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EMPLOYMENT TRIBUNALS

Claimant ***Respondents***

Miss S Shayesteh **AND** The Whittington Hospital NHS Trust

Heard at: London Central **On**: 22-25 October 2018

Before: Employment Judge Wade
Mr M Simon
Mr S Godecharle

Representation
For the Claimant: Mr T Perry, of Counsel
For the Respondent: Mr A Allen, of Counsel

RESERVED JUDGMENT

1. The Judgment of the Tribunal is that the Respondent did not subject the Claimant to detriment on the ground that she had made protected disclosures in breach of section 47B of the Employment Rights Act 1996.

REASONS

1. The Claimant, who remains employed as a dental nurse by the Respondent, alleges that she made a number of protected disclosures at the time of a transfer of staff from other Trusts into the dental service in which she worked. We have found that she did not make protected disclosures and that, if we are wrong and she did make disclosures, any detriment which she suffered was not on the ground that she had made protected disclosures.

The evidence

2. The Tribunal heard evidence from the Claimant. For the Respondent we heard from Ms M Shaffi-Ajibola, HR Business Partner, Ms E Closier, Senior Practice Development Nurse and Investigation Officer for the grievance, Ms F Isacsson, Director of Operations Surgery and Cancer, who heard the Appeal and signed off the grievance report and Mr D Cole, at that time Head of Nursing and

Speak Up Guardian. We did not hear from Mr R Jones, Employee Relations Manager who became unwell during the Hearing and was not able to attend to give evidence. We read his statement and gave it such weight as was appropriate.

The Relevant Law

3. At a Preliminary Hearing in January 2018 I decided that the Claimant did not have the legal right to bring claims in relation to failure to consult under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") or the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA"), as the correct complainants were the recognised union. The decision was upheld by the EAT.

4. As the parties agreed, this case was not a review of the Respondent's working practices, nor was it a review of whether the Respondent had complied with its obligations under TUPE or TULCRA. The only question for us was whether the Claimant had made protected disclosures and whether she had suffered detriments on the ground of having made any protected disclosures.

5. We heard evidence and argument for three days and have made findings on three points only. These are:-

(1) There were a number of alleged disclosures which were capable of being protected disclosures provided the Claimant reasonably believed that (a) they tended to show a breach of a legal obligation and (b) they were made in the public interest (Employment Rights Act section 43B(1)). We looked at whether she had such reasonable beliefs. In relation to belief in the public interest, issues at work which affect a small number of employees only can, following *Chesterton,* still be in the public interest. On the other hand, matters which arise which are complaints about private employment disputes only will not be in the public interest even though a legal provision may be alleged to have been breached. The question is "what was the reasonable belief of the worker" not whether, objectively, the matter was in the public interest. However, the two are connected in that the reasonableness of the belief will depend to a large extent upon the content of the alleged disclosure and the motives of the employee making it.

(2) If there was a protected disclosure, the burden will be on the Respondent to show that a worker was not subjected to any detriment on the ground that she has made the protected disclosure. If the protected disclosure materially influences the employer's detrimental treatment of the employee, the Claimant will be successful.

The Facts

6. The Claimant's employment as a dental nurse with the Respondent started in August 2010. To this day her terms and conditions remain unchanged and her place of work is the Crowndale Health Centre in Camden. What has changed,

following the TUPE transfer discussed below, is that the Claimant now works in a group of practices which extends into the outer London boroughs such as Haringey. This is known as "Lot 6". Before the transfer there was no possibility that pursuant to the mobility clause in her contract she would be asked to work outside Camden and Islington, but now there is. She is not happy about that.

7. It appears that this litigation was the claimant's way of challenging change and that since she had no other legal grounds for challenge without resigning, she chose protected disclosure detriment which was actually not a suitable vehicle.

The transfer of new staff into the Trust

8. In August 2016 the employer issued a notice to all staff informing them that the Whittington had been successful in a tender process which meant that they would be taking on more dental work across a wider area of London and therefore staff who had previously been employed by other Trusts would be transferred into the respondent Trust under the TUPE Regulations.

9. There are duties under TUPE for both transferor and transferee (Whittington was the transferee) to inform and, in some circumstances, consult their staff. The Claimant says that she reasonably believed that the Respondent failed in its duty. Whilst the evidence which would lead us to agree with the Claimant was thin, we have not reached a definitive decision on that question.

10. Information was provided to existing employees about the transfer. No staff members of the Whittington were consulted, as opposed to being informed, because the Respondent's position was that there was nothing to consult about at this point. The respondent told them that once the new staff had been transferred in, a reorganisation would take place, but the respondent says that this was separate from the transfer. This may or may not have been right and the claimant disagrees and says that they must have had plans at the time.

11. Liaison with staff as prescribed by TUPE was via the "staff side" group of unions led by Unison which was recognised by the Trust for this purpose. The Claimant was not a member of a union and so was in the uncomfortable position of not having an elected representative to act on her behalf; however under the collective agreement UNISON was charged with protecting her interests along with those of its members.

12. The Claimant was supplied with contact information for the staff side who represented her, but she did not contact anyone to raise any queries or concerns. The Claimant was present at a staff briefing on 28 February 2017 which was before the TUPE transfer took place, so she was told what the plan was.

13. Therefore, at the point the TUPE transfer took place the Claimant knew that it was happening and that the Respondent was planning a reorganisation thereafter. She therefore knew as much as anybody else, union member or not.

She had taken no steps to check out whether she should have any concerns beyond an understandable nervousness about how the future might affect her.

14. The transfer of undertakings into the respondent Trust took place on 3 April 2017.

The reorganisation

15. In May the Respondent started a consultation about reorganisation. It says that the process that it entered into was not governed by TULCRA because there was no proposal to make twenty or more staff redundant and collective redundancy consultation was the only possible relevance of TULCRA to this process. However, the respondent was contractually committed to a process under the Change Management Policy.

16. Along with all other staff, the Claimant was sent a consultation paper which had links to the new draft job descriptions although she cannot recall if she looked at them.

17. The Claimant says that looking at the documents which were issued to her she was reasonable to think that more than twenty staff were going to be made redundant. However, unless you pick numbers at random out of the consultation paper, it was clear that at this stage no one was at risk of redundancy. Also, she would know that her job was safe because the service was in fact planning to recruit more dental nurses to the existing cohort. Thus the claimant did not have a reasonable belief that the respondent was obliged to consult in conformity with TULCRA and therefore that the respondent was or might be in breach of that legal obligation.

18. What the Respondent was not going to do, however, was slot the Claimant into a new job, which meant that she would be obliged to express an interest in a role, possibly be interviewed for it and then await the outcome of the reorganisation. She says that this was in breach of the change management policy, paragraph 5.10 but we cannot read the policy in that way or see how it could be read that way; slotting is an option but not a requirement as the policy makes clear. The claimant, an educated person who had studied law, did not have a reasonable belief that this part of the policy, which was a legal obligaiton, had been breached.

19. We understand that the Claimant was worried about her future but we do not think that she was worried in the public interest. It is striking that for the whole period of the transfer and the reorganisation, when the best thing to do if concerned about a matter of general importance to colleagues, would have been to talk to them, to her managers and to the staff representatives to whom she had been sign-posted, she did none of those things. As a non-union member she must have felt vulnerable but all the more reason to try to seek out information as to who might be able to represent her interests if she felt that management were failing in their duties to their staff.

20. As part of the process the Claimant was offered a one to one meeting but she chose not to go and so did nothing to explore the issues which she told us she was concerned about before coming to the conclusion that the law had been broken. The Claimant's focus was on herself; when asked at the Appeal meeting why she did not go she responded that she was "still not agreeing with the one to one meeting or any difference it would have made to me". Note that she consistently talked about "me" not "us".

The reorganisation consultation period

21. The reorganisation consultation period under the Change Management Policy, (not a statutory TULCRA consultation period), ran from 22 May 2017 to 5 July 2017. The Claimant was informed about this and invited to the launch meeting which she attended.

22. On 6 June she received an update and was again offered a one to one meeting but did not go. She says that as an alternative she was entitled to provide feedback to the consultation team by email. This was true; however this was not a good way to have a dialogue or seek reassurance on wider issues.

23. On 27 June, very much towards the end of the consultation period, the Claimant emailed a list of questions; she raised questions about the TUPE consultation and the current process, which she identified as a redundancy consultation process although this was not correct. Despite this mention of TUPE and redundancy, it was clear from that early stage that her concerns were for her personal future as a Band 4 Dental Nurse at the Crowndale Health Centre, how the changes would impact on her and whether they could be challenged. Of course, these were her concerns, this was her career and her future, but she was fighting a private battle against change.

24. The HR Business Partner responsible for consulting the community dental service was Ms Shaffi-Ajibola. The claimant's email was acknowledged the next day and the Claimant was told that the Dental HR Consultation Team would answer "most of the questions raised below shortly". The Claimant immediately challenged why the email had stated that *most* of the questions would be answered rather than *all*, and asked them to confirm, which they did.

25. At this point, before the Claimant had received a reply to her questions she started the ACAS early conciliation process. Her allegations were that the Respondent had failed to comply with its duties under TUPE, TULCRA and the contractual Change Management Policy.

The email correspondence with Ms Shaffi-Ajibola begins

26. There is no sign that when Ms Shaffi-Ajibola replied to the Claimant's questions on 5 July she knew about the start early conciliation. If she did, her behaviour from then on could have been influenced by the fact that she knew the claimant might litigate but not by the fact that she had made alleged protected disclosures, because none had yet been made.

27. The Claimant waa told that there was no plan to dismiss on the ground of redundancy twenty or more employees, so from then any concern about breach of TULCRA was definitely unreasonable.

28. At this point the Claimant was incorrectly told that her representative was the Royal College of Nursing. This was not a detriment for the Claimant because she always knew that she was not a nurse who was represented by the Royal College of Nursing. The Claimant did not pursue the allegation that this misinformation was deliberate, but it is relevant that the mistake, repeated several times by HR, started before the Claimant allegedly blew the whistle so it could never have been a detriment on grounds of making a protected disclosure.

29. The Claimant complains that Ms Shaffi-Ajibola's answers were "opaque and obtuse" and says that information about her job security should have been provided. However, this was not possible because the process was not yet complete, but Ms Shayesteh found it hard to accept that they would not have known the answer.

30. As the Claimant agrees, the discussion that started on 5 July set the tone for a large number of email exchanges which broadly talked about the same things. These exchanges predated any alleged protected disclosure and carried on in the same tone and on the same subject afterwards so it is very hard to envisage that any alleged detriments in the later exchanges were on ground of a protected disclosure.

31. The Claimant understood the process sufficiently to complete an expression of interest form and send it in. She asked for her existing post at the Crowndale Heath Centre and expressed no alternative preferences.

The end of the consultation under the Change Management Policy

32. The Respondent produced a lengthy paper on 11 July responding to the consultation process. It acknowledged that anxiety had been expressed regarding job location, with staff concerned that they might have to move geographical areas to get to work and said, "every attempt will be made to ensure staff are offered their preferred location as their main base". It also said that there were no plans to close clinics and emphasised that there were going to be more Dental Nurse Band 4 positions than before so that there was no potential impact in terms of redundancy on the Dental Nurse group. Therefore, from this point the Claimant's only concern was with the location of her post. The Claimant was not happy that she was not going to be slotted into a new role, but the Respondent explained why this was. Essentially, they were going to be moving some Band 5 Dental Nurses in to Band 4 roles and so a process did have to be followed.

33. The Claimant immediately replied to the consultation and asked questions, which was strange given how clear the response to consultation had been. She asked whether she was now at risk of redundancy when she had been clearly told that she was not and whether she was being required to compete for her existing role. The answer to that was less clear except that she had been

reassured that there were not going to be any Band 4 Dental Nurse redundancies. The Claimant had been provided with answers, they were just not exactly the answers she required. Our understanding is that the Claimant's concern here was she was not being slotted in to the Band 4 role that she wanted at the Crowndale Health Centre. She said that this was in breach of the change management policy, but these were private concerns.

34. The Claimant's emails often had a confrontational tone. As a result, difficulties occurred in communications between the Claimant and the people who were trying to answer her questions because they found her confrontational and resistant to understanding their clear messages, and this meant that they were frustrated. Ms Shaffi-Ajibola explained that her natural style was to meet people and to mediate with them which she was unable to do because the Claimant would not meet her. A complex discussion conducted entirely by email is doomed.

35. At this stage, and indeed at all past and future points, the Claimant was the only person who appears to have complained about the process. Of the 118 staff affected, the majority of whom were trade union members, there were no recorded individual of collective objection. Although it is understandable that the Claimant felt vulnerable, it was her decision not to be a member of a union and also not to network with the union representatives. She says that she spoke to eight or nine other Dental Nurses about the situation but we detected no evidence that the Claimant considered herself to be speaking on behalf of colleagues in the public interest.

The first alleged protected disclosure

36. The questions which the Claimant asked on 11 July (the first alleged protected disclosure) repeated to some extent questions that had already been asked. They focused on change management and redundancy and not TUPE so the Claimant cannot say that she was making a disclosure in relation to illegality arising from TUPE.

37. In relation to the duty to consult under TULCRA, the claimant did not provide information but rather asked questions and those were not in the public interest, not least because the claimant had known for some time that this was not a redundancy consultation under TULCRA so the question was academic only. Whilst the claimant was asking questions about a process that affected others, her purpose was to protect herself and as such her questions have more the tone of someone persistently baiting her opponent for the sake of it not someone raising issues of public concern.

38. On 12 July the Claimant had a response to her email from David Ogulari of HR again confirming that there was no risk of redundancies at this stage. This had been alleged to be a detriment but that is no longer pursued. It is good that the Claimant has reflected and restricted her allegations, but at the same time it is troubling that she ever thought that this polite and clear reply could have been a detriment. As ever, Mr Ogulari offered the Claimant the chance to get in touch

if she had further queries, but she did not do so even though she had no grounds for mistrusting him.

39. The Claimant says that the second of her responses that day was a protected disclosure. The Claimant had been given an explanation of the process but still demanded "a simple "yes" or "no" whether I am now at risk of redundancy". Note that the concern expressed was as ever about herself.

40. Mr Ogulari suggested that as a Dental Nurse the Claimant could approach the Royal College of Nursing. This was an error which the Claimant knew to be incorrect, so it did not disadvantage her, and she did not follow it up and try to find out who to talk to.

41. Neither the Claimant nor the HR advisors really understood how the TUPE process worked in relation to staff who were not union members. This meant that the Claimant could have got the impression that she had not got the information she needed and that she was confused by some of HR's replies, but of course had she sat down with one of the list of staff side representatives she had been given and talked through her concerns, her queries would probably have been answered.

42. There was a second alleged protected disclosure on 12 July when the Claimant wrote another email to Mr Ogulari complaining about the lack of transparency in the process as "I do not believe that I have been or am being properly consulted in any meaningful manner"…"am I currently at risk of redundancy, yes or no?" The reply of 13 July again attracted an immediate response from the Claimant.

43. We know that as at 14 July Ms Shaffi-Ajibola definitely knew that the Claimant had entered into ACAS early conciliation. She continued to correspond with the Claimant and emailed on 19 July pointing out that the consultation period for the reorganisaiton was closed and saying "I am satisfied we have answered all of your questions in full. All staff during the consultation process were consulted with and had the opportunity to ask questions and provide further comments. This included 1:1 group meetings. Upon concluding we are no longer accepting any further feedback/questions. Thank you for your input".

44. Up to this point there had been no alleged detriments arising from the few alleged protected disclosures.

45. In cross examination the Claimant agreed that after this date, when she says that there were detriments arising from whistleblowing, the behaviour of the Respondent did not change to any real extent. This means that it is inherently unlikely that this same behaviour became a whistleblowing detriment once there had been a protected disclosure.

46. Rather than accept that the consultation period was over, the Claimant again emailed Ms Shaffi-Ajibola on 19 July and she replied on 20 July saying that she would respond to the email in full. The Claimant's persistence meant that her correspondence had not been shut down and that communication continued.

The claimant raises her concerns to the Speak Up Guardian

47. On 21 July the Claimant emailed various Senior Managers including Mr Cole, then Head of Nursing and the "Speak Up" Guardian who was the contact point for whistleblowers. She said that she wished to raise a formal grievance / whistleblowing complaint. The complaint was of a failure to comply with TUPE, to follow the change management policy, to follow a fair redundancy process and collective consultation and "to continue to fail to provide reasonable replies to my reasonable questions".

48. Mr Cole replied promptly and on 24 July he emailed the Claimant saying "I have discussed this with Mehvish and I believe that she is in the process of responding. I am satisfied that there is a full HR process in place with this, and therefore I have made a judgment that this does not constitute a whistleblowing alert. Of course, if you would like to discuss this in more detail with me or if there are any further issues that may change my judgment then please do not hesitate to contact me on email or my telephone number. Best Wishes".

49. Ms Shaffi-Ajibola had explained to Mr Cole that she was planning to respond to the most recent email which is what he meant by the "full HR process in place".

50. The Claimant responded saying "I am truly astonished and consider this to be detrimental treatment resulting directly from my complaint. I duly add this further ground to my complaint". She explained that she believed that she had not been properly consulted and then she said "please now confirm by return of email that my whistleblowing complaint of 21 July 2017 timed at 18:11 will be progressed (together with the further ground of complaint set out above, concerning detrimental treatment) in accordance with the Trust's whistleblowing procedure. If, notwithstanding the above, it remains the Trust's intention not to consider my complaints in this manner then please provide me with absolute clarity on the reasons why, having particular regard to the nature of the complaints raised".

51. Mr Cole's reason for not treating this as a whistleblowing complaint was carefully and convincingly explained in cross examination. He said that having read the whole background set of emails he considered that she was expressing concern about her personal job security at the Crowndale Centre and not whistle-blowing. That is our conclusion too and we note that even the claimant was not clear that her complaint fell into the category of whistleblowing as she had called it a "grievance/ whistleblowing complaint".

52. In response Mr Cole sent another email explaining his thinking and that he saw the issues as raising a dispute about the Claimant's own employment position. However, he said that he was more than happy to meet up, as a colleague having been through many consultations, to help the Claimant think through her options. It was a friendly email, but the Claimant did not take up this offer, which was a shame because it might have helped her analyse her concerns which were far from clear. Of course, he also did not understand the legal definition of a protected disclosure, so his view was not definitive.

53. The Claimant replied to Mr Cole saying "please do not take this email personally ….. I am afraid that your latest email is of considerable further dismay and concern to me. Considered alone, it manifests an intention to belittle and denigrate my whistleblowing complaints together with a refusal to investigate and respond to them in a reasonable manner and/or in line with the Trust's own policies, which I consider a detriment". She commented that it appeared that the Trust was not even proposing to register her complaints as a formal grievance or to investigate them in line with the formal grievance procedure.

54. The Claimant was correct. At this stage the Respondent was not offering to activate the formal grievance process, but she had access to the grievance policy and could have filled out the form and initiated the process herself which she did not do. There was nothing stopping her and she was demonstrably capable of doing so.

55. The Claimant argues that Mr Cole was trying to push her complaints under the carpet because they would be so damaging to the Trust and potentially expensive in compensation as well. We take the opposite view in that it was clear that Mr Cole did not fully understand TUPE/TULCRA consultation and as such it did not particularly frighten him that the Trust may not have complied. Also, had he been worried he would have erred on the side of caution and investigated the complaint.

56. His focus as a clinician and Speak Up Guardian was on staff who wanted to blow the whistle, principally in the clinical environment, and he was clear that the Claimant's complaint simply did not fit the mould. Of course, had the Claimant not complained there would not have been an alleged detriment but that does not get her home, Mr Cole's responses were not what the Claimant wanted but that does not make them a detriment. The claimant was "trigger-happy" in her accusations that she had been done harm by people who were conscientiously trying to respond to and reassure her.

57. As promised, although slightly later than planned Ms Shaffi-Ajibola wrote a comprehensive letter to the Claimant having taken legal advice. She said that she was worried by the Claimant's persistent assertions that the law had been broken and so sought legal advice. Of course, by this stage she also knew that the Claimant had entered early conciliation with a view to bringing a Tribunal claim.

58. The letter, very much a "legal letter", is a firm response to the Claimant's complaints and it clearly explains that TUPE/ TULCRA consultation with the trade union was on behalf of the whole group of staff as the union were recognised as consultees and so only the union could raise a complaint. The Claimant had access to legal advice, but she never accepted this point and her claims of failure to consult were dismissed only at the Preliminary Hearing in January. We do not see any significance in the claimant's argument that the respondent used the term "consult" when all it did was inform. This was a generic phrase meaning "inform and/ or consult".

59. The letter told the Claimant that the correct process had been followed and "on that basis, you will see that we do not consider that there has been a public interest disclosure that could fall within the Trust's whistleblowing policy and indeed you have been advised of this by the independent Freedom to Speak Guardian and we also do not consider that there is a grievance for you to raise under the Trust's grievance policy". The letter ended saying "I hope the above clarifies the process that the Trust has followed in this situation and while we shall not be addressing your complaints individually with you as the consultation process has now closed, I would encourage you to participate in the next stages of the reorganisation process".

60. The Claimant says that this was Ms Shaffi-Ajibola shutting down her ability to raise a grievance. We do not agree. A letter was written in response to the Claimant's persistent complaints about legal breaches firmly putting the Trust's legal position. It was important that they did this given that they were understandably and reasonably not prepared to consult with the Claimant any longer under the Change Management process which had closed. They did not think she had grounds for a grievance but were not saying she could not bring one. At this stage there appeared nothing to engage in a grievance about.

61. At the end of her letter, as she so often did, Ms Shaffi-Ajibola offered the chance to meet to discuss the email. The door was still open, but the Claimant did not go near it.

62. The Claimant had no sensible reason for refusing to meet with the friendly individuals who were trying to engage with her. She said that it was unreasonable to expect her to meet when they had told her they would not be discussing her complaints, but she had been told that they would.

63. At this stage there was very little to motivate the Respondent to subject the Claimant for detriment for perceived whistleblowing. They knew, confirmed by legal advice, that they had done nothing wrong in the consultation process and their concern was to communicate this so that Ms Shayesteh was comforted. The respondent's staff were frustrated that she persisted to allege wrongdoing and this, and the simple fact that enough time had been spent on trying to resolve her issues, were the motives for trying to close down her complaints rather than the fact that she had allegedly blown the whistle.

64. True to form, 28 July the Claimant emailed Ms Shaffi-Ajibola with various complaints including "and how precisely are you intending to block the process of a formal complaint from me as an individual employee of the Trust?"

65. Ms Shaffi-Ajibola responded confirming that both the TUPE and the consultation process had concluded but she again invited the Claimant to meet. As the Claimant correctly said, it was not for HR to prevent her from bringing a grievance. She says that this was an attempt to prevent her and a detriment although we do not agree. Ms Shaffi-Ajibola felt that she had engaged considerably with the Claimant and that it was time to stop as there was really nothing more to say, although she did try to meet. The claimant was never told

that she was not allowed to raise a grievance and if she was the motive was as set out in paragraph 62.

The claimant escalates her complaints

66. On 1 August Ms Shaffi-Ajibola wrote to the Claimant apologising that she had sent her in the direction of the Royal College of Nursing, which the Claimant had pointed out to her was wrong. She finally correctly signposted her to Claire Dixon of Unison who was the secretary of the "staff side" consultation group consisting of the various unions and empowered by the collective agreement to negotiate on behalf of all staff. She repeated that the matter had concluded, which the consultation had, but we repeat that the Claimant was demonstrably not somebody who would be gagged and had she wished to raise a grievance at that stage she would have done so. In fact, later on that day the Claimant wrote a long letter to Ms Shaffi-Ajibola repeating various complaints and asking more questions. She then escalated the email above Ms Shaffi-Ajibola to Mr Richard Jones who was the Employee Relations Manager.

67. Mr Jones responded saying that the email which had been sent to the Claimant on 28 July dealt with her concerns about process and answered her questions regarding whistleblowing and grievance. On that basis they did not intend to respond to further correspondence. Unfortunately, he also got the identity of the Claimant's representative wrong and referred her to the British Dental Association. Although this is said to be a detriment it is clear that Mr Jones was doing his best to signpost the Claimant and that this was not a deliberate mistake. Even she conceded that he may have been reckless rather than deliberate which makes it unlikely that his action was designed to frustrate her.

68. The Claimant had been given the contact details of the representatives negotiating on the staff side some months before, but she still asked for them and did not point out to Mr Jones that she already knew that she was not a member of the British Dental Association.

The claimant issues her tribunal claim

69. On 17 August the Claimant issued her claim in the Tribunal.

The claimant is confirmed in post

70. On 4 September the Claimant was confirmed in post. From that point onwards, she had no concern about her job security and her only remaining issue was that she was allocated to "Lot 6" and that the actual location of her post was yet to be decided.

71. The Claimant was informed that she could appeal regarding changes affecting her terms and conditions although in fact her terms and conditions were not changed.

The appeal

72. The Claimant appealed on 12 September. She appealed against the process and also said that she had no clarity on the role, the precise terms of employment or the location. She also said that she wished to raise a grievance, further proof that she knew that she had been prevented from raising one. The Claimant had been told that she did not have amended terms and conditions because she did not have an amended contract, but still raised that in the Appeal.

73. The Claimant was told by David Ogulari that she was now in Lot 6. His response was entirely clear, but she did not like it and so persisted with the Appeal, accusing Mr Ogulari along the way of being "not only patronising, but also vague and lacking in any reasonable degree of transparency". It should be noted that the Claimant's terms and conditions have never permitted her to be based at just one Dental Health Centre.

74. The Claimant's Appeal was to be heard by Fiona Isacsson. Although the Claimant complained that she wanted a Chair who was "properly independent", Ms Isacsson had not had dealings with her before, did not know about the litigation (this is what she says and we have no reason to disbelieve her) and so was definitely adequately independent. The Appeal she was going to hear was all about the Claimant's discontent at not having been handled fairly during the restructuring process. It was a personal complaint and we saw no basis on which Ms Isacsson could feel that she would wish to retaliate against the Claimant for having purportedly blown the whistle. The alleged act of whistleblowing was a very long way away from what Ms Isacsson was thinking about at this point.

75. In an email to Mr Jones on 9 October the Claimant raised that she suffered from a serious stress related condition. This was not an alleged protected disclosure though.

76. As part of the Appeal process the Claimant was in correspondence with Mr Jones, he offered to meet her, she did not take up the offer, when asked why she said that this was not a correct way of proceeding. Several new alleged protected disclosures were made at this point but in fact no new information was provided.

77. The Claimant was invited to the Appeal hearing on 17 October. The Appeal papers with their attachments made it clear that she would be based at the Crowndale Health Centre, which is what she wanted, and also that she would not be required to be on call. Her banding and salary would be the same. This is all she ever wanted apart from a commitment not to have to move around Lot 6. In those circumstances it is hard to see why, given that she remains in the Trust's employment, she wanted to press on with the litigation.

78. An illustration of how she finds it difficult to see the wood for the trees is that she complains that she was subjected to detriment by not being given more time to prepare for the Appeal Hearing. She failed to understand the process despite

several clear emails from Mr Jones explaining it and demanded that she should have more time to go through the Respondent's papers when it was not asking her to do that within the timescale proposed. A short telephone conversation, which was suggested and rejected, would have resolved everything.

The appeal hearing

79. The Appeal Hearing was slightly fractious and the Claimant, predictably, says that she was subjected to detriment. Firstly, by Richard Jones being involved as Ms Isacsson's HR Advisor. He was the appropriate person for the job and was there only as an advisor not a decision maker. Ms Isacsson, however, says that if she had known that he was aware of the litigation (which she did not) she might in fact had asked for another advisor, which was a fair comment to make.

80. On the other hand, Mr Jones had only started with the Trust in May and had not been involved in the TUPE transfer or the restructuring and so he was not somebody who would take any criticism of that personally and was less likely to have a motive to treat the Claimant badly.

81. Ms Isacsson and Ms Shaffi-Ajibola say that the Claimant behaved in a difficult way during the Hearing, huffing, puffing and tutting to the point where Ms Isacsson reprimanded her. The Claimant of course says that she was bullied but there is really no evidence in the minutes to suggest that. Ms Isacsson carefully explained to us that she could see that Ms Shaffi-Ajibola was getting frustrated because the Claimant did not seem to be listening to her answers to questions raised and this was a shame when she was trying very hard to explain what had happened and had been trying for some months. She was getting the feeling that whatever was said was not being listened to and would not be believed. Regrettably, we got exactly that impression from the evidence. We conclude that Ms Isacsson's occasionally firm behaviour towards the Claimant was motivated by her need to keep the Hearing fair and focused which was her duty as the Chair, and not by the fact that she thought that the Claimant had blown the whistle.

82. The grievance was kept separate from the Appeal although this was rather confusing since there seemed to be an overlap.

The grievance

83. Emmeline Closier was responsible for investigating the grievance. She was new on the scene and had very little motive to punish the Claimant for blowing the whistle. This was not least because although she tried hard, she simply did not understand that the Claimant was complaining about the TUPE and consultation processes. She treated the complaint as one about the Claimant's personal experience. She did not explore the wider point, but there is absolutely no evidence that she did that deliberately or that she did it because the Claimant was a whistle blower. It is instructive that she missed the wider point and we conclude that this was because the claimant's complaints were both unclear and narrow.

84. The Appeal was rejected on 7 November. Ms Isacsson responded to each point made, rejected it and expressed concern about the Claimant's behaviour. Her suggestion that the claimant had shown a lack of professionalism and that the Claimant might perhaps approach Occupational Health for some assistance, greatly offended the Claimant. We could find no possible reason why the Claimant would associate Ms Isacsson's conscientious approach to the Appeal and her decision to reject with her belief that she had blown the whistle.

The grievance is rejected

85. Ms Isacsson then confirmed the grievance outcome as the official decision maker on that on 27 April. The delay was due to the winter crisis in the NHS and we could not understand why the Claimant, who knew the problems, might have even imagined that the delay was intended to punish her for making complaints. Her conclusion shows how very focussed she was on herself and how unable to look at her situation in context.

Conclusions

No detriments caused by alleged protected disclosures

86. It will be clear from the above that we have decided that if there were any detriments, they were not a result of whistleblowing. This was not least because the claimant's complaints were not perceived by the Respondent to be acts of whistleblowing. Further her complaints were not a cause for concern by the Respondent because there was clear legal advice that they had behaved correctly. For those reasons the Respondent's witnesses simply thought that they had to try to explain the reorganisation to a Claimant who had mislabelled her personal complaints, and we agree.

87. What was at the forefront was frustration with the Claimant's behaviour in repeatedly asking questions which had already been answered and complaining in imperious terms about the manner of the replies. Senior and junior managers alike had been contacted by the Claimant and she had persisted in the face of clear explanation and despite being told that the consultation was over. Any acts of the Respondent which the Claimant was aggrieved by were caused by her behaviour rather than managers' desire to punish her for being a whistle blower.

And few if any detriments

88. There were in fact very few events which could be classified as detriments. A detriment is not a detriment just because the claimant says it is, see for example the events described in paragraph 78. The claimant showed herself fully able to pursue her points of complaint and was never prevented from lodging a formal grievance although the respondent made it clear to her, correctly, that it did not consider that she had grounds to complain.

Reasonable belief

89. If we are wrong on the detriment point, we find that that the Claimant did not reasonably believe firstly that legal obligations under TULRCA and the Change Management Policy had been broken and secondly that her complaints of whistleblowing were made in the public interest. She genuinely believed that she was a whistle-blower, but she did not reasonably believe that what she was doing was in the public interest. Her approach was narrow and intensely private in that she made no effort to engage in the wider discussion. It is true that some HR advisers misinformed her about who was representing her and that many did not fully understand the collective consultation process, but what they did understand was that the Claimant was pursuing a purely personal crusade against them, one which she appeared not to want to resolve. The Respondent has said that there are learning points for it from the process which took place but that does not make the claimant a whistle blower.

90. We have not dealt with all the legal points raised because it would be disproportionate given these conclusions. It is very perplexing that the Claimant perpetually got in to situations where she was misunderstanding the advice given. Given her continuing employment with the Trust and the fact that she came to this hearing knowing that her job was safe and substantially unchanged, a great deal of heartache could have been avoided had she only asked and listened.

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Employment Judge Wade`

Dated: 20 November 2018

Judgment and Reasons sent to the parties on:

21 November 2018

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For the Tribunal Office