risk assessment and would want to take expert advice before doing so. [814] On 23 December 2015, AD sent the claimant a stress risk assessment form to complete, which the claimant filled in and returned on 5 January 16' [826, 848]. The claimant went off sick the next day (6/1) with work related stress and did not return to work until 22 February 2016. [927]. The claimant was absent again, for 2 days on 22 and 23 April. [1005, 1013]. The stress risk assessment took place on 27 April 2016 and as part of it, an action plan was agreed, with a review date of 6 September 16'. [1025]. The claimant alleges that the delays in carrying out the stress risk assessment amount to victimisation.

44. On 4 July 2016, the Claimant raised a grievance against JB making various allegations, specifically about the failure to appoint him permanently to his role. He alleged that this was racism based on him being black British [1197-1199]. He relies on this grievance as one of his protected acts.

45. A second probationary review took place on 8 July 2016 [1207]. By this time, further issues concerning the claimant's relationship with colleagues and staff had arisen and there were concerns about his general ability to teach and complete marking and administration to the required level. In addition, the claimant level of sickness absence was high – By the date of the review he'd had 48 days off sick since his appointment. These concerns are set out in an email from JB to JS dated 8 June 2016. [1096] and were discussed with the claimant at the probation review meeting where he was advised that his probationary period was being extended and he was to be put on a performance improvement plan. [1212-1215]. The claimant relies on this decision as an act of victimisation.

46. Promonitor is an electronic system which contains a record of students throughout the year. Staff have access to it and can post comments about particular students, including confidential comments. Students have access to a lesser extent. In November 2015, the claimant complained that he was not being notified of comments that related to his own students. In response, NC told him that it had been agreed by the team that staff would only be notified of Promonitor comments if there was an action point required from them. That point had been recorded in the Outcentre Managers meeting minutes of 5.11.15 and an extract from those minutes was included in NC's response to the

claimant. Notwithstanding, NC told the claimant that in future, she would copy him into any comments that arose concerning him or his lessons [744-745]. We accept NCs evidence. It was not challenged by the claimant and it is supported by contemporaneous documents. This is one of the allegations of victimisation.

47. On 22 September 2016, the respondent wrote to the claimant inviting him to an end of probation meeting on 29 September, the stated purpose of which was to discuss his unsatisfactory performance. The letter advised that the outcome could be dismissal [1424].

48. The following day, (23/9/16) the claimant lodged a grievance against JB, NC and JS alleging discrimination and harassment [1425-1433]. As a result, the final probation review meeting was postponed, eventually taking place on 12 January 2017. [1601-1605]. The claimant did not pass his probation and the decision was taken to dismiss him. This was confirmed in writing by a letter dated 17 January 2017 [1608].

Submissions

49. The respondent presented written submissions supplemented by oral ones. The claimant presented oral submissions. The tribunal adjourned early so that the parties could prepare their submissions overnight with the instruction to the claimant that the submissions should focus on the issues in the case. As the claimant was in person, he was given 45 minutes for his submissions as against 30 minutes for counsel. Despite my instruction, the claimant spent most of the time available on irrelevancies and on directing inflammatory personal comments at the respondents. There was therefore little of his submissions that we were able to take account of.

Conclusions

50. Having considered our findings, the law and the relevant submissions, we have reached the following conclusions on the agreed issues:

Victimisation

Protected acts

51. The claimant relies on his emails of 20.7.15 to HS [577], his grievance of 4.7.16 [1197] and his grievance of 23.9.16 [1425] as protected acts. The respondent accepts, and we agree, that these qualify as protected acts for the purposes of section 27(2) EqA.

Detriments

Delay in introducing risk assessments

52. This allegation is directed at JB and JS. The claimant alleges that they failed to ensure that his line manager, AD, did risk assessments on time and implemented and reviewed the action plan. He contends that there was unreasonable delay between 22 February 2016 and 27 April 2016 in carrying out the assessment and failure thereafter to implement the action plan or carry out the review. Our findings in relation to this issue are at paragraph 43 above. The total period in question is 9 weeks. It is unclear when within that period the claimant contends the assessment should have been done but the respondent's evidence was that during this time, the college closed for 3 weeks for the Easter break, AD was off sick for a week and the claimant was off sick for 2 days. Once

you deduct these periods, that effectively leaves 4½ weeks within which to carry out the assessment. That does not in our view suggest that there was an unreasonable delay

but even if we are wrong, there is no evidence at all that the delay was deliberate or in any way linked to the claimant's email of 20.7.15. The same applies to the implementation of the action plan.

Extension of probationary period

53. These allegations are directed at JS and NC. The background facts relating to the probationary period are at paragraphs 39 & 45 above. Dealing firstly with the allegation against JS that she failed to give the claimant notice of the probation review meeting on 27.11.15, her evidence to the tribunal was that she had no direct involvement in arranging the meeting and that this would have been the responsibility of the line manager, AD, who would only have contacted HR if support were needed. JS also said that she was unaware at the time that the claimant did not receive notice of the review. We accept her evidence.

54. The allegation against JB is said to relate to her emails stating that the claimant was not ready to pass his probationary period. This appears to be a reference to one email, that of 8 June 2016 setting out reasons why she was not happy to sign off his probation [1096]. This email was written before the claimant's grievance against JB so could not have been motivated by it. Also, we have seen the contemporaneous correspondence relating to many of the issues raised in the email. For example, negative feedback from students about the claimant [1010-1011], accusing WG of professional misconduct [1132]; throwing students work on the floor [1135]; photographing a colleague and her marking [1002]; refusing to follow NC instructions [1179].Taking all of this into account, we are satisfied that JB's concerns were not only genuinely held, they were objectively justified. Indeed, we would go further and say that the respondent would have been justified in terminating the claimant's employment at this point. That it did not do so but instead gave him a further opportunity to improve his performance was to his benefit rather than his detriment. We are satisfied that the Respondents' actions had nothing to do with his protected acts.

JS' failure to take into account AD's failure to organise mediation

55. This is a rather convoluted complaint because although directed at JS, the detriment is said to have been done by AD. At a 1:1 meeting between the claimant and AD, the claimant said that he was interested in taking part in mediation to repair his relationship with KS and the notes of the meeting indicate that AD was going to arrange this [684]. A mediation meeting was not arranged. JS evidence to the tribunal was that HR are not normally aware of 1:1 meetings and that she was not aware of this meeting at the time. We accept her evidence. We know not why the mediation was not arranged but we know from the evidence that KS had tendered her resignation a few days beforehand and left after serving her notice period. In those circumstances, it is difficult to see what detriment was caused to the claimant. In any event, we are not satisfied that the failure to arrange mediation was in any way linked to the protected acts.

Raising fictitious issues against the Claimant

56. This claim is made against NC and relates to 4 matters:

Allegation that a parent made a complaint against the Claimant out of time

On 5 July 2016, the respondent received a letter of the same date from a parent complaining about the standard of teaching in level 3 animal management. It details areas of concern and finishes off by complementing the efforts of other staff (not the Claimant) [1201-1203]. On 15 July 2016, the claimant sent an email to ED in which he refers to the parental complaint having been discussed at his 1:1 meeting with NC. [1267]. The allegation in the list of issues was that complaint was fictitious because it was out of time. He based this on ED's response to his email above informing him that the complaint could not be investigated because it was received late (presumably after the end of the teaching year). [1267] Even if that was the case, it is difficult to see how that makes the complaint fictitious. The allegation developed during the hearing when the claimant accused NC, without any evidence whatsoever, of instigating the student to get their parent to make the complaint. NC denied this and we reject the allegation completely.

That the Claimant was not attending lessons

57. On 27 November 2015, AS a Technical Instructor, emailed NC complaining that the claimant had left her to lead a class by herself. (We were told by the respondent that a Technical Instructor is not a lecturer and should not be left to run a class). AS claimed that when she went to look for the claimant, he used a strict tone to tell her not to come into the office to find him in the future and that she was not to question where he was completing his register [714]. The claimant did not deny leaving the lesson early at the time but said that AS was lying about his tone. The respondent refers to another occasion when the claimant left another technical instructor on her own. This was reported in an email from NC to JB [1134]. There was also a separate complaint that the claimant that had left his lesson 35 minutes early [1033] and on another occasion, had again left the class to the technical instructor to supervise. On 23 June 2016, KM, Technical Instructor, emailed NC informing her that the claimant was absent from the lesson and that he had not arranged any practical lessons for the students. NC told us that she located the claimant in the office and when she asked him why he was not in his lesson, he protested, saying that he had told KM that he would be absent for the whole lesson because he had too much marking to do. NC said that she reminded him that he must attend all his timetabled lessons and ordered him to return to his lesson, which he did under protest. NC also told us that at 11.25am on the same day, while a lesson was in progress, the claimant went to the office to ask for permission to sit at his desk and continue marking as his students had finished on the unit and that a colleague had taken over his class. NC said that she went to check and found that the said colleague had not taken over the students and that KM was in fact still working with the 8 students on the unit. It was therefore her belief that the claimant had lied to her [1136].

58. We accept NC's evidence on this. There is a contemporaneous email trail showing that these matters occurred and that they were raised with the claimant at the time. The claimant did not deny his absences from class at the time but instead sought to justify

himself. His reasons were not accepted by the respondent. Before us, the claimant asserted that the allegations were fictitious because the absences were from practicals rather than lessons. That was not a distinction recognised by the respondent and in our view was an attempt at obfuscation by the claimant.

Writing reports about the Claimant concerning student issues on Promonitor without consulting him or copy him in.

This issue is dealt with at paragraph 46 above. We are satisfied that the reason for not initially copying the claimant into comments was because of the agreement reached at the Outcentre Managers' meeting, which applied to all teachers, not just the claimant. We are also satisfied that this had nothing to do with the claimant's grievance of 20.7.15, which was the only protected act that had been carried out at the time. There is also no evidence that NC did not keep her promise to notify the claimant of future student comments after the other protected acts had been done.

The allegations of victimisation relating to these matters is not made out.

Having Protected Meetings

59. This is a reference to protected conversations, within the meaning of section 111A ERA. There are 3 elements to this complaint. The first is directed at JS who is alleged to have alerted the claimant to problems very late. The claimant was not specific in his evidence about the problems he was referring to. The first protected conversation is first referred to in an email from ED dated 27 June 2016, where she informs the claimant that JS would like to have a conversation with him about his sickness absence. [1143]. At that point, the claimant had had 48 days sickness absence in the academic year to date [1819]. The meeting took place on 28 June 2016. The only protected act in existence at the time was the email to HS on 20.7.15.

60. The second complaint is against JB for not following procedure regarding the claimant's complaints against WG, AS and KM. It was not clear what procedure the claimant was referring to but if he is referring to the grievance or disciplinary procedure, protected conversations are designed as an alternative to going through such procedures.

61. The third complaint is against NC for complaining about the claimant failing to internally review an assignment. NC explained the college's verification process. The first aspect is that all assignment briefs are internally verified to ensure that they meet the requirements of the qualification provider (City & Guilds) and to ensure that they are of a certain academic standard. The second part is verification of the marked assignments. NC was the lead verifier and the second verifier would be an experienced lecturer. Although we had no evidence of any formal complaint, NC told us that she reported to JB that the claimant had refused her request to amend certain sections of an assignment brief and had shouted at her in the presence of other staff in the office. The claimant told us that this was a lie but it is clear from paragraph 320 of his witness statement that he did object to the request and that there was an argument about it. There is also evidence that the claimant eventually carried out the requested amendments but only with NC's assistance, which he subsequently thanked her for [1334]. We accept NC's evidence on this.

62. Protected conversations are by their nature confidential so we have not interrogated the detail of the what was discussed or how these 3 matters relate to those discussions. However, we are not convinced that the mere holding of a protected conversation is a detriment and agree with counsel's submission that they are a preferential alternative to outright dismissal. Protected conversations are entirely voluntary and the claimant had trade union representation. If attending the meeting was viewed as detrimental, his union could have advised him against it.

63. We are not satisfied that having a protected conversation is a detriment so the victimisation allegation is not made out.

    <u>The Claimant's efforts to secure employment were sabotaged by the college and its agents</u>

64. The Claimant relies on two matters, the first is a post on JB's Linked-in page, which the claimant says is about him. The screenshot of the Linked-in page was a document provided by the claimant and because of the way it had been enlarged and copied, some of the letters from words in the margins are missing. [1688]. The screenshot is reproduced below as it appears in the bundle:

    SHARKS COMPLAIN ABOUT MONDA
    NO
    EY'RE UP EARLY, BITING STU
    HASING SHIT, BEING SCARY
    MINDING EVERYONE THEY'RE
    FUCKING SHARK

65. JB says that it was not about the claimant and was posted by her partner as a joke. When it was put to the claimant in cross examination that the message had nothing to do with him, he disagreed. He first of all claimed that it referenced statements made by JB at his final probation meeting on 12 January 2017. He claimed that on that occasion JB had said he was like an elephant in the house. This then changed to a bull in a china shop. However, neither expression appears in the online post. There is also no mention of anything that refers to the claimant or college, either expressly or implicitly. There would have been no expectation by JB that a prospective employer of the claimant would be looking at her Linked-in account to glean information about him. For the claimant to suggest that the post was aimed at sabotaging his employment prospects is fanciful.

66. The second complaint under this heading is an allegation that JS provided an inaccurate reference to a prospective employer. JS told the tribunal that the respondent's policy on references is to only confirm the job title, dates of employment and whether there were any safeguarding issues. We accept her evidence as we take judicial note of the fact that many employers, particularly those in the public sector, adopt such a policy. We have seen the references prepared in respect of the claimant and are satisfied that they are consistent with the respondent's stated policy and that there is nothing inaccurate about them [1706 & 1707]. In his witness statement, the claimant puts the allegation slightly differently than in the agreed list of issues (another example of him moving the goalposts) where he claims that somebody (unidentified) gave more than the basic

reference and this is the reason for job offers being withdrawn. However, there was no evidence before us to support such a conclusion and we reject the allegation.

67. We find that all the claimant's allegations of victimisation are not made out.

Direct Race Discrimination

68. The claimant alleges that his white British colleagues were not subjected to the same rigour in relation to probationary periods and appraisals as him. The Claimant did not particularise this allegation in the list of issues despite 3 preliminary hearings and a 97-page witness statement. The complaint was therefore formulated while the claimant was on the stand and only then, after much prompting from the panel and after much prevaricating and obfuscation on his part. The basis of this allegation kept shifting, first the complaint was that he had a short probationary period compared to others, then it was that the period was too long. Where we got to in the end was that the complaint was one of direct discrimination, the less favourable treatment being that the claimant was subjected to more probationary reviews than his non-black colleagues who worked longer periods on probation before being reviewed. He complains that he was subjected to 3 probationary reviews within 14 months. This allegation is directed at JS though she told us that she was not involved in the decisions either to carry out the probation reviews or to extend the probationary periods. The decision in relation to the first and second review were taken by ZS [1506] and JB told us that she took the decision to have a final review.

69. The fact of a probationary review is not in our view detrimental treatment as it is something that the claimant would have expected to happen as part of the process for becoming a permanent employee. The detriment from his point of view is the number of times it happened. The complaint is, in effect, that the reviews did not lead to a permanent contract.

70. The claimant did not name any comparators in the list of issues but did so in evidence. They were SM, NC, MM and AW. Their circumstances, as far as we were able to determine from the documentation provided were as follows:

71. SM commenced as a Lecturer on 11.8.14 and had a probation review on 17.7.15, which did not result in her being made permanent [821]. She was on probation for 16 months before being confirmed in post on 22 December 2015 [2073].

72. MM commenced employment on 6.9.10 and was confirmed in post on 11.7.11 [2073]. She was not in the same job as the claimant as she was employed as a Technical Instructor. We have no evidence at all about her probationary reviews. All we have is an appraisal on 21 October 2013, after she was made permanent. [817]

73. The claimant contended that NC did not have a probationary review for over 2 years. He based this on a document in the bundle in which there is a reference to a probationary review for NC on 20 November 15'. [818] At paragraph 2 of her witness statement, NC explains that within the 2 years in question, she had 2 promotions – firstly to Team Leader and then, in Summer 2015, to Centre Manager. NC said in oral evidence that she had probationary reviews in respect of all of her positions and we accept her evidence.

74. AW started on 28 May 15' as a Lecturer and was confirmed in post on 18 July 16'.

75. The Claimant has not shown that any of these individuals were appropriate comparators. Apart from the fact that some of them had different jobs, there was no evidence that they had the same or similar performance and behavioural issues as he did or that they had comparable absence records. All the claimant has been able to show is that they were appointed to permanent roles after different periods on probation and are not black. The reasons for extending the claimant's probation have been discussed above and we are satisfied that they had nothing whatsoever to do with his race.

76. The next complaint is that JB applied a different probation review schedule to the claimant in comparison to other lecturers. He relies on SM as a comparator. This appears to be a complaint about his first review not taking place at 6 months. The only evidence relied on by the claimant is a document at [1829] which is a table containing appraisal information about various staff members, including SM. Its provenance is unknown as JB told us that it is not an HR document. The information does not assist us in determining SM's probation schedule. The reasons for rescheduling the claimant's first probation review are referred to at paragraph 38 above and we are satisfied that these had nothing to do with race.

77. The Claimant contends that NC discriminated against him by reporting to his line manager that he had left lessons early and had allowed a Technical Instructor to take over a lesson. As found above, the matters reported did take place and during cross examination, the claimant accepted that a white lecturer guilty of the same conduct would have been reported. In those circumstances, there has been no less favourable treatment.

78. The remaining race claim relates to an alleged comment by MLT, who heard the claimant's grievance appeal on 2 December 2016. The claimant alleges that MLT commented to another that he (the claimant) was "*very crappy*". In relation to this allegation, the claimant relies on his secret recording of a conversation during an adjournment to the grievance appeal. The brief adjournment happened because the claimant announcing that he felt dizzy. Before leaving the room, the claimant took off his jacket and left it behind. In the pocket he left his mobile phone on record. He tried to convince us that this was accidental but we do not believe him as this was one of a number of secret recordings he had made at different meetings and which he justified to us as him protecting himself. The claimant has provided his own transcript of the recording, which the Respondent disputes. The relevant extract is set out below:

    "What he is saying is that he feels that he has been discriminated against. But there is no evidence to discount his appeal. That's why I am leaving that room. I think where we have to prove now is the bloody review of minutes thing. That is bloody stupid. That is the only real argument. Everything else is just crap. I think he has been having mental illness. He is very crap. I have not had him for years."

79. The Respondent provided its counter transcript, prepared by its solicitors, and their version of the disputed comment is: "…*I think even* AL *knows it's a load of crap. You can tell. I've known* AL *for years*". [2052]

80. The tribunal listened carefully to the audio recording of the conversation, in the presence of the parties and again in chambers. Whilst elements of it were not audible, this particular section was clear and we are satisfied that the recording accords with the

respondent's transcript. The claimant's transcript is not only self-serving, it is deceptive. The recording would have been as clear to him as it was to the respondent and to the tribunal so there is no reason why he should have interpreted it differently. Also, the words: "*I think he has been having mental illness"* appear nowhere in the audio recording or anything similar. We believe these have been deliberately added to the claimant's transcript to bolster his case. His allegation is not made out.

81. The claimant had originally claimed that MLT had also said on the same occasion that he (the Claimant) had crawled out from under a stone. When it was put to the claimant that the allegation was not in his witness statement, he withdrew it. In our view, the claimant deliberately took out of context a comment by MLT which was clearly about somebody else (AL) [2053].

82. We have therefore treated the rest of the claimant's transcripts of recordings with caution and where they conflict with the respondent's transcripts, we have preferred the respondent's.

83. We find that none of the factual allegations are made out therefore the claimant has not discharged the burden of showing facts from which we could conclude discrimination. The race claim therefore fails.

Automatic Unfair Dismissal (whistleblowing)

84. The claimant alleges that he made 7 protected disclosures to the respondent and that as a result of those disclosures, he was dismissed. The tribunal therefore has to determine, firstly, whether the said disclosures qualify as protected disclosures for the purposes of section 43B(1) ERA, and if they do; whether they were the reason, or if more than one, the principal reason for dismissal.

Disclosure 1

85. The claimant sent a number of emails to the respondent on 21.10.15, 8.10.15 and 25.9.15 reporting that the classrooms were inadequately heated [C91, C92 & C106]. NC addressed the issue on the same day by arranging with housekeeping for the heater timer to be reset. NC informed the claimant and asked him to keep her updated. He responded by thanking her for progressing the matter and said he would keep her updated.

Disclosure 2

86. The claimant says that on 7.9.16, he raised concerns to JB and NC verbally about the management of the new animal unit at Mottingham resulting in the death of 60% of the small animals. The words used are set out in the claimant's transcript of his recording of the meeting and are as follows:

"*I am even angry with you. The AMU* (Animal Management Unit) *is a project we are not project managing it and I wonder "Oh my God! I am more into project management*". [2031].

87. JB and NC were not asked about this in cross examination and it is not referred to in the claimant's witness statement. However, we are satisfied that the quote does not disclose sufficient information as envisaged by section 43B(1).

Disclosure 3

88. By an email dated 23.3.16, the claimant reported to NC that a coat hanger was creating a hazard as students were hitting their heads on it. Within a couple of hours of receiving the email, NC gave instructions for the coat hanger to be removed. [C180-181]

Disclosure 4

89. By email dated 3.12.15, the claimant reported to NC and others that the entrance to the poultry was hazardous to students and staff. Within 14 minutes of receiving the email, NC had responded, confirming that she had arranged for wood chip to be placed in the area and for the process to be completed that day. [C144].

Disclosure 5

90. By email dated 21.6.16, the claimant reported to AD and NC that he had been subject to incessant verbal abuse by a student and had experienced a panic attack [1127]. The clamant agreed when cross examined that the respondent addressed this by providing him with extra support in lessons from WG, Lecturer, and a PGCE student.

Disclosure 6

91. The claimant relies on his grievance of 23.9.16 alleging race and disability discrimination and failure to carry out a risk assessment as a protected disclosure [1425]. This was dealt with through the respondent's grievance process. One of the outcomes was to allocate him a work mentor. Consistent with his approach to portray all of the respondent's actions in a bad light, the claimant told us that this was punitive as he had 37 years teaching experience and did not need support. Yet elsewhere in his evidence, he complained that the mentor never responded to his calls, suggesting that the idea of a mentor was not as egregious as he portrayed.

Disclosure 7

92. The claimant relies on his grievance of 4.7.16 against JS, specifically, his assertion that students were not being taught and his assertions about the treatment of white British staff in relation to probation as a qualifying disclosure. [1198]. This was dealt with through the respondent's grievance process.

93. We accept that disclosures 1,3,4,5,6 & 7 are qualifying disclosures, falling within sub-paragraphs (b) and/or (d) of 43B(1). Disclosure 2 is not a qualifying disclosure. Although disclosures 6 and 7 are primarily about legal obligations owed to the claimant, given the wider issues raised in relation to discrimination and health and safety, it was reasonable for him to believe that the matters were raised in the public interest.

94. We therefore find that apart from Disclosure 2, the disclosures were protected disclosures for the purposes of the ERA.

Was the Claimant dismissed because of the protected disclosures

95. It is clear from the evidence above that disclosures 1,3,4,& 5 were dealt with promptly by NC and there was nothing in her responses to suggest that she did so grudgingly or that doing so caused her any inconvenience. The claimant was raising matters of general welfare, which NC would have been interested in resolving as Centre Manager. The

information disclosed did not contain personal criticisms or allegations of failure by NC, such as to cause her to be aggrieved and we find no causal link between these disclosures and the claimant's dismissal.

96. The claimant was first notified of the respondent's intention to hold an end of probation meeting on 22 September 16'. The meeting was scheduled for 28 September and the invite stated that the meeting was to discuss his probation and unsatisfactory performance. It went on to say that depending on the facts established at the meeting, the outcome could be dismissal. [1424] The following day the claimant lodged her grievance (disclosure 6) against several members of the respondent alleging discrimination and harassment. [1424-1448]. What is clear from the timing is that the respondent was already contemplating the claimant's dismissal before protected disclosure 6.

97. Turning to protected disclosure 7, the grievance against JS, if the respondent was motivated to use this to get rid of the claimant, the ideal opportunity would have been when he failed his second probationary review on 8 July 16'. Instead of dismissing the claimant at that point, the respondent put him on a performance improvement plan, thereby giving him a further opportunity to pass his probation and become permanent. That, in our view, does not suggest that the respondent was motivated to get rid of him because of protected disclosure 7.

98. The decision to have an end of probation review meeting and ultimately, to dismiss the claimant was taken by JB. JB explains her reasons at paragraphs 40-43 of her witness statement and expanded on these in oral evidence. In summary, there remained concerns about the claimant's relationship with colleagues and superiors, as well concerns about his performance, which meant that he had not achieved an overall level of performance that was acceptable in his probation assessment. JS told the tribunal that by the end of summer 2016, despite there being a mediation agreement in place, it became increasingly apparent that the claimant's relationship with NC and JB was breaking down and both NC and JB perceived the claimant as being increasingly hostile towards them and NC expressed concern about continuing to work with him. Concerns were also raised by DP, the Vice Principal of Curriculum, about the claimant's relationship with NC who had reported matters to him. JS also told us about an occasion when NC rang her in floods of tears because of the way the claimant had behaved towards her. Such were the concerns about the claimant that on 19 September 2016, JS requested authorisation to formally suspend him. She says in her email at the time that she considered this necessary in order to safeguard staff because of the tone and tenure of the claimant's emails and his erratic and aggressive behaviour towards his female line manager in particular. [1420]

99. We are satisfied that the concerns expressed by JS were genuine and justified. Some of the hostility and threatening behaviour described was evident from a number of emails from the claimant to his superiors, which we were taken to in the bundle. [1404, 1410-1411,1462]. Similar behaviour was on display at the tribunal where the claimant was exceedingly rude towards the respondents. He constantly pointed at them in an aggressive manner, ignoring my many instructions to desist. He made unnecessary personal comments about the individual respondents; stating that they did not deserve to

be teaching students and should hang their heads in shame; referring to them as wicked people who god would ultimately judge and describing NC as a chronic liar.

100. There is ample evidence before us supporting the reasons put forward for the claimant's dismissal and no evidence at all that the dismissal was in any way caused or linked to his protected disclosures. The automatic unfair dismissal claim fails.

Judgment

101. The unanimous judgment of the tribunal is that all claims fail and are dismissed.

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Employment Judge Balogun
Date: 13 December 2018