EMPLOYMENT TRIBUNALS

Claimant: Mr M Darlington

Respondent: Interserve (Facilities Management) Ltd

Heard at: Birmingham **On:** 9 – 13 September 2019

Before: **Employment Judge Miller**
Mr C Dodds
Ms S Outwin

Representation
Claimant: In person
Respondent: Miss I Ferber - Counsel

RESERVED JUDGMENT

1. The claimant's claims of detriment on the grounds of making a protected disclosure are not well founded and are dismissed.
2. The claimant's claim that he was dismissed for the reason that he made a protected disclosure pursuant to section 103A Employment Rights Act 1996 is not well founded and is dismissed.
3. The claimant's claim that he was unfairly dismissed pursuant to section 98 Employment Rights Act 1996 is well-founded and is upheld. Remedy will be determined at a separate hearing.

REASONS

Introduction

1. This was a claim brought by Mr Martin Darlington on 14 May 2018 following a period of early conciliation from 5 April 2018 to 4 May 2018. His complaints were of unfair dismissal, both general unfair dismissal within section 98 of the Employment Rights Act 1996 and automatically unfair dismissal under section 103A of the Employment Rights Act 1996; and that he had been subjected to detriments under section 47B of the

Employment Rights Act 1996 on the grounds that he had made protected disclosures.

2. The claimant's employer was Interserve (Facilities Management) Ltd, a company that provided facilities management services including to public sector organisations under PFI agreements.

3. Mr Darlington was dismissed, ostensibly for redundancy, on 28 February 2018 and his job at the time was Business Support Manager.

4. In summary, the claimant's case is that prior to being engaged as the Business Support Manager, he was employed by the respondent as the Account Director for the Dudley Group of Hospitals NHS contract (DGH). On 14 December 2015 the claimant sent a letter to Adrian Ringrose, the Chief Executive of Interserve Plc, the respondent's parent company, setting out a number of matters which the claimant says amounted to protected disclosures, concerning matters of contract performance and health and safety at the DGH hospitals.

5. Thereafter, the claimant says, he was subjected to a number of detriments. These were clarified with the claimant at the beginning of the hearing as being those matters set out at page 51 of the bundle.

6. Specifically, they are:

    a. The DGNHSFT (Dudley Group NHS Foundation Trust) client had previously asked the respondent to remove other members of staff from the site, these being Mark Felton, senior commercial manager, and Stephen Ball, head of projects. Both requests were ignored and both members of staff continued to be present on site. The claimant notes he was treated differently from other staff and this is noted in the claimant's letter to the executive director Bruce Melizan dated 11 July 2016, the letter also containing other relevant detail.

    b. The claimant was told by the executive director responsible InterServe (Facilities Management) Ltd, Bruce Melizan and, at the meeting held on 1 July 2016 that the job as Business Support Manager was a genuine job. Over the 18 month period from July 2016 to December 2017, and for the reasons contained in this response, this was proven not to be the case.

c. The claimant was isolated little work given to him. What work was given to him was not at the level the claimant worked out prior to December 2015. Some months no work was done. On average over the 18 month period the work done amounted to no more than an average of four hours per week.

d. The claimant concluded and submitted a review of the respondents “Protect” commercial and operational process and found it to be inadequate for the health environment. Advice was given as to how the process could be improved and made robust. No action was taken.

e. Claimant had little contact with his line manager. A few phone calls and a few meetings in the 18 month period.

f. Claimant had no client contact, no staff or direct reports, no P & L responsibility and no authority or remit to get involved with operational issues or make contact without having been given direction from his line manager.

g. Working from home the business did no home visit to conduct a review of the work environment and health and safety (yet later in the redundancy consultation respondent was absolutely adamant that the claimant’s home was an establishment of InterServe). At times it was as if the claimant did not exist in the claimant’s repeated request for his job back as the account director for the Dudley hospital PFI contract were ignored. It was not as if the claimant did not want to return to a proper job with the associated challenges and responsibilities he was responsible prior throughout his service to the respondent as had been the case prior to 14 December 2015.

h. The claimants PADP (performance review and personnel development plan) was ignored and not completed. The claimant believes this to be due to the letter of 14 December 2015 and whistleblowing to the respondent’s then chief executive. The claimant sent an email to his line manager Jason Hogan, commercial director, on the 31 July 2017 confirming his PADP had been submitted online (the procedure is completed electronically

online) and that it should be discussed and closed out. In the same email the claimant asked the respondent to review the whistleblowing procedure as he believed he was awaiting the outcome of the internal review and response from the group secretary. In the claimant's email to the respondent sent 4 August 2017 the claimant again queried why the standard InterServe PADP and performance review was not being followed, that is to review last year's performance (2015) and agree objectives, training and development needs and once agreed signed them off online following review by the persons managers manager, in the claimant's case this being managing director Martin Burholt. The PADP process was not completed despite the claimant's request for the process to be followed.

i. On a number of occasions the respondent attempted to unilaterally change the claimant's terms and conditions and the claimant rejected each and every attempt claimant's letter to HR director Geoff Hughes dated 24th of March 2016 refers.

7. The claimant also claims that his dismissal was because of the letter sent to Adrian Ringrose on 14 December 2015.

8. The respondent's case is that the claimant was dismissed for a fair reason, namely redundancy, and it is not accepted that the claimant's letter of 14 December 2015 was a qualifying protected disclosure within the meaning of section 43A of the Employment Rights act 1996.

9. In any event the respondent denies, effectively, that the claimant has been subjected to any detrimental treatment. To the extent that any of the matters listed earlier are detriments, the respondent says that none of those things happened as a result of the claimant writing to Adrian Ringrose on 14 December 2015.

10. During the hearing it appeared from the questions that the claimant was asking of the respondent's witnesses that the claimant might now be suggesting that the reason he was moved from his job as account director at DGH to that of Business Support Manager was also because of the letter sent to Adrian Ringrose on 14 December 2015. As it had appeared from the evidence the tribunal read and heard that the decision to remove

the claimant from the DGH contract was communicated to the claimant on 10 December 2015, this did not seem to be a realistic assertion. However, when asked to clarify this, the claimant said that in fact the decision to remove him from the DGH contract was taken at a meeting on 11 February 2016. This was not put as an application to amend the claimant's claim by the claimant but was said to be a clarification of the first alleged detriment as set out previously.

11. By way of explanation, the claimant was engaged, certainly prior to 10 December 2015 (although it is necessary to make findings of fact about when this occurred as this date is not agreed), as the contract director in relation to a PFI contract in which the respondent provided facilities management services at a hospital. We did not hear detailed evidence about most of the contractual arrangements of the PFI scheme, but in summary the Dudley Group NHS Foundation Trust ("the Trust") was the end client. The Trust engaged a special purpose vehicle (SPV) called Summit Healthcare (Dudley) Ltd ("Summit") to deliver services to it, and Summit then subcontracted the facilities management services to the respondent. The claimant was therefore responsible for matters relating to this contract at the Trust's premises.

12. It is not disputed that the claimant stopped working at the Trust under the PFI contract, that he had a period of sickness absence immediately thereafter, that he was then on gardening leave (during some of which period he was also sick) and that ultimately he was appointed to the job of Business Support Manager. It was from this job of Business Support Manager that the claimant was ultimately dismissed but the precise details and timings of this chronology form a substantial part of the matters of dispute in this case.

13. Particularly, the claimant complains that the job of Business Support Manager and alleged detriments two, three, five and six are effectively matters relating to the claimant's appointment to what he says was "a non-job".

14. This is a broad overview of the case.

The hearing

15. The claimant provided a witness statement running to some 102 pages and the respondent called seven witnesses, namely

    - Heather Ward-Russell, HR director Interserve
    - Martin Burholt, managing director of the Community's Business Unit since October 2015
    - Dean Ruck, Business Unit Director and the claimant's line manager on the DGH contract
    - Jason Hogan, Commercial director for Interserve support services and the claimant's line manager from June 2016 until November 2017
    - Jon Crump, the commercial director in the Commercial Business Unit and the claimant's line manager from 1 November 2017 until his dismissal
    - Geoffrey Hughes, HR director Infrastructure and Industrial Business Unit
    - John Lambert people director across the Interserve group of companies

16. The tribunal was also provided with a bundle of documents running to 778 numbered pages, although including additional sub numbered pages, and the claimant produced an additional bundle of documents which he said the respondent had not agreed to include in its bundle.

17. The tribunal read the witness statements and documents referred to in the respondent reading list. It allowed the claimant to refer to his additional documents as necessary.

18. There was also some late disclosure of documents during the tribunal including extracts from the relevant parts of the PFI contract and a missing page from Geoff Hughes' investigation report.

19. Unfortunately, because of time constraints and witness availability, the tribunal was forced to impose a reasonably strict timetable on the parties for cross examination. Recognising that the claimant is a litigant in person and the respondent was represented by solicitors and counsel, the tribunal sought to assist the claimant in the presentation of his case. We are also grateful for the helpful assistance of Miss Ferber in this respect.

Respondent's application to amend its response

20. In the course of the hearing, after the respondent had given evidence and when the claimant was being cross examined, it became apparent that the respondent sought to argue that the claimant had not had a reasonable belief that the disclosures he made in the letter of 14 December 2015 were made in the public interest. This was not part of the respondent's pleaded case.

21. Ms Ferber made an application under rule 30 of the Employment Tribunal Rules of Procedure 2013 to amend the respondent's response to rely on the defence that the claimant did not reasonably believe that any disclosures he made in the letter to Adrian Ringrose of 14 December 2015 were in the public interest. That application was allowed for the following reasons.

22. The claimant had already given evidence about his belief in the public interest and had cross examined the respondent's witnesses on that. He confirmed that there was no more evidence he wanted to bring about the public interest test. We were therefore satisfied that, in effect, despite the pleadings both parties were proceeding on the basis that this already formed part of the respondent's case. There was therefore no prejudice to the claimant in allowing this amendment even at this late stage. Conversely, there would have been substantial prejudice to the respondent in not being able to challenge in cross examination the evidence already given by the claimant on this matter. Having regard therefore, to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment, the tribunal's decision was to allow the amendment

The law

Protected disclosures

23. The law relating to protected disclosures is set out in Part IVA of the employment rights act 1996.

    Section 43A (Meaning of "protected disclosure") provides:

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

Section 43B (Disclosures qualifying for protection) says:

(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

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

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

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

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

Section 43C (Disclosure to employer or other responsible person) provides:

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure . . .—

(a) to his employer, or

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

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

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

to that other person.

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

Section 43K (Extension of meaning of “worker” etc for Part IVA) says, as far as is relevant:

(1) For the purposes of this Part “worker” includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for “personally” in that provision there were substituted “(whether personally or otherwise)”,

[(ba) works or worked as a person performing services under a contract entered into by him with [the National Health Service Commissioning Board] [under [section 83(2), 84, 92, 100, 107, 115(4), 117 or 134 of, or Schedule 12 to,] the National Health Service Act 2006 or with a Local Health Board under [section 41(2)(b), 42, 50, 57, 64 or 92 of, or Schedule 7 to,] the National Health Service (Wales) Act 2006]. . .,]

(bb) …

(c) …

(ca) . . .

(cb) …

(d) …

and any reference to a worker's contract, to employment or to a worker being "employed" shall be construed accordingly.

(2) For the purposes of this Part "employer" includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,

(aa) …

(ab) …

(b)…

(ba) . . .

(c) …

(3) ...

(4) The Secretary of State may by order make amendments to this section as to what individuals count as "workers" for the purposes of this Part (despite not being within the definition in section 230(3)).

(5) An order under subsection (4) may not make an amendment that has the effect of removing a category of individual unless the Secretary of State is satisfied that there are no longer any individuals in that category.

24. This means that in order to be protected, the relevant disclosure must satisfy all of the following requirements:

    a. It must be the disclosure of information

    b. The worker disclosing the information must reasonably believe both:

        i. That the information tends to show one of the listed matters; and

        ii. That the disclosure is in the public interest.

25. The disclosure must also be made to an appropriate person – namely the worker's employer or, where the conduct relates to someone other than his employer, that person or, in respect of any other matter for which someone other than his employer has responsibility, that person.

26. The tribunal was referred to the following cases in respect of the question of what it means to say that the worker has a reasonable belief that the disclosure is made in the public interest. These are:

    Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA. Miss Ferber submitted that there was, in effect, a two-stage test for the tribunal in determining this question:

    a. At the time of making the disclosure, did the worker actually believe that the disclosure was in the public interest; and
    b. If so, was that belief reasonable.

27. We agree that this is an accurate summary. We were also referred to subsequent passages in *Chesterton* that "while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it".

28. We were also referred to the Employment Tribunal case of *Abrams v EAD Solicitors LLP* ET Case No.2402068/14. Ms Ferber submitted that, although decided before *Chesterton*, it gives weight to the submission that a disclosure made for a purely personal motive would not be made in the public interest. To that extent, motive *is* relevant for the purposes of

determining whether the worker actually believed, at the relevant time, that they were making a disclosure in the public interest (part 1 of the test under *Chesterton*, above).

29. EJ Ryan said, in *Abrams*

> *"I was not persuaded that the correspondence was in any sense a disclosure to raise discriminatory practices within the firm in the interests of other members or of members of the staff, or because of a general public interest in combating age discrimination. Both letters make reference to matters of negotiated financial settlement which clearly indicate that rather than disclosing matters of public interest Mr Abrams was prepared to do a deal. That correspondence does not attract the protection afforded by the "whistle-blowing" legislation. I accept that a protected disclosure could have a dual purpose including personal considerations as well as a public interest, but I am not satisfied that this correspondence is of that nature; it is entirely personal to Mr Abrams and is seeking to optimise terms for his departure".*

30. Notwithstanding that this was decided before *Chesterton*, it is not inconsistent with it. It appears from this passage that the claimant in that case was motivated solely by personal matters. If that is the case, that claimant could not have actually believed he was making the disclosure in the public interest if he was making it for entirely personal reasons.

31. Finally, in respect of the legal position relating to protected disclosures, although the response referred to a lack of information or facts, the respondent produced no evidence and made no submissions about this. Nonetheless, we have considered *Cavendish Munro Professional Risks Management Ltd v Geduld* 2010 ICR 325, EAT in which it was held that

> *"…the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be: "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that: "You are*

not complying with health and safety requirements." In our view this would be an allegation not information".

Detriments

32. The law relating to detriments is set out in Part V of the Employment Rights Act 1996.

Section 47B (Protected disclosures) provides:

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

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).]

(2) . . . This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of [Part X]).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, “worker”, “worker's contract”, “employment” and “employer” have the extended meaning given by section 43K.

33. Detriment is not defined in the statute. However, it has a wide meaning and includes being put at a disadvantage. It does not necessarily have to be an economic disadvantage and should be considered from the worker’s perspective.

Section 48 (Complaints to employment tribunals) provides

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(3) An [employment tribunal] shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done.

(4A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).

(5) In this section and section 49 any reference to the employer [includes—

(a) where] a person complains that he has been subjected to a detriment in contravention of section 47A, the principal (within the meaning of section 63A(3));

(b) in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.

(6)…

34. This means that it is for the employer to show the ground on which any act or deliberate failure to act was done.

35. In *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, it was held that *'A reason for [an act or omission] is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to [act or refrain from acting]'*

36. Finally, in *Aspinall v MSI Mech Forge Ltd* EAT 891/01 the EAT held that

> *"For there to be detriment under section 47B "on the ground that the worker has made a protected disclosure" the protected disclosure has to be causative in the sense of being "the real*

reason, the core reason, the causa causans, the motive for the treatment complained of", to borrow the words of Lord Scott in the Race Relations case of Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 at 1082. Similarly if the detriment is (as was suggested in this case) dismissal, the making of the protected disclosure has to be the reason or principal reason for the dismissal".

Unfair dismissal

37. **Section 98 (General)** provides

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [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)—

(a) 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

(b) shall be determined in accordance with equity and the substantial merits of the case.

(5) . . .

(6) [Subsection (4)] [is] subject to—

(a) sections [98A] to 107 of this Act, and

(b) sections 152, 153[, 238 and 238A] of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

Reason

38. It is for the employer to show the reason and we refer again to the same passage in *Abernethy v Mott Hay and Anderson* [1974] ICR 323, [1974] IRLR 213 set out above.

Fairness

39. In respect of Redundancy, the leading case is *Williams v Compair Maxam Ltd* [1982] IRLR 83 in which the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows:

"… there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent

union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

> *1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
>
> *2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
>
> *3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*
>
> *4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.*
>
> *5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim'.'

40. We also refer to the case of *R v British Coal Corporation and Secretary Of State for Trade and Industry ex parte Price and others* [1994] IRLR 72 in which Lord Justice Glidewell held

    “It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p.19, when he said:

    'Fair consultation means:

    (a) consultation when the proposals are still at a formative stage;

    (b) adequate information on which to respond;

    (c) adequate time in which to respond;

    (d) conscientious consideration by an authority of the response to consultation.'”

Automatically unfair dismissal

Section 103A (Protected disclosure) provides

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

Findings and issues

42. We have set out the context of the claim above. We now make the following specific findings in respect of each issue, including relevant findings of fact. We recognise that the claimant referred to a number of matters of great importance to him relating to the subject matter of his letter of 14 December 2015 and his subsequent grievances. It is important to note, however, that the tribunal is not able to make findings of fact about the matters alleged in that letter or matters outside the claim as pleaded. The facts we make are only those necessary to resolve the dispute before us. Where we have made findings of fact, they have been made on the balance of probabilities.

Letter to Adrian Ringrose of 14 December 2015

43. The first question to determine is whether the letter sent by the claimant to Adrian Ringrose on 14 December 2015 was a protected disclosure.

44. The first element of the test is whether the letter contained facts or information. We did not hear evidence or submissions about this, so we have had regard to the letter sent on 14 December 2015 to Adrian Ringrose.

45. In our view, the letter manifestly does contain facts. Specifically, those set out at page 271 of the bundle numbered 1 – 5. The claimant refers to:

    a. operating theatres were in use by the trust and the public were being operated on when the ventilation systems are not valid dated and certified as being fit for use as required by the law and health technical memorandums (HTM). There were not certified as being to the minimum acceptable standard.

    b. Maternity wards were in use when the ventilation system had not been maintained for a period of in excess of 10 years. Supply and extract ductwork was dirty and the VAV boxes choked with dirt and so very little airflow was present in rooms where medical gases such as Entonox (a mixture of Nitrous oxide and oxygen) was employed. The trust raised issues that two nurses have commenced proceedings on the basis they had suffered interlocks poisoning.

c. Water sampling regimes to safeguard against Legionella were not being completed in anything like the quantity required for protecting people against the risk of infection. No water responsible persons were appointed and the risk share between trust, Summit SPV and Interserve had not been agreed. The water risk assessment also needed to be addressed.

d. The mortuary ventilation system had not been properly tested or validated as being fit for purpose as required by law and Health Technical Memorandum. The trust raised this on the basis that morticians and clinical staff have been put at risk when undertaking procedures.

e. In March 2015 the generators filed under test. An investigation proved that a lack of maintenance with the system over a period of 10 years was the reason. Fuel oil had become contaminated with water. Further investigation found a lack of maintenance with the oil from infrastructure. Pipework electrical lighting, electrical wiring, transfer pumps, containment and oil spillage into the adjacent nature reserve all became apparent. In addition, following the engagement of specialists it was determined that oil tanks (dating from the mid-70s) required repair.

46. All the above items, in our view, disclose facts that may tend to show that the health or safety of any individual has been, is being or is likely to be endangered. All matters relate to the safe working of a hospital, the failure of any one of which could result in a risk to the health or safety of the patient or employee of the hospital. In addition, item (e) also included information that tended to show that the environment has been, is being or is likely to be damaged. Specifically, the discharge of oil into the adjacent nature reserve.

47. Other matters referred to in the letter of 14 December 2015 include at page 271 that there was only one senior technician who was the "authorised person HV", which we understand to refer to there being only one person who was authorised to work on the high-voltage electrical infrastructure system. At page 274, the claimant said that "Interserve has never conducted a black start of the generators" and at page 275 the

claimant said that “in winter 2014/15 was found that due to faulty damaged frost coils to clinical area air handling units that operate on 100% fresh air, equipment also been left open so as to allow air to be drawn for the plant rooms… This potentially led to sealed clinical areas being left open to vermin and infestation.” Again, given the nature of the environment in which these failures were said to occur, in our view these disclosures do disclose facts which may tend to show that the health or safety of any individual has been, is being or is likely to be, endangered.

48. The next element of this test is whether the claimant reasonably believed that the facts disclosed tended to show one of the matters referred to in section 43B (1) ERA 1996.

49. We accept the claimant’s evidence that he did believe this. He was very persistent about this and he was not challenged. In fact, the respondent accepted all the failings put to them by the claimant. Although we are not required to make any findings as to the truth of the allegations set out in the letter of 14 December 2015, the fact that the respondent accepted the failings put to them supports the claimant’s evidence that he did reasonably believe that the facts he set out tended to show that the health or safety of any individual has been, is being or is likely to be endangered.

50. The next question for us to consider is whether the claimant reasonably believed that he was making the disclosures in the public interest.

51. The claimant says, on the second page of his letter (at page 271), that “I ask you, do you consider these issues that have impacted on the community and trust staff should be fully shared with them in a spirit of cooperation and partnership along the lines of Interserve’s four pillars and Vision 2020? The Trust and public have been put at risk by Interserve.”

52. It was put to the claimant in cross examination that the reason for sending the letter was to get his job back, and he was referred to the meeting on 10 December 2015 at which he had said he had been told by the respondent that he could remain on the DGH contract until retirement.

53. The claimant denied that this was the reason. We were also taken to page 276 of the bundle (in the letter of 14 December 2015) as evidence that the reason for the sending of the letter was for his own benefit. Specifically, he

was referred to his reference to the duty of care he said the respondent had to *him* as evidence that the claimant sent the letter solely for his own benefit. Again, the claimant denied this.

54. On balance, we find that part of the reason for sending the letter was that the claimant was very unhappy with the decision to remove him from the DGH contract. However, we also find that the claimant did believe at the time that in respect of the specific disclosures in the letter set out above, that he was making disclosures in the public interest. The claimant said as much at the time and repeated this in evidence. One of the reasons, he said, that he wanted to return to the DGH contract, was to continue with the work of improving matters at the hospital. This is consistent with our finding that the claimant reasonably believed that he was making disclosures in the public interest. The claimant's desire to return to DGH to remedy the outstanding failures was not inconsistent with making the disclosures in the public interest.

55. Finally, we note that the respondent said that Adrian Ringrose was aware of these matters. The claimant said he did not know that Adrian Ringrose was so aware, and we wholly accept his evidence. Adrian Ringrose was the Chief Executive of the parent company of the respondent, a large PLC of which Interserve (Facilities Management) Ltd was but one division. From the claimant's perspective the problems had not been remedied for 14 years. It was therefore reasonable for him to believe that Adrian Ringrose was not aware of the detailed issues.

56. The tribunal's view is that it was reasonable for the claimant to hold this belief. The matters raised – Entonox poisoning, legionella and ingress of vermin by way of examples – are clearly and obviously matters of public interest.

57. Neither party raised the question of whether the disclosure was made to the correct person but Interserve (Facilities Management) Ltd was the claimant's employer not Interserve PLC. A copy of the respondent's Whistle Blowing Policy was included but we were not explicitly taken to it. However, we note that the policy does state that a disclosure could be made to any PLC board member, so we are satisfied that the disclosure

was made to an appropriate person in accordance with section 43C(C) ERA.

58. We conclude, therefore, that the letter of 14 December 2015 did contain protected disclosures.

Detriments

59. We now consider the detriments. As mentioned above, although we heard a great deal of evidence about various matters, we are only able to make decisions about the detriments that the claimant says he was subjected to as a result of the protected disclosure of 14 December 2015. We therefore set out our decision on each of those matters below and have only made such findings of fact as are necessary to determine each issue.

60. *Detriment (a): the DGNHSFT (Dudley Group NHS Foundation Trust) client had previously asked the respondent to remove other members of staff from the site, these being Mark Felton, senior commercial manager, and Stephen Ball, head of projects. Both requests were ignored and both members of staff continued to be present on site. The claimant notes he was treated differently from other staff and this is noted in the claimant's letter to the executive director Bruce Melizan dated 11 July 2016, the letter also containing other relevant detail*

61. We find that the decision to remove the claimant from the DGH contract was made before 10 December 2015. It was communicated to the claimant in a meeting with Dean Ruck on that date and as recorded in the claimant's own notes of that meeting at page 261 of the bundle. In fact, the claimant asserted that the decision had been made by Martin Burholt as early as August 2015 following a meeting with the chair of the Trust.

62. There is therefore no way in which the decision to remove the claimant from the DGH contract could possibly have been taken as a result of the claimant sending the letter to Adrian Ringrose 4 days later, on 14 December 2015.

63. The claimant did say at one point that, in fact, the decision had been taken at the meeting with Heather Ward-Russell and Dean Ruck on 11 February 2016. We do not agree. The facts are that the claimant went off sick on 17 December 2015 and thereafter stopped work on the DGH contract. The

fact that there had been a plan to handover the work at DGH does not alter the date on which the decision to remove the claimant was made.

64. We find that the reason that the claimant was removed from the DGH contract was because the respondent was required by the Trust to remove him. Martin Burholt was very clear that the reason the respondent acceded to this request was because, in his view, the claimant was confrontational with the client and was not adjusting his management style.

65. We heard submissions about the contract between Summit and the respondent and, specifically, whether that conferred the right on Summit to require removal of the claimant from the contract. However, we do not need to make a finding about that. Martin Burholt was clear that the decision was his and had been made for commercial reasons.

66. It follows therefore, that the claimant was not subject to detriment (a) on the ground that he made a protected disclosure on 14 December 2015.

67. *Detriment (b): The claimant was told by the executive director responsible InterServe (facilities management) Ltd, Bruce Melizan and, at the meeting held on 1 July 2016 that the job as business support manager was a genuine job. Over the 18 month period from July 2016 to December 2017, and for the reasons contained in this response, this was proven not to be the case*

68. It was agreed that the claimant was told that the job of Business Support Manager was genuine. The claimant's case was that the job was not genuine. The basis of the claimant's case was that he did not have sufficient work to fill his time. He produced an analysis which he said showed that the work he was given in his new role as Business Support Manager was only sufficient to fill 7.42% of his available working time.

69. It was not put to the claimant that he was in fact fully occupied throughout this role. However, we heard from Jason Hogan, his manager through the majority of his time as Business Support Manager, that he believed the claimant was fully occupied with the work he had set him. He said that it was concerning that a senior manager was only working 4 hours per week and that he had not known that. Jason Hogan said that he trusted the claimant to manage his own time and ensure the delivery of his role. The

claimant did say in his PADP in July 2017 that he felt undervalued, but in response Jason Hogan asked him to report what he had done and discussed opportunities to get involved in Alder Hay and Slough contracts.

70. Jason Hogan said that he expected the Slough contract to last to about five months. The claimant said that he only did about 11 days' work on this. There were no complaints about his work there. We accept Jason Hogan's evidence and it was, we find, reasonable for him to believe that the claimant was busy while he was managing him. There was no other evidence to the contrary. Further, the claimant did not appear to seek out further work – he said it was up to his managers to allocate work to him.

71. As far as the respondent was concerned, therefore, the claimant had a proper job and it was paying him to work full time on it. When the claimant did say he was under occupied, the respondent took steps to identify further work.

72. When Jon Crump took over as the claimant's manager on 1 November 2017, he checked with the claimant what he was working on. His evidence was that the claimant was abrupt with him and said he was working on the Slough contract. He said that as the claimant was a senior experienced manager, he didn't question him about his workload. He also said that the claimant did not ask him for any more work so assumed he was very busy. Jason Hogan had said he expected the Slough contract to run until December 2017. Again, there was no evidence to the contrary and we consider that this was a reasonable position for Jon Crump to take. The claimant said that there had been no meetings, but he did not dispute that Jon Crump had tried to meet him and had spoken to him on the telephone.

73. We also accept that the claimant knew in detail the nature of the role he was offered and then accepted. The formal offer letter was sent to him on 20 July 2016, the role having been first mooted on or around 9 June 2016. This is when the job description was created and sent to him. The claimant did not start working in the Business Support Manager role until September 2016 and in the intervening period the claimant had the opportunity to consider the role in detail. The claimant accepted in cross examination that he understood the implications of the job description when he received it. The claimant accepted that Jason Hogan was

genuine, and he also accepted that he considered the role to be genuine when offered. We find that the role was created with the claimant in mind.

74. Having been taken off the DGH contract in December 2015, it was made clear to the claimant on a number of occasions that the respondent wanted to retain his services. They made enquiries of other departments about roles for him and ultimately created a role. We wholly accept the respondent's evidence that there was a need for that role and that the offer of the job was genuine to retain the claimant's skills in the business.

75. Therefore, we find that the claimant was not subject to a detriment by the respondent. The respondent genuinely believed it was giving the claimant a real job and that the claimant had accepted it.

76. *Detriment c: The claimant was isolated little work given to him. What work was given to him was not at the level the claimant worked at prior to December 2015. Some months no work was done. On average over the 18 month period the work done amounted to no more than an average of four hours per week*

77. The claimant's evidence was not challenged on the level of work he did. However, as discussed above the respondent reasonably believed that the claimant was fully occupied.

78. In respect of being isolated, it was put to the claimant that this was as a result of his choice to work from home rather than working in Redditch. The claimant accepted that he was invited to meetings and did attend some. He also accepted that Jon Crump had tried to meet with him when in London, but the claimant declined to meet him as he was in Slough. This was not then pursued by the claimant. Given the claimant's evidence about the small amount of time the claimant said he was working, we find it surprising that the claimant did not have the time to chase up or seek to arrange a meeting with his new manager.

79. The claimant explained in cross examination that by isolation the claimant was referring to his lack of engagement in the work and he referred to the removal of his previous responsibilities. This was, to a degree, in the claimant's control. Both Jon Crump and Jason Hogan expressed the view that the claimant was an experienced manager and would expect to be

fairly autonomous in his work. However, it was, we find, the nature of the role, the role was genuine, and the claimant was aware of this when he took it. If this was a detriment, it was not because the claimant had sent the letter – it was because the claimant accepted a new job.

80. We therefore find that the respondent did not subject the claimant to detriment (c) on the grounds of making the protected disclosure on 14 December 2015.

81. *Detriment (d): The claimant concluded and submitted a review of the respondents "protect" commercial and operational process and found it to be inadequate for the health environment. Advice was given as to how the process could be improved and made robust. No action was taken.*

82. The claimant agreed under cross examination that the reason for his recommendations on the PROTECT project not going ahead were because of cost and IT issues. This was not, therefore, linked to the protected disclosure and accordingly we find that the respondent did not subject the claimant to detriment (d) on the grounds of making the protected disclosure on 14 December 2015

83. *Detriment (e): The claimant had little contact with his line manager. A few phone calls and a few meetings in the 18 month period*.

84. This is covered above. The claimant could have been more proactive in contacting his managers if he needed to. If there was little contact, we find that this was not related to the protected disclosure made on 14 December 2015. The reason for the low contact from Jason Hogan was that he thought the claimant was busy. Jon Crump did try to contact him, but the claimant would not meet him.

85. Jon Crump did speak to the claimant by phone as was accepted by the claimant. We accept that the first time he met him was at the first Redundancy consultation on 15 January 2018, but we also accept that Jon Crump had made genuine efforts to meet the claimant before that.

86. We therefore find that the respondent did not subject the claimant to detriment (e) on the grounds of making the protected disclosure on 14 December 2015.

87. *Detriment (f): The claimant had no client contact, no staff or direct reports, no P & L responsibility and no authority or remit to get involved with operational issues or make contact without having been given direction from his line manager*.

88. As previously discussed, this was an inherent part of the job which the claimant agreed to take. The claimant agreed under questioning that he knew what the job would entail. The matters set out were an inherent part of the job. We therefore find that the respondent did not subject the claimant to detriment (f) on the grounds of making the protected disclosure on 14 December 2015.

89. *Detriment (g): Working from home the business did no home visit to conduct a review of the work environment and health and safety (yet later in the redundancy consultation respondent was absolutely adamant that the claimant's home was an establishment of Interserve). At times it was as if the claimant did not exist and the claimant's repeated requests for his job back as the account director for the Dudley hospital PFI contract were ignored. It was not as if the claimant did not want to return to a proper job with the associated challenges and responsibilities he was responsible prior throughout his service to the respondent as had been the case prior to 14 December 2015.*

90. We heard from Jason Hogan who also worked at home. He confirmed that it was not Interserve's policy to conduct home working assessments. When this was put to the claimant, he accepted that the failure to conduct an assessment was not related to his letter sent to Mr Ringrose on 14 December 2015. Therefore, we find that this failure, if indeed it was, was not because of the protected disclosure of 14 December 2015.

91. We do not accept that the claimant's requests to be reinstated were ignored. The claimant made this request on numerous occasions, including writing to the new chief executive of Interserve PLC on 14 December 2017. It was made clear to the claimant over and over again that that was not an option. When he raised this with Jason Hogan in his PADP in July 2017, Jason Hogan again looked into it.

92. In the claimant's grievance appeal meeting on 23 May 2016, the claimant said he wanted to be returned to his job at DGH. Mike Watson said twice

in that meeting that the claimant needed to draw a line under that issue – the DGH position had gone. It should have been clear to the claimant by then that he was not going to be able to return to work at DGH. Nonetheless the claimant continued make this request and we were taken to numerous instances of this. He continued to raise it even in the redundancy consultation meetings in February 2018 and in fact restated this to the tribunal. It is not that his requests were ignored, rather that there was no new response the respondent could give except to tell him, again, that that would not be possible.

93. We therefore find that the claimant was not subjected to the detriment of having his requests to be reinstated ignored. The claimant was just unable to accept the response he was given.

94. *Detriment (h): The claimants PADP (performance review and personnel development plan) was ignored and not completed. The claimant believes this to be due to the letter of 14 December 2015 and whistleblowing to the respondent's then chief executive. The claimant sent an email to his line manager Jason Hogan, commercial director, on the 31 July 2017 confirming his PADP had been submitted online (the procedure is completed electronically online) and that it should be discussed and closed out. In the same email the claimant asked the respondent to review the whistleblowing procedure as he believed he was awaiting the outcome of the internal review and response from the group secretary. In the claimant's email to the respondent sent 4 August 2017 the claimant again queried why the standard Interserve PADP and performance review was not being followed, that is to review last year's performance (2015) and agree objectives, training and development needs and once agreed signed them off online following review by the persons managers manager, in the claimant's case this being managing director Martin Burholt. The PADP process was not completed despite the claimant's request for the process to be followed.*

95. The claimant had a PADP meeting with Jason Hogan on 6 February 2017. The claimant had not completed the requisite online paperwork prior to this meeting. The claimant said that he felt he did not have enough work and he discussed with Jason Hogan his objectives for the year. The

claimant was required to retrospectively fill in the online PAPD form which he was unable to do because of technical issues until 30 or 31 May 2017 and Jason Hogan acknowledged receipt of that on 5 June 2017. When Jason Hogan looked at the form, he found that it was exclusively about the claimant's time at DGH before he was the claimant's manager. We were taken through the form by Miss Ferber and the claimant agreed this. He said it was because he had not had a previous PADP meeting. It did not include reference to any of the matters discussed in the February PADP meeting with Jason Hogan.

96. Jason Hogan therefore arranged a meeting with the claimant on 26 July 2017 to discuss this. As a result, Jason Hogan undertook to consider what were described as "the whistleblowing issues" about DGH that the claimant raised at that meeting and he requested from the claimant a report about the work the claimant had done. Jason Hogan reported back to the claimant that his issues about DGH had been looked at. Jason Hogan also discussed further work for the claimant including the Slough demobilisation and Alder Hay. Jason Hogan says that the reason the PADP was not closed down (signed off as complete on the ILearn system) was because the PADP document only concerned matters at DGH. Jason Hogan said he was unable to close this as they were matters about which he did not know.

97. We accept Jason Hogan's evidence on this point. We were taken in detail through the PADP forms and they were wholly consistent with Jason Hogan's evidence. It was apparent that the claimant had not complied with the purpose of the PADP – reviewing work and setting objectives – and this was the reason the PADP was not closed down. Therefore, it was not because of the claimant's protected disclosure and we therefore find that the respondent did not subject the claimant to detriment (h) on the grounds of making the protected disclosure on 14 December 2015.

98. *Detriment (i): On a number of occasions the respondent attempted to unilaterally change the claimant's terms and conditions and the claimant rejected each and every attempt claimant's letter to HR director Geoff Hughes dated 24th of March 2016 refers.*

99. This related to the claimant's notice period. When working at DGH and before, the claimant had the benefit of a contractual right to one year's notice on termination of his contract of employment. It is common ground that at a meeting on 11 February 2016 with the claimant, Heather Ward - Russell and Dean Ruck, the claimant was told by Heather Ward-Russell that his notice period was three months. Her evidence was that the claimant had been given new contract terms when he started at DGH and this include only three months' notice.

100. It was also agreed that this was corrected in the grievance outcome notified to the claimant on 25 May 2016. Geoff Hughes accepted, as part of this grievance investigation that the claimant had not agreed to new terms of employment.

101. The claimant accepted in cross examination that it was possible that Heather Ward-Russell had simply made a mistake about the claimant's contract terms. On the balance of probabilities, we find that it was just a mistake. Heather Ward-Russell said she was unaware of the content of the letter to Adrian Ringrose of 14 December 2015 and there was no evidence to suggest otherwise. The mistake was corrected without any apparent issue by the respondent, albeit that it took some time.

102. We accept therefore that this was a mistake and that it was rectified. The Claimant had the benefit of a contractual right to one year's notice. At no time during his employment did he sign any revised/amended job offer in which this period was adjusted. We also find that, on the balance of probabilities, Heather Ward-Russell was unaware of the protected disclosure made by the claimant. We therefore find that the respondent did not subject the claimant to detriment (i) on the grounds of making the protected disclosure on 14 December 2015.

Reason for dismissal

103. We find that there was, from December 2017, a redundancy situation within the respondent. The claimant accepted that the respondent was in financial difficulties. Jon Crump's evidence was that he was required, by Heather Ward-Russel to reduce wage costs for 2018. The respondent had implemented a programme called "Fit for Growth" which included a requirement to reduce headcount. This was not disputed.

104. The claimant asserted that the decision to make him redundant had been taken prior to the protected conversation on 13 December 2017 with Jon Crump. Jon Crump said in evidence that he had decided, prior to the protected conversation, that the claimant's role (of Business Support Manager) would have to go. He said that the claimant's role could be subsumed into existing roles and he made that decision to lose the claimant's role prior to the protected conversation.

105. Jon Crump also confirmed in evidence that he did not consider any alternatives to the claimant being selected for redundancy once he had decided that the claimant's post could go. He equated the claimant's post with the claimant as an individual. There was no consideration of moving the claimant to another post and making a different person redundant. Therefore, we find that in effect Jon Crump had made the decision to select the claimant for redundancy prior to 13 December 2017.

106. We accept, however, Jon Crump's evidence that the reason he selected the claimant for redundancy was because he needed to save money and he considered that the claimant's role's functions could be subsumed into his wider team. He said that he needed to focus on commercial issues and the claimant accepted that his role was not a commercial one. It was common ground that there was less need for operational work in Jon Crump's team. The respondent's clear view was that having identified a "pool of one" (namely the claimant's role) there was no need for any further consideration.

107. The claimant declined the offer in the protected conversation and thereafter the respondent commenced a consultation process.

108. The consultation process consisted of three meetings on 15 and 22 January and 1 February 2018. The claimant was invited to a further three meetings on 5, 12 and 19 February 2018 which he was unable to attend due to ill health. On 28 February at a final meeting the claimant was dismissed.

109. We were taken in some detail through the meetings the claimant attended. In our view, the respondent did consult with the claimant in these meetings about alternatives to redundancy. The claimant was invited to provide an up dated CV which he declined and vacancies

across the group were brought to his attention. The claimant said none of those were suitable. The claimant also raised issues about the length of the consultation, and it was extended to 45 days.

110. However, the decision having already been taken to select the claimant for redundancy before 13 December 2017, the consultation did not address whether there was any alternative to selecting the claimant for redundancy, and whether the selection process was fair.

111. It is apparent, however, and the claimant agreed, that the only alternative to redundancy the claimant would accept was being reinstated to his previous job at DGH. The claimant confirmed this in cross examination – that he still wanted to return there.

112. We accept the evidence of Jon Crump that the reason for selecting the claimant for redundancy was because Jon Crump felt he could reorganise his team to do without the claimant's role and distribute the tasks in the claimant's role amongst other managers. The claimant did not seek to argue that his role continued – in fact, despite our findings, the claimant's view continued to be that the role was not a genuine one. The claimant did not secure an alternative position, so he was dismissed. The reason for his dismissal was, therefore, redundancy.

113. There was a clear reduction in the need for people to undertake the claimant's role.

114. In respect of the protected disclosure of 14 December 2015, Jon Crump said that he did not find out about it until the claimant himself told him about it. We accept this evidence – there was no evidence to the contrary and no basis for concluding that Jon Crump had been previously aware of it. We note also that the respondent's clear and consistent evidence was that it had, effectively, created a job for the claimant in the form of the Business Support Manager role and had made it clear to the claimant on a number of occasions that they wanted to retain his experience. The claimant occupied that job for approximately 1 ½ years. It seems inherently unlikely that the respondent would go to those lengths to retain the claimant only to then later dismiss him for making a protected disclosure 2 ½ years earlier.

115. It follows, therefore, that the reason for the claimant's dismissal was not that he made a protected disclosure.

Was the dismissal for redundancy fair?

116. We have had regard to the well-known case of *Williams v Compair Maxam Limited* [1982] IRLR 83, EAT in which the following guidance was provided

> *1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
>
> *2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
>
> *3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*
>
> *4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.*
>
> *5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*

117. We have found that Jon Crump made the decision to select the claimant for redundancy in December 2017, before he had the protected

conversation with the claimant. Jon Crump said in his witness statement that the claimant's role did not fit into the team. He decided therefore to make the role redundant.

118. In giving evidence, Jon Crump said that he did not give any consideration to whether any other person could be selected, or any steps could be taken to avoid the claimant being selected. The claimant said that he had been told by Paul Kenton in HR in the protected conversation in December that if he did not take the offer, he would be made redundant.

119. On the basis that Jon Crump equated the post with the claimant, we find that he had made the decision to dismiss the claimant in or around December 2017. This was before the formal redundancy process commenced, the first meeting being on 15 January 2018 and before any consultation with the claimant.

120. For consultation to be meaningful, it must be undertaken before the decision in respect of which consultation is undertaken is made (see *British Coal* above). Consequently, we find that to this extent the claimant's selection for redundancy was unfair. There was no consultation with the claimant before the decision to dismiss him was made and no consideration with the claimant to alternatives to selecting him for redundancy.

121. However, it was clear – and in fact had been for some time – that the only job the claimant wanted was that at DGH. This applied before the redundancy process started and continued to do so. The claimant did not consider applying for any other jobs and said that he could/would not do any other jobs in the commercial team.

122. Notwithstanding this, the claimant attended four consultation meetings including the final meeting on 28 February 2018 when he was dismissed. At those meetings, other available jobs were discussed with the claimant. At the first meeting on 15 January 2018, the claimant refused to provide a copy of his updated CV to the respondent to assist in obtaining alternative employment. In fact, it is clear form the pre-prepared statement attached to the minutes of that meeting that the claimant's focus was on DGH.

123. At the second meeting, the claimant again raised the issues relating to DGH and expressed concerns with the timing of the consultation process.

124. At the third consultation meeting on 1 February, the claimant said his job *remained* that of Account Director at DGH.

125. On 1 February 2018, a list of potential jobs was sent to the claimant. He said in reply to that email that he was only interested in the job as Account Director at DGH The claimant was taken through the jobs in cross-examination and said that none of the jobs were suitable and, in fact, he said that he still wanted to return to his job at DGH.

126. A further list of jobs was sent to the claimant on 7 February 2018, although the claimant was absent from work through ill-health from around 12 February until 22 February 2018. The claimant attended a final consultation meeting on 28 February 2018 at which he was dismissed. This meeting dealt, predominantly, with financial matters.

127. It is clear, from the notes of these meetings which were predominantly the claimant's own notes that he was given the opportunity to raise any matters of concern in these meetings. However, it is also clear that the claimant did not engage with the respondent in seeking to obtain alternative employment. The respondent did send vacancies to the claimant and it sought an updated CV to circulate.

128. The claimant was clear that he considered that none of the available jobs were suitable but, in any event, it was abundantly clear from the contemporaneous evidence and the evidence that the claimant gave to the tribunal that in fact the only job he would be prepared to accept was that of Account Director at DGH.

129. We find, therefore, that the respondent took reasonable steps to identify alternative employment for the claimant as an alternative to redundancy.

Conclusion

130. For the reasons set out above, the claimant's claims of detriment on the grounds of making a protected disclosure and unfair dismissal for the reason of making protected disclosures are unsuccessful.

131. The claimant’s claim of unfair dismissal pursuant to section 98(4) Employment Rights Act 1996 (ordinary unfair dismissal) is successful only in so far as the decision to select the claimant for redundancy was made without any prior consultation with the claimant. We have found that there was a genuine redundancy situation and reasonable attempts were made to secure alternative employment for the claimant.

132. In *Polkey v AE Dayton Services Ltd* 1988 ICR 142, HL, it was held that *“There is no need for an 'all or nothing' decision. If the [employment] tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment”.*

133. The tribunal did not hear or invite submissions on *Polkey* so is unable to determine this issue. It may be, however, that the application of *Polkey* may result in a substantial reduction in the compensation payable which could include a reduction of 100% so that no compensation is payable. There will, therefore, need to be a remedy hearing to determine how much, if any, compensation should be awarded in respect of the unfair dismissal of the claimant.

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Employment Judge **Miller**

Date: 18 October 2019