EMPLOYMENT TRIBUNALS

Claimant: Mrs M Done

Respondent: Tameside, Oldham & Glossop MIND

HELD AT: Manchester **ON:** 10 and 11 August 2017

BEFORE: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: In person
Respondent: Mr J Jenkins, Counsel

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These are the reasons for the tribunal's judgment which was previously sent to the parties. They are provided in writing pursuant to a request made under rule 62(3) of the Employment Tribunals Rules of Procedure 2013.

REASONS

1. By a claim presented to the Tribunal on 28 February 2017 the claimant brought complaints of unfair dismissal asserting that, on 17 November 2016, she was dismissed from an employment which had started on 15 January 2016, by reason of having made a protected disclosure contrary to the provisions of section 47B and section 103A of the Employment Rights Act 1996. The respondent then defended the claims. There were two preliminary hearings in this case.

2. The first preliminary hearing was before Employment Judge ("EJ") Slater on 4 May 2017 (set out in the respondent's bundle at pages 19-23), and EJ Slater identified the issues at Annex A. She also recorded that the claimant was claiming, contrary to section 100 of the Employment Rights Act 1996, that this was a dismissal alleged by the claimant to be unfair because it was for a reason that she had brought to her employer's attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety. EJ Slater attempted to clarify the issues. The difficulty was at

that stage that the particular factual disclosures that the claimant alleged she had made were not capable of being identified.

3. There was then a further preliminary hearing before EJ Franey on 29 June 2017, and in the Annex to his Order (29-30) he recorded that the claimant had identified two emails as being the protected disclosures for the purposes of the claims: an email of 9 November 2016 sent at 12.35am to Anne Campbell and Caleb Cunniffe, and a second email that was identified as sent in the morning of 9 November 2016 but only to Mrs Campbell.

4. The claimant gave evidence in support of her claim. The respondent called Mrs Campbell, a senior practitioner who was the claimant's line manager, and Mr Caleb Cunniffe, an even more senior practitioner who was Mrs Campbell's manager.

5. References made in this judgment are to pages as numbered in the respondent's bundle unless indicated otherwise. The parties were unable to agree upon the contents of a bundle. Two bundles were provided to me which to some extent duplicated documents.

Findings of fact

6. It was common ground that the claimant was dismissed by Mrs Campbell on 18 November 2016. Neither does anything turn on the date that this employment appears to have started on 6 June 2016 rather than in January 2016 because on either basis the claimant could only bring a claim for unfair dismissal relying on the statutory provisions which have been identified above. She did not have 2 years' continuous service and therefore could not claim unfair dismissal under section 98 of the Act.

7. The respondent's service is the provision of low level mental health care to children and young people in the Heywood, Middleton and Rochdale Boroughs in cooperation with an NHS Trust and other organisations.

8. The claimant's employment, as evidenced by her contract of employment, began on 6 June 2016. She was identified there as a Children and Young Person Coordinator and it is common ground that in that role she was to perform 18 hours' work a week for therapeutic services.

9. She was, by reason of the nature of her work, required to have monthly supervisions with her line manager. The claimant's supervisions in this case were generally with Mrs Campbell and occasionally with another member of staff if Mrs Campbell were absent.

10. In September 2016 the claimant started further work for the same employer in a training role. From September 2016 she was doing 18 hours' work of that type in addition to those she performed in therapeutic services, making 36 hours in all. The claimant in final submissions explained how that work was split and the times when it was performed. On some days she was required to work both for the training department as well as therapeutic services, and it was that in part that led to some difficulties.

11. On 15 September 2016 the claimant attended a supervision with Mrs Campbell (50). There is a note in the supervision record which reads:

> "Probationary period. Started 6.6.16. Extended due to the role not getting fully started. Schools not yet up and running. Michelle fine with that."

12. The claimant had previously denied that her probation, which would have been normally for three months from 6 June, had been extended. Faced with that supervision note she accepted that it would have been sent to her by email. She said that either she had not opened it or not read it. She had not printed it out. She accepted that an extension to her probation had probably been discussed with her at the meeting. Whether it was discussed in those terms or not I find the claimant was notified. The respondent has a reasonable expectation that people working in their service will open their emails and read them. In my judgment it is probably the case that the claimant did read it and had simply forgotten about it by the time that events overtook her and she was eventually dismissed.

13. The crux of this case arises out of the involvement of the claimant and the respondent as a whole with five children in one particular family. The father had recently died by his own hand. I will not identify the family but describe them as the "H siblings". There were five siblings who came within the respondent's sphere of attention. Three were younger and therefore capable of being seen in a local school when the claimant visited schools as, for part of her work, she did. Two older children, however, were not seen by her.

14. The referral to the respondent service was triaged on 28 September 2016 by the claimant and a worker who had started only the day before, Lucy Semple, and a record was made, and it is the contents of that record that was a matter of concern to the respondent later on.

15. As a result the claimant, on 10 October 2016, attended the school for what are called "drop in sessions" with the three younger siblings. She completed some paperwork in relation to that. It is common ground that whether the claimant was aware of it or not at the time, it was not the correct paperwork. She also made some notes as to what the children were saying. It is not necessary to refer to the notes in detail but it is clear from the claimant's notes, which she subsequently sent to Mrs Campbell or Mr Cunniffe, that none of the children she saw were expressing at that stage any sign of an intent to self harm.

16. However, a week later on 18 October 2016 the claimant was at the same school when a teacher told the claimant that one of those three children had started to self harm by biting and scratching. The claimant indicated that she would pass this on for counsellors to address.

17. After the attendance at the school, not having spoken herself to the children or the children's mother she telephoned Mrs Campbell and reported this. She said that due to her own personal issues and emotions she did not feel able to work with the family any longer. What was in the claimant's mind was that her own father had committed suicide and that, she felt, made it inappropriate for her to carry on. She did not tell Mrs Campbell of that reason at that stage. She said the situation with the H siblings was "too close to the bone". Mrs Campbell thought

she might have said "too close to the bone" or "too close to home". In either event, both because of the nature of the issues with the children and because of the claimant's comments, on the following day the care of the H siblings was passed to Mr Cunniffe, a much more senior practitioner, for follow up.

18. Mr Cunniffe and Mrs Campbell took the case to a meeting of the Emotional Health and Wellbeing Board. Mr Cunniffe explained to me in evidence, and I accept, that this was a multi-disciplinary Board with a number of agencies attending. Those attending may take files to its meetings so that if there is a transfer of treatment or care the file can be passed across. The file was not considered by them at that stage, and thus at that stage they were not aware that the claimant had not completed paperwork properly as should have been the case. The case remained with the respondent at that stage.

19. The claimant sent an email to Mr Cunniffe on 20 October 2016 (147-148). Significantly she did not record that of the five siblings one had started to self harm. What she does record is that:

> "The mum of the children was in school and really appreciated the phone call from a member of our staff. Hasn't left mum's number. I assume it will be in the children's file although the initial referral was sent in by a Mesh worker. Are you able to speak to mum?"

20. The next significant event is that on 1 November 2016 the claimant had a supervision (55-56). At that stage she was working with the training department still. She did not report any issues with this particular case under the heading "general wellbeing". However, there was a discussion about paperwork and she referred to not having time to complete an appointment, taking history and contact sheets home to complete, and that that was the only bugbear with the job. It is clear that there was an issue of some kind in relation to the split of her work between therapeutic service and training department. The note describes the claimant as needing to assert herself with the training department as they are booking schools on different days and it is having an effect on her therapeutic service hours and work.

21. On 7 November 2016 Mr Cunniffe emailed the claimant (145) because by then having looked at the file he had realised that the forms, known as "drop ins", which should have been on the file were not there, and he asked the claimant that day to bring them to Langley, one of the offices, in order for the files to be made complete.

22. On 8 November 2016 Mrs Campbell, to whom that previous email had been copied, was writing to the claimant (152) making general concerns known to her that paperwork was incomplete, describing what should have been done with certain types of paperwork, and saying:

> "I've looked through some of your files and you have completed some assorted paperwork but there were files where there's no paperwork completed just a note on the history sheet; a file that dated back to July for another client that had no paperwork or history completed, just a post it note."

23. She acknowledged that the claimant had, as indeed the claimant did, raised concerns in the past about paperwork and processes, but this was what she described as "standard" paperwork that should be completed at "drop in" and with regard to the H siblings she said:

> "Please can you email the info over to me as per the drop in paperwork and I will cut and paste it in so that we can pass on to HYM [another service called Healthy Young Minds)] and complete the letter to mum and an incident report."

24. The claimant replied at 3.00pm that afternoon (154) saying, "here are the notes we spoke about earlier", and she included typed notes showing what she had discovered from talking to the children. I note that in respect of one of the children the date of birth may not be accurately recorded because it says 28 October 2016 which is clearly a typographical error, but nothing turns on that. It is clear that those notes do not, as notes, complete all the information that the respondent was necessarily going to need for the purposes of dealing with these cases, but there may have been other paperwork completed by the claimant as well.

25. The next step in the process was that a text was sent by the claimant to Mrs Campbell discussing who it was who had reported the incident when she went on the 18th. She also added that on the morning of the 20th the teacher had left her a voicemail saying that the mum wanted a phone call. I suspect it was that that prompted her to write to Mr Cunniffe.

26. At all events, in her email at 6.26pm on 8 November 2016 Mrs Campbell said this, in that she was getting confused about dates:

> "We did supervision on 1 November and you mentioned the case was too close to home. I remember you telling me one of the brothers had begun to self harm. So you have a record of this? Probably not ideal for the school just to pass this on verbally."

27. Mrs Campbell asked the claimant to forward the email sent to Mr Cunniffe. She said that Caleb Cunniffe, herself and another person took the case to the Emotional Health and Wellbeing Board on 19 October and informed it about the brother's deterioration, and that Mr Cunniffe followed up with the mum the following day. She pointed out there was nothing in the notes of files that showed she received a call from the school or made a call, and therefore she described the conflict as two people from Thrive, which is the marketing name, as it were, of the organisation of contacting mum, which may have caused confusion.

28. The claimant responded shortly after (157) saying that on 18 October:

> "When I rang you and spoke to you directly when I left the school and said that mum had asked for more help and I said I couldn't work with them as it was close to the bone I didn't know any of the family was self harming. It hadn't been mentioned to me by any member of our staff or the teacher."

29. That, of course, was inconsistent with what the claimant had earlier written.

30. There then followed the email that is said by the claimant to comprise her first disclosure. It is an email of 9 November 2016 at 12.35am (page 166) and it attaches the timeline of events which Mrs Campbell had asked for to enable them to what is called "back track", namely to fill in factual details after the event. The email itself on which the claimant relies reads as follows:

> "Please find attached my timeline of dealings I had working with the H children as requested by Anne. I have filled in the paperwork as requested and they are now in the files. I would just like to point out the discrepancy I found in the paperwork in the files [and then she identifies one of the children by initial and by NHS number]. It states he was triaged on 26.9.2016. He wasn't. He wasn't triaged by myself and Lucy. It also says that decision was made for EI Middleton which is also not correct as we sat and did them together on Wednesday 28.9.16. I was off sick on 26.9.16 so it couldn't have been that day. We definitely did them all for bereavement counselling also."

31. The claimant accepted that the second use of the word "wasn't" in the middle of that quotation was a typographical error for "was", and that what she was asserting was that it was not on 26 September 2016 that she and Lucy Semple had triaged the cases, but it was on 28 September. She also maintained that they had identified on each one of the five that they would be referred for bereavement counselling. "EI Middleton" is a reference to early intervention at Middleton which is another form of first contact.

32. The evidence of Mr Cunniffe was that neither the discrepancy in the date nor the reference to "EI Middleton" or "bereavement" was put down by the respondent to anything other than error. It seems likely that the 26 September 2016 date was entered in error. Mr Cunniffe had examined it and said it had, he discovered, been entered by Lucy Semple who had only started on the day after that, 27 September 2016. So for the reasons advanced by the claimant it was impossible that she and Ms Semple had done it on 26 September 2016. The other forms he believed were completed properly.

33. Mr Cunniffe explained to me there were tick boxes on the form as to whether there should be bereavement counselling or early intervention, and he explained for reasons which are obvious that since at that stage there was no suggestion that any member of the H family were self harming, that is to say any of the children were self harming, it was not material that these things should have been altered in any way, either at that stage or in backtracking. He said that the claimant's assertion which she only made later that this was in some way showing a cover up simply did not do so. It seemed to me, having heard the claimant's evidence on this and that of Mrs Campbell and Mr Cunniffe, that Mrs Campbell and Mr Cunniffe are likely to be right. Nothing that was altered on this, if it was altered, could be material to the question of a cover up. No party suggests at this stage that the claimant, or anybody else, could have known that any of the children were self harming because it was not reported for some two or three weeks later.

34. The timeline that the claimant attached supported the suggestion that when the claimant first saw each of these three younger siblings none of them expressed a

desire to hurt themselves. She confirmed that when she had on the subsequent day, that is 18 October 2016, told Mrs Campbell she could no longer work with these children, that Mrs Campbell had stated that the case had been taken on by Mr Cunniffe as the children needed bereavement counselling and not early intervention.

35. The second email on which the claimant relies is the one which follows this at 9:48 on the same morning (172). This email, sent only to Mrs Campbell whereas the other one was sent to Mr Cunniffe, says this:

> "Can I just point out that on the files for these children there is a post-it saying 'all five siblings allocated to Michelle Done'. This is not the case. I only arranged to see the younger three as they were in the same school. The older siblings are not at schools in the HMR borough so I never after triage arranged any appointments of contact with them. The younger three were allocated to me as I had arranged appointments."

36. At 9:49 Mrs Campbell responded (page 52 of the claimant's bundle) explaining that the timeline was just for the claimant's own notes and that she, Mrs Campbell, did them when she needed to backtrack any actions. She said there was "a misunderstanding as the issue was not specific to the work we have done which is that when other staff tried to pick up the cases to do further work the relevant paperwork is missing". She said that leading on from this she had been going through the files and identified there was paperwork and notes missing, in other words repeating the point that she had already made, and she asked the claimant whether she needed her to come and collect the files or whether she, the claimant, was going to bring them to her.

37. The claimant having sent an email only one minute before that, Mrs Campbell immediately acknowledged that and saying that she had read it after she sent her previous email and hopefully that that would answer the second email, namely the one which the claimant says is the second disclosure.

38. The claimant then wrote again to Mrs Campbell at 10:03 (167) giving an explanation as to what she had done in terms of recordkeeping, and she asked Mrs Campbell to collect the notes because her son was off school.

39. By this stage the claimant had handed in her notice for the training department part of the role because she recognised it was difficult to satisfy both parts of the service and it was something that she did, she said, on good terms and it was accepted in that way.

40. The evidence of Mr Cunniffe, which was not challenged was that he was on leave for the week beginning Saturday 12 November. He was not part of the decision that was taken in that week while he was on leave to dismiss the claimant. He was aware that there was going to be a meeting at which dismissal of the claimant was an option but he had not been asked for his opinion and had left the matter to Mrs Campbell, the claimant's line manager.

41. The claimant was due to have a supervision on 15 November 2016 (page 57). The notes show that what was done on that date was that there would be no

supervision as such because Mrs Campbell informed the claimant that there was to be a probationary review meeting and to take the following day off, and told the claimant she could be accompanied by a colleague or union representative, and that is what led on 17 November 2016 to the probationary review meeting conducted by Mrs Campbell, attended by the claimant accompanied by Ms Semple, and Barry Pollard who took notes. The minutes of the meeting are set out at pages 58-74.

42. After that meeting Mrs Campbell talked to Debbie Parkinson, the manager of the training department; she spoke to Mrs Pollard and she took advice from the respondent's solicitors and reached the decision to dismiss.

43. Mrs Campbell called the claimant back to a meeting on 18 November 2016 and provided a letter to the claimant (179-180). In the letter she identified areas of concern which led her to decide to dismiss the claimant during the probationary period. They are listed. The claimant accepted that all the matters contained in that letter were raised with her at the meeting and she had been asked to give her response to them.

44. The claimant indicated to me in submissions that she accepted that two of them were acknowledged by her as justifiable complaints or concerns, namely not keeping her calendar up-to-date with her work pattern, updating her calendar incorrectly and adding events retrospectively; and secondly several issues with paperwork, using the wrong forms and failing to complete paperwork altogether. She disputed the others, although in relation to two, namely "contradictions in dates when you claim to have been booked by the training department and so have swapped around your work for therapeutic service, and the dates the training department had confirmed you were actually booked" and "not communicating your work commitments well between the training department and therapeutic service": while she denied now that these were legitimate concerns she acknowledged that she had accepted in the meeting of 17 November that those were legitimate matters to raise.

45. To use her term, in the meeting she had "sugar-coated" her responses: in other words sought to appease Mrs Campbell, in my judgment probably recognising that she was in a difficult situation and seeking to make the best of it.

46. The reality is that although the claimant now denies that any of these things were legitimate concerns she acknowledged them in the meeting. Although no procedure was followed such as would be followed at a performance review in a formal way, she did make a number of admissions and accepted before me that they were matters upon which Mrs Campbell was entitled to rely.

47. Regarding working from home, there had been incidents put to her: Mrs Campbell put to her that the working from home was not approved. Mrs Done said it was not official: it was only when she was doing "admin". With regard to the working pattern in the training department, she said it was very difficult juggling the two roles and she had not had time to update her calendar. With regard to the calendar again she said it was a mistake on her part and bad administration on her part. She did not believe a number of other matters were true and she said so. With regard to working in the week of 8 November 2016, it

was put to her that Ms Parkinson, the training department manager, was unaware that the claimant was off all week, as in an email to her it was stated she would just be off for one day, on 8 November. The claimant's answer to that was that she had spent a lot of time ringing and logging it through to anyone at the schools, and it does not appear that there was a specific answer to that allegation by her at the time.

48. The claimant accepted to some extent the allegations about the communication between departments causing difficulties. She said to Mrs Campbell that it was difficult and upsetting, she was just told her role was changing in supervision.

49. The issues with paperwork were clearly discussed over a period of time. The notes on paperwork begin on page 69 and go on to the bottom of page 71. The claimant accepted the criticisms that were made against her in relation to that. It was put to the claimant that she could not justify her hours, that is the 36 hours which obviously had been reduced by then because she had given notice to the training department. Mrs Campbell described it as people not seeing her around, paperwork not complete.

50. The claimant accepted that she had just not updated the calendar. She said "I totally accept that I had not filled in the paperwork for certain pieces of file". She was referring to the H family. She said she felt she had triaged the information and that it was not a drop-in. She said that now on reflection she could see the importance of using the correct paperwork. When at the end the claimant was asked if she had anything to add the note reads this:

> "Just disappointed to be in the situation; realises that paperwork needs to be filled in and the calendar updated correctly; realises that she has put herself in the position and that having the two roles has been really hard work; has not done the work she should have done for the training department due to changes; she has also realised that if she has any issues in sessions to ask for help. Also to bring up any issues with her supervisor at the time and not wait until team meetings, however it was not intention to cause disruption between departments."

51. That it was that led to the decision to dismiss, and the claimant was told that she would be dismissed with one week's notice which she would not be required to work.

52. In the meeting on 18 November 2016 when that decision was communicated to the claimant notes were taken by Jason Bromley (page 75) and the claimant was given the letter, and it is recorded that she took time to read it. The note then reads :

> "MD [the claimant] stated she would be pursuing this under victimisation and that any issues regarding paperwork had been dismissed. MD feels AC has issues with MD and has campaigned against her. MD referenced various points in brief: reasoning around her feeling victimised, including an incident on 11 November at Langley clinic, friction between training department and TS, not informed of probationary period extension, only recently received TOG MIND policy and procedures handbook."

53. It is clear that between the dates, 9 November, when the alleged disclosures were made, nor at the probationary review on 17 November, nor in the meeting of 18 November did the claimant seek to say to the respondent anything about the disclosures or the effect they may have had upon her.

The Law

54. Against that background of fact I identify the relevant legal provisions.

55. The definition of "qualifying disclosures" is contained in section 47B of the Act.

56. The provision in relation to unfair dismissal in relation to protected disclosures is set out at section 103A and in relation to raising health and safety matters section 100.

57. Half way through this case, the claimant's evidence having concluded, Mr Jenkins intimated an application to strike it out essentially a submission of no case having regard, he said, to the claimant's answers in relation to the state of her mind at the time that she said she made the disclosures. It is appropriate to record what the claimant in fact said.

58. I was asking the claimant to explain to the Tribunal how it was, she said, that these matters about the triages on the first disclosure, so-called, were said to be falsification of documents, which is what she said had occurred. For example I asked her whether the documents were filled in in typed script or handwriting and she said they were filled in in handwriting, but she had not compared the forms when she made the allegation.

59. With regard to whether these were disclosures that tended to show one of the prohibited steps she said this: "At this stage I didn't think I was", and her sentence tailed off, and then she said this: "I wasn't aware at this point I was making a disclosure or anything of the sort". I asked her to consider the contents of page 172, the second letter: "At this time I didn't believe they showed a cover up, it's just something I thought of since".

60. With regard to the second letter she said, in answer to a further explanation, "It was all backtracking. I just want to say it was not true. I didn't think I was making disclosures. I'm an honest person. I just wanted to tell the truth. I now believe in covering tracks. I can't say how it might have helped them", and she referred to the fact there was an incident report being written by Mrs Campbell and a letter to the mother of the H siblings. Neither of those documents were before me.

61. The submission made by Mr Jenkins for the respondent, and which ultimately he repeated in final submissions, since he did not proceed with his application to strike out at that stage, was that the claimant's belief in the protected disclosure or the belief in that things which tend to show a breach of a legal obligation, criminal conduct or concealment which is the three heads that the claimant relied on, must be contemporaneous with the making of the disclosure.

62. We adjourned in order to consider the question of whether that was right. There does not appear to be an authority in which it has been considered specifically,

but insofar as researches has helped there are dicta in the decision of the Court of Appeal in the case of **Chesterton Global Limited & another v Nurmohamed [2017] EWCA Civ 979** where in the judgment of Lord Justice Underhill on a different point he says at paragraph 27, this when he deal with the preliminaries in relation to that appeal, which is on an entirely different point and is really the question about belief in the public interest:

> "First and at the risk of stating the obvious the words added by the 2013 Act fit into the structure of section 43B as expanded in **Babula** (see paragraph 8 above) the Tribunal thus has to ask (and here I add emphasis):
>
> (a) Whether the worker believed *at the time he was making it* that the disclosure was in the public interest; and
>
> (b) Whether if so that belief was reasonable."

63. I realise that is a reference to the time at which the worker believes the disclosure was in the public interest, but in my judgment it is illogical to suggest that one can have one part of the belief, namely in the public interest or must have it at one point, and yet one could have a later belief that it tended to show one of the matters of concern in section 43B.

64. That, in my judgment, is equally consistent with paragraph 33 of the decision of the Employment Appeal Tribunal in the case of **Fincham v HM Prison Service EAT0925/01**, a Tribunal presided over by Mr Justice Elias as he then was, again in paragraph 33:

> "But there must in our view be some disclosure which actually identifies albeit not in strict legal language the breach of legal obligation on which the employer is relying. In this case the Tribunal found none."

65. So it is clear that he is saying that at the time of the disclosure the claimant must assert at least one of the matters set out in section 43B(2), criminal conduct, concealment or breach of a legal obligation. In my judgment those matters give guidance as to the time at which the belief and the disclosure must be made and what must be included in the disclosure. It is not necessary, for example, for an employee to identify a particular obligation which they say is breached, providing in general terms they can show that they believed one. It may in fact be a fallacious belief, that does not matter.

Conclusions

66. So against that background I turn to consider the issues in the case. The issues are set out at page 29, in particular I start with paragraph 5.

67. According to EJ Franey's record the claimant asserted there that the information disclosed said there were discrepancies in paperwork for a particular file, the date of the triage was wrong, the persons who carried out the triage were not accurately identified, the onward referral was inaccurately recorded.

68. He recorded at paragraph 6:

> "The claimant says that she reasonably believed this disclosure was in the public interest because it is of interest to members of the public in the relevant area who might have to use the services of Mind to know that their records are accurately kept."

69. EJ Franey goes on to record that:

> "She reasonably believed that this information tended to show a criminal offence by way of falsification of information (although the claimant had not specified the criminal offence in question) or that the managers employed by Mind were in breach of their legal obligations implied into their own contracts of employment not to behave in a way that would destroy trust and confidence of their employer by falsifying documents, or that the heath and safety of the child in question had been endangered. She also relies on a reasonable belief that the information tended to show that one or more of those matters had been deliberately concealed."

70. He also recorded:

> "The claimant also relies on that disclosure as protected under section 100 in that in the absence of a safety representative or safety committee she brought to her employer's attention by reasonable means circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety. It relates to the health and safety of the children in question."

71. With regard to the second disclosure he recorded that:

> "The claimant also relies on an email sent on the same or the next day and which stated that the paperwork was false and that it recorded all five siblings in the family had been assigned to the claimant when it was only three of them who had been so assigned. The claimant relies on the same analysis above as to why that disclosure qualified for protection."

72. It is not disputed by Mr Jenkins that the two emails are disclosures of fact which is a necessary step, but he submits that the claimant cannot on her own admissions show that at the time of making the disclosures she had a reasonable belief that it tended to show one of the matters alleged. The claimant's own answers to the Tribunal show that, and by extension it must follow that if she did not believe that she cannot reasonably have believed at the time that it was in the public interest to make those disclosures. Therefore, he submits, they were not qualifying disclosures. He pointed out there was no suggestion in either email that the claimant believed the information showed one of those things or believed it tended to show one of those things.

73. With regard to health and safety, he submitted that the claimant could not rely upon that because it was not health and safety related to work. The difficulty with that submission as we discussed in argument is that it is not necessarily the health and safety of the worker themselves or a fellow worker that could be protected. One example is if a worker reports a dangerous condition of a building that might be as dangerous to a member of the public walking past it as it would

be to somebody who works within the premises or is connected with the premises. Mr Jenkins acknowledged the force of that point.

74. There may be, in a suitable case, arguments of remoteness in terms of whether it is health and safety in work, but for example it is easy to see how in a service such as this a disclosure about the health and safety of a client because they have threatened to self harm, for example, during a therapy sessions, if reported and leading to the dismissal of the claimant would probably fit within that part of section 100(1)(c).

75. However, because there was no evidence from the claimant that she believed at the time that one of those things was tended to be shown. She accepted that the matters were not raised in the meeting of 17 or 18 November. Having regard also to her comments at page 75 which I have just recited on being told of the dismissal, I accept the submission it was not a qualifying disclosure.

76. If it was a qualifying disclosure it is not disputed it would be protected because it was made to the employer.

77. But what, rhetorically, would be the position if I were wrong and the claimant is found or held to have made protected disclosures? The claimant's case is that she had not previously been given formal warnings of her performance. It is true that that is the case, but there were a number of matters clearly on the supervisions that had been raised, although I accept not all of them. She submits that not having had those things raised in a formal way, then she makes what she asserts are the disclosures, then she is summoned to a meeting and dismissed.

78. The evidence of Mrs Campbell, which I accept, is that she came across missing paperwork on the H file and that led her to the discovery of generalised errors in the paperwork, a failure to complete files in some cases at all; that she discussed those matters with the training department and other matters came to light, and it appeared to her and Ms Parkinson in the training department that the claimant was citing the therapeutic service to the training department as a reason for difficulty with work and vice versa. She was aware that the claimant was under probation. She had a meeting and raised the issues. The claimant agreed that that was the case. The claimant, as I recorded, accepts responsibility for some issues, and the claimant had said she had sugar-coated her responses i.e. sought to appease Mrs Campbell.

79. Mrs Campbell said that she considered the claimant's responses and based upon that and the multiplicity of them and the nature of the concerns, and I can understand that in this sort of service concerns about failure to complete paperwork would be of particular significance, decided to dismiss having consulted Mr Pollard, Debbie Parkinson and a solicitor.

80. Mrs Campbell was asked by me whether any reference was made to the emails during the decision to dismiss. She indicated that she did not even have them in her mind. She had forgotten what the claimant had said about the triage issue at that point. It was not referred to and it was not in her mind. I accept that evidence.

81. Whatever the procedural or fairness arguments that the claimant might have raised under section 98 if this were a section 98 case, with regard to lack of warnings and not having sufficient time to improve her performance, none of those matters, which clearly are preying on the claimant's mind and in respect of which she has a sense of grievance acknowledged by Mr Jenkins, undermine Mrs Campbell's account for the reason for the dismissal.

82. For that reason I find that the the respondent has proved that the reason for dismissal was in fact that which they assert, namely the claimant's performance. Were this case to be considered in line with the guidance in **Kuzel v Roche** I would hold that the respondent had satisfied the first stage of that guidance, namely it is for the employer who knows why they have dismissed to show to the tribunal the reason. On the balance of probabilities they have done so.

83. It must follow that I should hold that the dismissal was neither because of any disclosure made by the claimant that might have been protected nor, by extension of the same analysis and reasoning, because of any health and safety issue.

84. For that reason the claim is dismissed.

85. I conclude with an apology to the parties for the delay in sending this written version of these reasons. This has been due to the pressure of other judicial work.

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Employment Judge Tom Ryan

Date: 20 November 2017

REASONS SENT TO THE PARTIES ON

22 November 2017

FOR THE TRIBUNAL OFFICE