EMPLOYMENT TRIBUNALS

Claimant: Mr A Ghaffar

Respondent: Age UK Calderdale and Halifax

Heard at: Leeds **On** 13, 14, 15, 16 and 17 May 2019

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: Mr, W Wharton, lay representative
Respondent: Mr Falcao, solicitor

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The reason for the dismissal was not because the claimant had made a public interest disclosure.

3. Had the respondent adopted a fair procedure there was an 80% chance the claimant would have been retained in employment on a contract at 25 hours per week.

REASONS

Introduction

1. On 30 January 2018 Mr Ghaffar, the claimant, received written notice that his employment with Age UK Calderdale and Kirklees, the respondent, would end after 11 weeks, on 30 April 2018, by reason of redundancy.

2. In these proceedings the respondent has admitted that this dismissal was unfair, because errors occurred in the scoring exercise. The managers undertaking it had misapplied the guidance in respect of the selection criteria concerning the duration and frequency of sickness absence. Had it been applied correctly, all candidates would have received the same score overall. Because of the mistaken

computation of the claimant's score in respect of sickness, he had a lower overall mark than the other three in the pool and was the one who was made redundant.

3. The principal issue in this hearing was whether dismissal was unfair for another reason, because the claimant said he made a number of public interest disclosures. Further issues were whether the dismissal was unfair for additional reasons, being a failure properly to consult and apply the redundancy policy, to consider and offer the claimant suitable alternative employment and whether he would or might have been dismissed in any event had a fair procedure been adopted.

4. **The facts/background**

5. The respondent is a registered charity, operating under a brand partnership agreement with Age UK. It receives funding from a variety of sources including charitable donations, grants from local government and health authorities and the profits derived from the sale of insurance products by a separate company called Age UK Calderdale and Kirklees Training Ltd ("Trading").

6. The claimant commenced employment with the respondent on 8 October 2007. He was employed as an Information and Advice worker.

7. On 25 August 2017 a number of staff of the respondent attended at a social event at the Percy Shaw public house in Halifax. Mr Hillyard, who is a trustee and non-executive director of the Board of the respondent, was present throughout the evening. Whilst in the company of a small group of the staff, which included the claimant, he initiated a discussion as to how the charity could do better. A number of suggestions were made. At one point during the evening, the claimant said to Mr Hillyard that he did not believe the appropriate recruitment policies had been followed for the appointment of three members of staff. One was Mrs Susan Cromack, the insurance supervisor at Trading. In his evidence the claimant said that others had complained that Mr Cromack and Carol Rodmell, who was at the time the quality manager, adopted bullying practices and that he then volunteered that Mr Cormack was guilty of misusing the charity's funds by creating jobs for family and friends and recruiting to those posts without following standard procedures, in breach of the charity's guidelines. Mr Hillyard denied that the complaints were as extensive as this.

8. I prefer the evidence of Mr Hillyard about what had been said on this occasion. Inevitably, both accounts suffered from the substantial elapse of time. The witnesses were recalling a discussion which took place months before over a short period. Neither made a record of it. The claimant's recollection was unreliable. He was adamant at the outset of the hearing that Mrs Rodmell and Rachel Horner, financial executive, had been present when the discussion took place. He was reluctant to accept that Mrs Rodmell was not present even after she had produced documentation which conformed that she had been on holiday overseas. Only when she produced a photograph of herself in Portugal with friends, dated 25 August 2017, did the claimant reluctantly concede the point. This was an example of the tricks that the memory can play. I bear in mind that it is the claimant who has the burden of proving facts relating to the alleged protected disclosure. I am not satisfied, on the evidence, that the conversation went beyond him raising concerns

about the appointment of three members of staff contrary to recruitment practices and policies, one of whom was Mrs Cromack.

9. On a date in September 2017, which the parties have not identified, a further discussion took place between the claimant and Mr Hillyard, who had attended at the Batley office. Mr Hillyard has no recollection of what had been said. I accept the claimant's evidence that he complained that Mr Cromack had misused charitable funding. In his witness statement, he said that he also had said that the respondent's whistleblowing procedure was non-existent. I do not find that was likely. It was not included in the further particulars provided by the claimant in these proceedings. He had been required specifically to identify what he had said.

10. Although not in his own witness statement, I consider it likely that the claimant raised concerns about recruitment practices and promotions, referring to the fact that Mrs Cromack had been interviewed by her husband before being appointed to a more senior post at Trading. I also consider it likely that the claimant said he had raised the matter before, in August 2017. I take this from the email of Shazad Sadiq, dated 30 August 2018. He was one of the Information and Advisory team. He had been specifically asked about these matters, in an email, by Mrs Butland, for the purpose of the preparation of this case by the respondent. He was not called as a witness and his evidence is hearsay. It requires some caution and would normally carry far less weight as evidence than that tested by cross-examination. However, Mr Hillyard had no recollection of this conversation. The claimant produced a briefer account of what had been said. There was no suggestion from either party that Mr Sadiq had any other motive than to do his best to recall what had happened. His first remark in the email makes it clear he was unsettled to become personally involved in the matter. Given all the difficulties surrounding the accuracy of discussions which took place over a matter of a few minutes, based upon recollections many months later, I find the consistency between the account of the claimant and Mr Sadiq persuasive and the further detail in Mr Sadiq' email summary likely to be correct.

11. On 23 January 2018, Mrs Butland received notice that the Calderdale CCG was not to renew a grant which had been provided annually for a number of years, from 31 March 2018. That would reduce funding by £180,000. Mrs Butland had to review the service in the light of the reduced budget. The CCG grant had provided funding for one member of the Information and Advisory team, one advocate and all 3 staff in the home from hospital service. The reduced funding led to the loss of all three staff from the home from hospital service and the advocate. In addition all four members of the Information and Advisory team were given notice of the termination of their employment, by letter of 30 January 2018. The service was to be continued by the re-appointment of three of the four, following a consultation process, albeit that was not made clear in the letter. The Information and Advisory service was a core part of the respondent's provision.

12. Mr Cormack held a meeting with those employees who were affected by the redundancy situation on 30 January 2018, before giving letters to each. He explained how the situation had arisen. He said that there would be a consultation period with meetings with staff on a one-to-one basis. They could put forward any ideas to avoid the situation. He said that attempts would be made to fill the funding gap.

13. Mrs Butland secured an extension of the funding from the Calderdale CCG to 30 April 2018.

14. In the letter of 30 January 2018. the claimant was given notice of 11 weeks to expire on 30 April 2018. He was informed there would be a period of consultation during the notice period and that opportunities would be given for suitable posts within the organisation for alternative employment if vacancies arose. Priority would be given to those at risk.

15. On 1 February 2018 the claimant telephoned Mr Hillyard. He raised an issue concerning a printer at the Batley office and then asked Mr Hillyard whether he was aware that he had been made redundant. He asked Mr Hillyard if he recalled him mentioning the recruitment of Mrs Cromack the previous year. Mr Hillyard said he did. He was shocked to learn that the redundancy notices had been issued because, as a trustee, he considered the Board should have been consulted. He was annoyed. He immediately contacted Mrs Butland about how this had come about. Mrs Butland sent an email to the Board the next day to explain the loss of funding and the urgent plans which were taking place to salvage any jobs.

16. On 5 February 2018 Mrs Butland informed those affected employees by email that she had not persuaded the CCG to extend the funding further and she encouraged the staff to book their one-to-one meeting with Mr Cromack or herself.

17. On 12 February 2018 the claimant met Mrs Butland at a one-to-one consultation meeting.

18. On 19 February 2018 Mrs Butland wrote again to the affected employees to offer fortnightly one-to-one meetings to answer any questions. She took up a suggestion for each affected team to meet and asked Mr Cromack to arrange that.

19. On 19 February 2018 the claimant wrote to Mrs Butland to say she had not responded to his questions raised in the one-to-one meetings and she responded that day to say she was seeking external advice upon it which was sent by post later that day. In response to the query she said that if the claimant were to be offered reduced hours and he turned it down he would not be entitled to a redundancy payment if it was suitable for him. She reiterated that there would be fortnightly updates. She informed him that there would be home help positions available if he wished to apply.

20. On 28 February 2018 the respondent's internal weekly newsletter included reference to the withdrawal of the CCG grant with the cessation of part of the service. It stated that the information and advice service would continue but with reduced staff.

21. On 1 March 2018 Mrs Butland wrote to the claimant and informed him that the Board of Trustees had met to discuss the implications of the withdrawal of the CCG grant. She informed him that the team would have a reduction of hours of between 30 and 37.5 hours per week. She invited ideas as to how that could be achieved by 6 March 2018 and asked for any expression of interest in redundancy.

22. On 1 March 2018 the claimant sent an email to Mrs Butland and asked what the total allocation of hours in the information and advisory service would be after reduction. He also asked what specific hours would be allocated to each adviser. In response, the following day, Mrs Butland informed the claimant that the managers were not offering specific hours to specific staff but were looking to them to come up with a solution during the consultation process. She said this had been done with another team.

23. On 3 March 2018 the claimant replied and asked for further details about which team had agreed to redistribute its hours. Mrs Butland replied on 5 March 2018 and informed the claimant that it was the insurance team. It had to make savings. She said she would ask Sue Cromack, of that department, if she would be happy to speak to members of the claimant's team.

24. Ms Connor requested details of the reduced hours. Mrs Butland stated it would be 85 to 87. On 7 March 2018 the four members of the team met to discuss any suggestions to move matters forward. Following the meeting Mrs Butland emailed Ms Connor to ask her the outcome. On 9 March 2018 Ms Connor replied by email. She said there was a need to provide the service in three extensive areas, North Kirklees, Great Huddersfield and Calderdale, on reduced hours. She said the team had explored options, that some ideas were constructive and wide-ranging and hopefully they could make a positive contribution during the one-to-one meetings. She posed questions about the vision for the future of the service and said that she would be able to give relevant suggestions following the answers. In response Mrs Butland said she would be consulting with the executive team to agree the future composition of the information and advisory team and that she would be in touch.

25. On 6 March 2018 the claimant sent an email to his team colleagues and Mrs Butland which said simply, "*Read it in the insider……*". This was an ironic reference to the fact that information concerning the reduction of the team had first been published in the internal weekly newsletter and not provided first to the team members. Another employee had posted comments upon Facebook. Mrs Butland sent an email to the team to inform them that she expected all to behave in a professional manner. She attached a copy of the code of conduct. She considered regarded the actions of the claimant and other member of the team as falling short.

26. The claimant had a second one-to-one meeting with Mrs Butland on 12 March 2018. A short note of this meeting was made by Mrs Butland. The claimant said in evidence that he handed her the code of conduct and drew attention to the passage which related to recruitment practices. Paragraph 15 of the Code states that '*in order to avoid any possible accusation of bias, employees should not be involved in an appointment where they are related to an applicant, or have a close personal relationship with him or her*'. The claimant said that he asked Mrs Butland to act upon it with respect to Colin Cromack having created a job for his wife and recruiting her himself. He says his words were "*Colin has effectively been stealing money from age UK by giving this job to his wife and nobody cares and nobody will do anything!*'. He said Mrs Butland passed the code back to him.

27. Mrs Butland denies there was any such conversation. It is not referred to in her notes. There is a reference at the commencement of the meeting to the claimant saying executives were not telling the truth. At the end of the meeting there is also

reference to the claimant still being upset about the insider (the weekly newsletter). The remainder of the notes concern the plans of the executive and the claimant's concern of a lack of information.

28. I am not satisfied the claimant had the discussion he set out in his witness statement and evidence. It is not referred to in the claim form at all. He only mentions discussions with an Age UK trustee in late 2017. This is plainly a reference to the discussions with Mr Hillyard. In explaining its omission in cross-examination, the claimant said that he was not familiar with legal procedures and had been advised by Mr Wharton that he could add further information at a later stage.

29. I do not find this a convincing explanation for the omission. This alleged disclosure would have been critical to the events which followed. That is, if the reason for the claimant's selection for redundancy was because he had made public interest disclosures, the most significant one would have been that to one of the decision-makers, Mrs Butland, the most senior executive officer. The discussion with a trustee, who he had no reason to believe had been involved in that process directly, would have secondary importance. I find it inconceivable that the claimant would have failed to refer to this important fact. It is not a question of understanding legal procedures, but rather that in the mind of any litigant this part of the history would be critical and so would be set out in the factual account in the claim form.

30. A further difficulty is that there are variations in the account he has given about what he actually said. His witness statement differs from the further particulars. Employment Judge Rogerson had ordered the claimant to explain what precisely was said. The particulars do not make reference to a suggestion that a job had been created for Mrs Cromack and in re-examination the claimant said he had never alleged that Mr Cromack had created the job for his wife. But his witness statement specifically states, at paragraph 17, that he told Mrs Butland, on 12 March 2018, that Mr Cromack had created a job for his wife. At paragraph 11 he stated that he told Mr Hillyard on 25 August that Mr Cromack had created jobs for family and friends. This could only be a reference to the job Mrs Cromack had been appointed to, because the other two promotions the claimant had mentioned were not relatives of Mr Cromack. This shift in respect of what had actually been said was damaging to the claimant's reliability as a witness.

31. I also had regard to the contemporaneous note of the meeting Mrs Butland had made, which supported her recollection and not the claimant's as well as the letter she wrote, of 15 March 2019, in which she recorded some of the queries the claimant had raised.

32. On 12 March 2018 Mr Cromack wrote to the team to arrange a further meeting. On 30 March 2018 a letter was sent to all team members and expressions of interest were invited for posts, two at 37.5 hours per week and one at 15 hours per week, in the proposed new structure. The claimant's request for an extension of time, because he was on leave, was refused because of time limitations. In the event, none of the team wrote to express an interest.

33. On 23 March 2018 Mrs Butland, Ms Horner and Mr Cromack met and allocated marks in the redundancy scoring exercise. A blank copy of the scoring matrix had been sent out with the redundancy policy in the letter of 30 January 2018.

The claimant was allocated an overall score of 110. The other three received a score of 125. The differential arose from the scoring of duration and frequency of sickness absence. The managers used the claimant's total absences over the last three years. The requirement was to divide that by the number of years recorded and, if duration was for fewer than six days and frequency fewer than three occasions, the top mark should have been allocated. The managers did not divide the total by three years, as required. The claimant's redundancy was confirmed by letter dated 23 March 2018. He was informed that although he had not expressed an interest in any of the posts, it had been deemed fair to consider him as against them.

34. Mr Wharton submitted that neither the meeting nor the scoring exercise took place. Mr Wharton relied upon an inconsistency, a different date in paragraph 24 of Mrs Butland's witness statement, in which she stated that the meeting was on 21 March 2018. I am satisfied that this was simply an error. Mr Cromack said the meeting was on 23 March 2018. In cross examination Mrs Butland said that she had checked her diary and the correct date was 23 March 2018.

35. Additionally, he suggested Ms Horner could not have been present at such a meeting because in an email dated 8 May 2018, Mrs Rodmell had stated that Ms Horner had not been involved in 'the process'. That was not a reference to the scoring exercise, but the consultation process. It was made in connection with later events, when an instruction had been given to the claimant only to communicate through Mrs Butland. Ms Horner was asked to collect the claimant's work equipment. Mrs Rodmell explained in cross examination the context of this email chain and what she had meant when she said Ms Horner had not been involved in the process, namely the consultation process. I accepted that explanation. The claimant had not been dealing with Ms Horner during the consultancy exercise, but with Mr Cromack and Mrs Butland. Any anticipated conflict at a meeting to return work equipment would be less likely with Ms Horner. The claimant had not been informed of her involvement in the scoring exercise.

36. I reject the submission of Mr Wharton that the meeting at which the scoring exercise took place never occurred. I do not accept that Mrs Butland and Mr Cromack have lied about it on oath.

37. On 2 April 2018 the claimant wrote to Mr Hillyard. He expressed his concern that he had been selected for redundancy because he had raised concerns with various colleagues about 'disreputable and unlawful practices'. He asked Mr Hillyard to provide a statement for legal proceedings concerning a discussion about Mr Cromack recruiting his wife in a highly suspect way to the post of insurance manager. Mr Hillyard replied to say he would be happy to provide a statement and he did so on 10 July 2018.

38. The claimant submitted a notice of appeal on 4 April 2018 (wrongly dated 4 March 2018). He set out four grounds. The first was that no alternatives were considered, the second was that the selection criteria and scoring process did not appear to have been applied, the third was the procedure had not been followed and the fourth was that he was concerned that he had been selected because he was an older Asian person.

39. The appeal hearing was arranged for 20 April 2018. A management response to the four points of appeal was sent on 16 April 2018. Mr Wharton requested permission to represent the claimant by email of 17 April 2018. This was declined because he was not a trade union representative or work colleague. The claimant was informed, on 18 April 2018, that he could provide representations in writing. He did so, on 19 April 2018.

40. He included three further points to his grounds of appeal. Towards the end of the submission the claimant wrote, "*please confirm that I have made public complaints about the unlawful misuse of charitable funds by my line manager Colin Cromack in employing his own wife for Age UK position under highly suspect circumstances".*

41. On 20 April 2018 the staffing subcommittee met and considered the appeal. The claimant did not attend. Mrs Ellis and two other trustees dismissed the appeal and wrote to the claimant that day. The letter addressed a number of the points raised in seven numbered paragraphs, but did not specifically respond to the issue of any public interest complaint. The claimant and Mr Wharton alleged that Mrs Ellis and Mrs Butland had not provided the further written submission to the other members of the panel, because there was no email chain copying them in. That was because Mrs Rodmell had made paper copies for the panel. The letter sent by the panel to the claimant specifically addressed an issue which he had raised in his additional grounds of appeal about one member of the panel being a wheelchair user. It is clear from this that the panel had considered the written representations. The suggestion that the panel did not have a copy of it was conjecture, without any evidence in support. I reject it.

42. One of the issues which the appeal panel considered was whether the claimant's absences due to illness should have been discounted because, in his appeal letter, he stated he had a disability of diabetes and was carrying for his wife who was also disabled. Ms Dixon, the external human resources adviser commissioned by the respondent, advised that the records needed to be checked. That was done and they did not disclose any obvious connection to diabetes. The panel therefore concluded that the scoring was accurate and was the reason the claimant had been selected.

43. The panel asked Mr Cromack, who was presenting the management case, about the allegation concerning the appointment of his wife. Mr Cromack told them that she was employed by Trading and not the charity and that he had been involved in the process of her appointment as a technical advisor to Mrs Marsh, the corporate services executive. The appointment had been in 2010. Mrs Cromack had worked for Trading prior to that appointment and was still in its employment at the date of appeal. The panel concluded that this had no bearing upon the selection of the claimant for redundancy. It left the matter for Mrs Butland to investigate, if she saw fit.

44. On 20 April 2018 Mr Cromack wrote to the claimant and informed him that he had been asked to liaise with him regarding his proposal for a job share to avoid redundancy. He invited him to reply within three days to express how many hours he would wish to consider as an alternative to redundancy. This is because one of the panel members, Mr Felton, was concerned that no stone should be left unturned to

assist in this difficult situation. Mr Cromack accepted that suggestion during the appeal hearing.

45. Mrs Rodmell restricted the claimant's access to the respondent IT equipment for the last days of his employment. He had been absent on sick leave from 26 March 2018 until 30 April 2018 when his employment terminated. Mrs Butland acted upon the advice of Ms Dixon. She was concerned the claimant might say something inappropriate to other staff if he could use his email.

46. The claimant lodged formal complaints with the national charity Age UK and with the Charity Commission about Mrs Cromack's appointment. These were not taken forward by those bodies.

The Law

Unfair dismissal

47. By Section 98(1) of the Employment Rights Act (ERA 1996) it is for the employer to show the reason for the dismissal and that it falls within a category recognised in Section 98(1) or (2), one of which in that the employee was redundant, see Section 98(2)(c).

48. Under Section 98(4) of ERA "*where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.*

49. There is no burden of proof in respect of the analysis to be undertaken under Section 98(4) of the ERA. Material considerations in a case where the reason for the dismissal was redundancy will include whether the employer consulted the employees at an early stage with a view to considering whether the redundancy could be avoided and, if it could not, to provide information about the procedure and the criteria to be used in selecting the employees for redundancy, to consult with the affected employees and provide a right of appeal, see ***Williams v Compair Maxam Ltd [1982] ICR*** *156.*

50. By Section 123(1) of the ERA, the amount of the compensatory award shall be such amount as the Tribunal considers just and reasonable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. If the dismissal is unfair for procedural reasons, the Tribunal may reduce or extinguish any compensatory award, if the Tribunal concludes that the complainant would or might have been dismissed had the procedures been fair[1].

[1] Polkey v A E Dayton Services Ltd [1988] ICR 142.

51. By section 103A of the ERA dismissal will be regarded as unfair if the reason or, if more than one, the principal reason for the dismissal is that the employee made a protected disclosure.

52. The disclosure will qualify for protection if it is a disclosure of information which, in the reasonable belief of the worker making it, is made in the public interest and tends to show one or more aspects of wrongdoing defined in section 43B of the ERA, one of which is that a criminal offence had been is being or is likely to be committed. If qualifying, the disclosure would be protected if it is made to the worker's employer, see section 43C of the ERA.

Analysis and Conclusions

Unfair dismissal on the ground that the claimant had made protected disclosures

53. I have made findings about precisely what was said by the claimant to Mr Hillyard and Mrs Butland about the information which was disclosed in respect of the alleged protected disclosures. The wrongdoing alleged is the commission of a criminal offence.

54. On 25 August 2017 the claimant told Mr Hillyard that he believed the appropriate recruitment policies had not been followed for the appointment of three members of staff and this included Mrs Cromack. That, of itself, was not disclosure of information which tended to show that a criminal offence had been committed. A failure to follow policies would not indicate that a criminal offence had been committed.

55. However, what was said on separate occasions can be taken together, for the purpose of determining whether the disclosures were protected[2]. The claimant relied upon the August and September disclosures to Mr Hillyard in the further particulars, but not the discussion the following February.

56. In September 2017 the claimant told Mr Hillyard that Mr Cromack misused charitable funding and that he was concerned about recruitment practices and promotions. He specifically said that Mr Cromack interviewed his wife for the post at Trading where she had worked and she had been appointed to it. Reference to misuse of charitable funds takes the level of wrongdoing further and could, subject to the context and other circumstances, tend to show the commission of a criminal offence. Misuse of charitable funds could amount to theft.

57. In ***Kilraine v London Borough of Wandsworth [2018] ICR 1850*** the Court of Appeal considered the principles under section 43B of the ERA. For a disclosure to be qualifying it must have a sufficient factual content and specificity to be capable of tending to show one of the defined acts of wrongdoing, in this case a criminal offence. At paragraph 36 of the decision Sales LJ said, "*It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters"*. To

[2] Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540

address that question in the present case, it is necessary to examine both what was said and what it could reasonably have tended to show.

58. The starting point is what happened and then what became known to the claimant. Mr Cromack's evidence about his involvement in the appointment of his wife and the account which he gave to the appeal panel, was that he did not appoint his wife to the post, but was present at the interview to give technical advice. She had already been in the employment of Trading and this was an application for a promotion. She and one other internal candidate applied and Mrs Cromack was successful. I accepted Mr Cromack's evidence. I am satisfied, in common with the present code of conduct of the respondent, this was not good practice and had every possibility of raising the suspicion amongst others of bias.

59. In her evidence Mrs Rodmell said that she had previously been aware that Mr Cromack had some involvement in the appointment of his wife. The claimant said this was well known and I am satisfied there were rumours about it for several years amongst the workforce of both organisations.

60. Mr Falcao submitted that the claimant knew that the appointment was to a limited company which was separate to the respondent charity and therefore the charity's funds were protected and not used for that purpose. He therefore submitted that the claimant could not reasonably believe that the funds were misused. By way of a legal analysis that is a reasonable proposition. But I am not satisfied it is a complete answer to the approach to be undertaken under section 43B of the ERA. Trading was a company wholly owned by the respondent. It sold insurance products and other services. Whilst it operated autonomously its practice had been to donate any profit to the respondent. If its generation of profit was adversely affected by an improper appointment, it could impact upon the respondent, albeit indirectly.

61. The problem for the claimant is a different one. It is that the facts which came to his attention did not tend to show a misuse of charitable funds, the part of the disclosure which might have tended to show the commission of a criminal offence. The information which had come to his attention, that Mr Cromack had been involved in the appointment of his wife to a post with an associated organisation, could reasonably amount to a belief that the appointment had been tainted with nepotism. That form of bad recruitment practice does not give rise to any criminal offence having been committed. The position might have been different if an unnecessary job had been specifically created for Mrs Cromack, so as to divert resources from another area of funding or to reduce profitability and thereby dividends of Trading. For the reasons I have set out, I am not satisfied the claimant did allege that Mr Cromack had created a job for his wife and he denied making such an allegation in cross examination. To summarise, the facts, or information, which the claimant disclosed could not, in his reasonable belief, have tended to show a criminal offence had been committed, but rather they tended to show poor recruitment practices, with risks of nepotism and favouritism.

62. Even if I were wrong, and the disclosure was protected, I am not satisfied that the executive officers who dealt with the redundancy situation knew anything about the discussions in August and September 2017, or for that matter February 2018, with Mr Hillyard during the consultation process and the decision-making exercise which led to the claimant's selection. Mr Hilliard was adamant that he had not taken

any action upon the claimant's concerns nor passed them on to anyone. I regarded him as a truthful and honest witness. He was prepared to provide a statement for the claimant about this matter for legal proceedings when asked. I accepted his evidence that he did not attach any great significance to what the claimant had said, largely because it concerned an appointment some seven years previously and arose from his own initiation of a discussion as to how to do things better. The claimant did not ask Mr Hillyard to undertake an investigation. Mr Hillyard was looking to the future, to improve practices. I have no doubt he would have taken action had he attached the significance now given to the complaint, which has become embellished with the passage of time.

63. I am not satisfied that the written submission to the appeal panel amounted to a further protected disclosure, for the same reasons set out above. The claimant could not have a reasonable belief there had been misuse of charitable funds by a nepotistic appointment. In his further particulars this is extended to an assertion that this departure from proper practice could lead to the financial abuse of the clients. That is not a reasonable inference from the information disclosed that Mr Cromack had been involved in the appointment of his wife.

64. Nor do I accept that the appeal committee dismissed the appeal because of the reference made at the end of a two-page written representation to misuse of charitable funds by reason of Mr Cromack appointing his wife. The claimant did not attend the appeal to explain this. In the written document the claimant did not allege that this was the reason he had been dismissed. I accepted Mrs Ellis' evidence that the panel had relied upon the scoring exercise in its determination to dismiss the appeal. This had nothing to do with any disclosure. One outcome of the appeal was to consider the opportunity for a jobshare with the claimant. He did not respond to this offer within the timeframe. Such an attempt to retain the claimant in employment diametrically contradicts the alleged desire of the respondent to remove him from its employment because he was a whistleblower.

Unfair dismissal: general principles

65. There was a redundancy situation, contrary to the arguments that this was merely a pretext to remove the claimant. Were that so, four other employees from the home from hospital service and an advocate would have been collateral casualties of a vindictive vendetta directed at the claimant. That was a far-fetched proposition which I did not accept.

66. There were flaws with the redundancy exercise in addition to the admitted one of scoring those at risk as required under the written matrix. I do not accept all of the criticisms. There were several meetings and opportunities for questions to be asked and representations made. That said, the information initially provided was inadequate. The letter did not explain that there would continue to be an Information and Advisory service in some form and further details became known from the newsletter, which was inappropriate.

67. In addition the respondent unreasonably failed to provide the claimant with the reason he had been selected for redundancy and a copy of the scores he had been given against the matrix. Any reasonable employer would have provided this information to enable the employee to make representations upon it, before

confirming its provisional view. The claimant would have been able to comment about his disability, albeit I am not satisfied that would have changed matters, but more significantly about the failure to divide the figures relating to absence by three.

68. I reject the submission that these errors were because the claimant had been singled out for different treatment, as he believes because of the disclosures. I am satisfied they arose from carelessness and lack of attention to detail. I regarded the witnesses who gave evidence for the respondent to be conscientious and committed, not only to the users of the charity but also to their staff. The serious accusations levelled at them and their representative were not justified.

69. Mr Wharton made an application for Mr Falcao, Mrs Butland and other managers of the respondent to be referred to the Attorney General for consideration of criminal charges for perverting the course of justice because of concealment of evidence. I could not find anything in the conduct of this litigation which was worthy of such accusations. It is true that there was late disclosure of the email of Mr Sadiq, but the evidence did not allow the inference that this was a consequence of deliberate concealment to pervert the course of justice. Disclosure of evidence and the rules of privilege are not straightforward and I have no information about how this document came to be served so late, following an earlier application before me. The respondent was entitled to rely on the legal professional privilege which applied during the conduct of this case. Mr Sadiq did not give evidence. There was no evidence he had been intimidated not to give evidence by the managers of the respondent, as alleged. I am not satisfied the inference Mr Wharton has invited can properly be made.

70. In respect of alternative employment, Mr Wharton submitted that a vacancy arose during the notice period but the claimant had not been considered for it. He questioned Mrs Butland about it. Mrs Brawn had been the team leader for the Home from Hospital Service and had other responsibilities. Her post was affected by the withdrawal of funding and she was allocated to other projects. She left in March 2018. Her post disappeared. Her duties were taken on by Kerry-Lee Horton, who was a senior manager in the care directorate. I do not accept that this amounted to a failure to offer the claimant a suitable alternative vacancy, as the post no longer existed.

Polkey

71. Under the written policy of the respondent the last in first out criterion could be used in the event the candidates all scored the same. All candidates would have scored the same had the guidance been applied correctly.

72. That would have led, in the first instance, to consideration of the redundancy of Ms Stead, who had been in her probationary period at the time. She had previously worked voluntarily for the respondent, but had been employed for about four months at the time of the consultation process. She only worked 12 hours.

73. Mr Falcao submits that the claimant would have been dismissed in any event. He says that the sickness absence would have been used and that he would have been selected because his record was the worst. I reject that. A concession was made that not only was the scoring exercise misapplied, it would have been

fundamentally inappropriate to compare the claimant's previous three-year attendance with that of Ms Stead. That is because the record of attendance could not give a fair and comparable indicator, because she simply had not been there long enough. That was a proper concession to make. I do not consider the respondent would have resorted to sickness absence in a different approach to that set out under the matrix.

74. The difficulty which had to be tackled was that there was a reduction in funding of 115.5 hours to something in the region of 85 to 87, as set out in the email of Mrs Butland to Ms Connor. Information provided at the end of the hearing indicated that two of the employees are now engaged on a 37.5 hour contract, albeit one had been previously employed for 36 hours, and Ms Stead remains on a 12 hour contract. It is perplexing that the expression of interest exercise proposed a 15 hour contract. It is the claimant's belief that Ms Stead turned that offer down. I have no evidence on that and consider it disproportionate to reopen the case as it is of no significance. I am satisfied that there was a little flexibility, as reflected in the estimate of the budget of 85 to 87 hours.

75. The offer after the appeal to discuss the possibility of job share is, in my judgment, significant. It suggests that Mr Cormack believed there was merit in the proposal and that his discussions with the other members of the team had not exhausted that possibility. It seems to me that there was every likelihood that Ms Stead would have been made redundant, the default position under the policy, leaving a requirement to save a further 16 to 18 hours. The claimant said he would be prepared to reduce his hours to 25. I have no evidence about what the other two staff would have said, but infer reduced hours were a real possibility because of the invitation to the claimant to express his view.

76. To discount the risk that this would have not been agreeable to the other two, I conclude that there was an 80% chance that the claimant would have been retained on a contract of 25 hours per week.

77. I was asked to take into account the fact that the claimant did not engage with the offer to consider jobshare after the appeal and so it is said there was no prospect of him agreeing to change his existing terms. I must consider what would have happened under an alternative hypothetical process. Had a fair procedure been adopted, I consider the claimant's attitude would have been different. I am satisfied he would have taken steps to discuss alternative terms, had he felt he had been treated fairly.

Employment Judge D N Jones

Date 18 June 2019

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