EMPLOYMENT TRIBUNALS

Claimant: Miss P Piotrowska

Respondent: Optimal Claim List

Heard at: Manchester **On:** 15 – 17 April 2019
30 July 2019
(In Chambers)
9 September 2019

Before: Employment Judge Sharkett
Mrs M Gill
Ms V Worthington

REPRESENTATION:

Claimant: In person
Respondent: Mr J Peel, Consultant (Employment Law)

JUDGMENT

1. The claimant's claim that the respondent discriminated against her on the protected characteristic of disability is not well founded and is dismissed.

2. The claimant made a disclosure of information to Mr Jacekzawieracz of the respondent. Such disclosure was a protected disclosure.

3. The principle reason for the claimant's dismissal was that she had made a protected disclosure.

4. Such dismissal was automatically unfair and the claimant's claim of unfair dismissal succeeds.

5. A remedy hearing will now be listed to determine the amount of compensation to be awarded to the claimant.

REASONS

1. The claimant brings claims of automatic unfair dismissal under Section 103A of the Employment Rights Act 1996 (ERA 1996) and unlawful discrimination under Section 15 of the Equality Act 2010. The claimant represented herself and gave oral evidence in support of her claim in addition to her written witness statements.

2. In respect of the claimant's claims of protected disclosures the claimant relies on the following:-

(i) The verbal disclosure of information to Mr J Zawieracz, Team Leader of the first response team in March 2018 when the claimant told him that contrary to his instructions in relation to receiving information about new claims, she was not prepared to log fraudulent claims for passengers who were not present in vehicles involved in road traffic accidents ;

(ii) In March 2018 the claimant notified Kerry Harding, the Human Resource Manager of the following: -

(a) That the claimant was feeling unwell and had suffered a miscarriage that might have been due to the abnormal cells around her cervix;

(b) The claimant informed Kerry Harding that she was not coping well with the harassment she was experiencing from Mr Zawieracz who was trying to persuade her to log claims for people who were not passengers in vehicles involved in road traffic accidents.

(c) The claimant complained to Miss Harding about emails in which Mr Zawieracz had made belittling comments about her; in one of them which she showed to Miss Harding Mr Zawieracz had written that the claimant was *"the biggest let down of the day";*

(d) The claimant also complained that she and other team members were being bullied by one of the co-ordinator, Miss J Jankowska The claimant showed Miss Harding 6 or 7 emails in which she considered to be belittling the claimant.

(iii) In respect the disclosures made to Miss Harding, it is the claimant's case that these tended to show in accordance with section 43B(1)(d) Employment Rights Act 1996 (ERA 1996), that the health or safety of any individual has been, is being, or is likely to be endangered and/or Section 43B(1)(e) that the environment has been, is being, or is likely to be endangered and/or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, Section 43(1)(b).

(iv) In addition to the above provisions it is the claimant's case that the disclosure to Mr Zawieracz, also tended to show that a criminal offence has been, is being, or is likely to be committed under Section 43B(1)(a).

3. Mr Peel, an Employment Law Consultant appeared on behalf of the respondent and called the following witnesses: -

(i) Aleksandra Jankowska (Supervisor New Business Team)

(ii) Jacek Zawieracz (Team Leader New Business Team)

(iii) Kerry Harding (Human Resource Manager)

(iv) Christopher Germaine (Legal Director)

4. The claimant had prepared a written witness statement and also gave oral evidence.

5. All witnesses gave evidence in chief by way of written witness statements which had been exchanged and had been read by the Tribunal prior to hearing oral evidence. The Tribunal was also provided with a joint bundle of documents consisting initially of 136 pages. During the course of the hearing the respondent disclosed a significant number of additional documents which were labelled as Bundles B, C, D and E. The respondent did not offer any explanation as to why these documents had not been disclosed in accordance with the Orders of the Tribunal or why new documents continued to be produced despite assurances having been given that disclosure was complete. The failure on the part of the respondent to comply with its obligation in relation to disclosure resulted in significant delay while documents were copied and the relevance, or not, of documents established. Consequently it was not possible to conclude these proceedings within the allocated time scale.

6. All references and page numbers within the body of this judgment are references to pages in the bundles provided unless otherwise stated.

7. The issues to be determined by the Tribunal were identified as.

<u>Protected Interest Disclosures</u>

(i) Did the claimant make the disclosure of information as particularised above;

(ii) Did the claimant reasonably believe that the disclosures were made in the public interest;

(iii) Did the claimant reasonably believe the relevant section i.e. 43B(1)(a to e) were met. The claimant is unable to bring a claim for ordinary unfair dismissal as she has less than two years' service. Therefore, can the claimant show that the reason for her dismissal, or if more than one

the principal reason, for the dismissal, is that she made a protected disclosure.

Disability

(i) Did the claimant have the impairment of Cancer;

(ii) Did the respondent have knowledge of this impairment or should it have had knowledge of the claimant's impairment?

(iii) Was the claimant dismissed because of something arising in consequence of her disability and if yes;

(iv) what was the legitimate aim the respondent was seeking to achieve and was the unfavourable treatment a proportionate means of achieving the same.

Submissions

8. As mentioned above there were significant delays experienced during the course of this Hearing which were predominately because of the respondent's failure to engage fully with its duty of disclosure in accordance with the Orders of the Tribunal. Consequently, whilst it was possible to hear evidence from all parties, it was not possible to hear oral closing submissions. The Tribunal had regard to the fact that the claimant lives in Scotland and is also pregnant. It was understandable that given the time delay in being able to re-list the Hearing, she did not want to have to travel again to make oral submissions. With the agreement of the parities the Tribunal made an order for written submissions to be made so that the parties would not have to attend. The Tribunal had regard to the fact that it is preferable to hear submissions from the parties, but in the circumstances of this particular case, the Tribunal decided that allowing written submissions was both appropriate and proportionate.

9. For the respondent Mr Peel submitted that whilst the respondent does now concede that the claimant is disabled for the purposes of the Equality Act 2010, at the material time neither the claimant or the respondent had any knowledge of the claimant's condition because it had not been diagnosed before her employment with the respondent terminated. Mr Peel reminded the Tribunal that the claimant admitted in oral evidence that she only ever referred to her having 'female problems' and did not tell Mr Zawieracz of her diagnosis of pre-cancerous cells of the cervix. He submits that her evidence that she told her previous manager, Dean Carpenter, is not credible as he was the type of man who would not have kept this information to himself.

10. In respect of the claimant's claim that she made protected disclosures Mr Peel submits that the only disclosure the claimant is said to have made is to Kerry Harding on 5 April 2018 when she alleged fraudulent activity. Mr Peel reminded the Tribunal that the claimant had been uncertain about the date upon which she says she made this disclosure and changed her evidence. Mr Peel also reminded the

Tribunal that the decision to dismiss the claimant was made before she made this disclosure and therefore it could not have been the reason for her dismissal. He submits that the real reason for the claimant's dismissal was because of her performance and the fact that she had failed her probationary period. Mr Peel further submits that there is no suggestion that a disclosure was made to anyone else because no one else was questioned about it during cross examination.

11. The claimant has submitted a document attaching a number of documents referred to in her submissions, where these have formed part of the bundles of documents before the Tribunal they have been considered, documents in Polish and on which the claimant had written the meaning in English have not been considered because the translation by the claimant has not been agreed with the respondent or independently verified.

12. The claimant submits that the respondent has attempted to mislead the Tribunal by producing notes of meetings that were not in the original bundle and are not referred to in written witness statements. She submits that she had raised the matter of logging fraudulent claims numerous times with Mr Zawieracz and that they had had many disagreements about it. She reminded the Tribunal that the respondent accepts that the claimant had these discussions with Mr Zawieracz. She submits that she had met with Miss Harding prior to her moving apartment on 5 April 2018 and in addition to the files she had taken as proff of what had been happening she was also asked to send emails relating to her allegations. She returned to work on 9 April 2018 and it was at this time that and she provided the documentary evidence. The claimant reminded the Tribunal of the documentary evidence before it in relation to the meetings with Miss Harding and submitted that her evidence cannot be relied on because of her inconsistent evidence in cross examination.

13. The claimant submits that she reported the alleged fraudulent activities to protect potential clients from committing fraud and to protect the public at large from what she described as 'get rich quick' methods being used by the respondent. She referred the Tribunal to examples of the respondent accepting claims from people who had staged car accidents or for people who were not in vehicles involved in accidents. She expressed her shock at the way in which she was treated.

14. The claimant submits that the respondent was aware of her condition because in October 2017 she had told Dean Carpenter and that both Mr Zawieracz and Miss Harding had constructive knowledge of her disability. She submits that she had also told both of them that she was suffering from female problems and that when requesting time off for appointments she had told Mr Zawieracz that she was attending smear tests.

15. The claimant submits that she was always concerned that asking for time off to attend appointments would be viewed badly. She submits that in addition to making the protected disclosure the respondent did not want to employ her any longer because she was taking time off work. She reminded the Tribunal that in oral evidence Mr Zawieracz had said that he had never seen the documents which were relied on as demonstrating her poor performance and that the documents in any event did not show her to be performing poorly. She further asked the Tribunal to

consider that despite Miss Harding saying that she had had frequent meetings with Mr Zawieracz about the claimant's poor performance there are no notes of any of these meetings and nor was the claimant warned at any time that her performance was below standard as no review meeting took place.

Findings of Fact

16. Having heard all the evidence, both oral and documentary, and having regard to the submissions of the parties, the Tribunal make the following findings of fact on the balance of probabilities. This Judgment is not a rehearsal of all the evidence heard, but is based on the salient parts of the evidence on which the Tribunal has based its decision.

17. The claimant first started to work for the respondent in October 2017. She had initially been interviewed in September 2017, for the position of Litigation Executive The offer of employment in this position was confirmed by email of 29 September 2017 (p38). The claimant had previously worked as a translator but had decided that she wanted to use her law degree and progress her career. Having been offered a job with the respondent she moved from Edinburgh to Manchester to take up the work. However when she started there she was not placed in the position that had first been anticipated but rather was placed in the Road Traffic Accident (RTA) Litigation Team and was required to give translation assistance to her colleagues. This was a technical team which required some understanding of the claims management process.

18. The claimant attended her three-month probationary review on 17 January 2018 where she reported her role as being that of providing translation and interpreting for the RTA Litigation Team. She said that she had welcomed a chance to experience working in a new environment but accepted that she did not have experience of working in this environment before starting there. She had however taken on board comments from her manager who always took his time to share his knowledge and provide her with guidance. She reported that she found it stressful to be placed in a position where she was required to translate on phone calls with clients without having any kind of knowledge about the case. She accepted that there was a lot to lean but found the working environment pleasant and that everyone in the team was always happy to help out. She expressed her desire to gain sufficient knowledge to enable her to become a fee earner and suggested that provision of comprehensive training would assist her. She was of the opinion that some training consisting of how the claim progressed from when it is lodged until it is settled would be of help to her.

19. In respect of the scoring of her capabilities the claimant scored satisfactorily in all but technical/legal knowledge, problem solving and decision making, creativity and innovation. Her manager accepted that these competencies tied in with legal knowledge and procedure which the claimant did not have at that time. The comment from the Team Leader was that

"*there has been a significant increase and knowledge over the last three months. However, I do feel that the learning as with everyone in the firm is ongoing*.

There needs to be a higher understanding of pro-claim and rescheduling of tasks. Notes that are left on the system need to be more detailed. Added to that there are occasions when I have to remind Paula to leave a note on file following the telephone conversation. Also, instances when a call has been made yet further information was required from the client which could have been resolved with more communication with the Fee Earner during the call to the client.

20. Following the appraisal Miss Harding (HR Manager), and Mr Carpenter agreed with the claimant's suggestion that she would benefit from the understanding of the New Business Team (also known as the First Response Team, (FRT)), and the manner in which claims are progressed. It was the view of her manager that this could only be achieved by spending time in this department with a future aim of progressing through the respondent in order to gain a full understanding of the claims process. Following the appraisal interview Miss Harding, wrote to senior members of the management team including the Legal Director Mr Germaine, and suggested that the claimant would benefit from learning the claims process from cradle to grave. Miss Harding also indicated that in addition to moving department the claimant was also hoping to have her salary reviewed. The question was asked of senior management whether they wished to retain the claimant or extend her probationary period for a further three months in her new role in the new business team. Mr German responded as follows:-

> *"As I see it there are three issues here:-*
>
> *(1) What training have we given Paula, my understanding is none and would we be repeating that mistake if we swapped her for someone else;*
>
> *(2) Whether FRT can accommodate Paula given her working time restrictions. If not, then she either stays where she is and gets trained or she leaves;*
>
> *(3) If we move her to FRT we can't be paying her a different wage to everyone else who is doing the same job.*
>
> *Point two would be discussion with Jacek assuming we overcome point one. Re point one, I sent to Dean my template for the process we use as her starting point at least.*
>
> *The subject of training and training plan cropped up yesterday. That needs further discussion to ensure we are providing the right training to the right people and that we have a policy that is fair for everyone and an agreed bundle to implement this."*

21. It was agreed that the claimant would move to the new business team and her probation would be extended for a further three months to accommodate that move. Mr Germaine explained that this was seen as a fresh start for the claimant. It was also agreed that her salary would be increased in line with that of other people working in the new business team. The claimant moved to the new business team on 5 February 2018 and that appointment was confirmed by letter of 26 January (p 86). In particular, the letter states;

> *"as discussed within the meeting of 17 January 2018 you feel that you would benefit from further knowledge of the claims process. As discussed in our subsequent meetings with Dean Carpenter, it has been agreed that you will transfer to the First Response Department as a Legal Assistant/Admin from 5 February 2018. In response to this we will extend your probationary period by a further three months.* It finishes by saying *"I would like to take this opportunity to congratulate you on your ongoing commitment and support which you have shown to the company".*

The Tribunal note that whilst there is reference to an extension of the claimant's probationary period there is no reference to an unacceptable performance prior to this.

22. It is the respondent's case that the claimant's performance did not improve following the move to the new business team and consequently a decision was taken on 5 April 2018 to terminate the claimant's employment with effect from 13 April 2018. Miss Harding's written evidence is;

> *"Unfortunately, the feedback I received from Jacek was not good. There was a general sense of lack of interest from the Claimant. She was the least productive member of the team and prone to mistakes. Moreover, the same mistakes kept repeating themselves. Diaries were not placed on files; proper notes were not kept of conversations. All of the same problems that had been there from the previous role and that were highlighted on the probationary review. I am aware that using the quantitative markers for productivity, the Claimant was the poorest performer in the team. I met with Jacek several times to discuss how we could improve the Claimant's performance. These included having the Claimant buddy up with more than one experienced staff by way of one to one training and requesting that the claimant read the training manuals. Despite these additional measures the quantitative markers for productivity identified that the Claimant was consistently the poorest performer in the team".*

Miss Jankowska also gives evidence that the Claimant made repeated mistakes.

Mr Zawieracz, written evidence is;

> *Within my department I keep records as performance indicators. Further any new cases opened by a team member are checked the next day to ensure quality control.*
>
> *Unfortunately, throughout her time within my department the claimant's work was of a poor standard. From the productivity records (**see pages 108-113)**, the Claimant was consistently the worst when it came to numbers of cases opened, number of tasks undertaken, and number of calls answered. On the odd occasion the Claimant was not the poorest performer I would feed this back to her and there would be a positive but short lived impact before the Claimant once more reverted back to being the poorest performer.*

23. During the course of the Hearing the Tribunal was referred to the productivity records kept by Mr Zawieracz (p108-113), and found that the highlighted line indicating held out as being the claimant's performance did not demonstrate the claimant to be the poorest performer. When asked to point out where in his records there was evidence of the claimant being the poorest performer, Mr Zawieracz explained that he was not familiar with the documents and that he hadn't seen them. Mr Zawieracz was unable to explain why if this was the case he had referred to them in his witness statement. The Tribunal had regard to the fact the English is not Mr Zawieracz's first language but was satisfied that he understood both the nature of the information he was being questioned about and the questions asked.

24. The last witness for the respondent, was Mr Christopher Germaine. He gave evidence on the last day of the Hearing and said that the highlighted area of the documents at (p108-113) which had been said to be a record of the claimant's performance was not a reference to the Claimant's at all and that the respondent had made a mistake in assuming that it was. This had not been offered as an explanation by Mr Zawieracz who was unfamiliar with the documents despite having said there were records kept by him. It had also not been raised by Mr Peel before Mr Germaine started to give evidence and nor was there a request for disclosure of the 'correct' documents. Whilst the Tribunal had previously asked for confirmation from the respondent that disclosure was complete, it was open to the respondent to request that further relevant evidence be admitted. As a firm of solicitors who are also represented at this Hearing this would have been known to the respondent and those they instruct. There was no such application.

25. Both Miss Harding and Mr Zawieracz gave evidence that there were frequent meetings with the Claimant to highlight the problems with her work and seek ways to improve the same. The Tribunal note that it has not been provided with any notes of these meetings. Given that the meetings were conducted between a HR professional and the claimant's manager the Tribunal would have expected to see evidence of this nature. Mr Zawieracz confirmed that he did not keep any notes and did not have a copy of the claimant's training plan. The claimant maintains that her dismissal came as a complete surprise to her and that none of these meetings ever took place. From the evidence before the Tribunal it is clear that the claimant was not expecting to be dismissed on 13 April 2018 and that on the balance of probabilities, having considered all the evidence in the round, the Tribunal find that while the claimant was working in the new business team she was not told that her performance was poor and that the meetings described by Miss Harding did not take place.

26. It is clear however that Mr Zawieracz and the claimant did not see eye to eye because she did not like what she was being asked to do and made it known to him that she did not. It is the claimant's evidence that during her time working in the new business team she was subjected to bullying behaviour and required to carry out tasks which she did not consider to be lawful. She ultimately made a complaint to Miss Harding referring to a number of emails. The first dated 5 March 2018 was from Mr Zawieracz headed *"please can you ask your teams to put the calls in the correct file references*". The email made reference to what was required of team members when dealing with cases and complained that what was happening was making the team look bad as there were a lot of mistakes. In bold at the bottom of the email was *"today let us down: Ewelinak and Paula P".* The claimant found this comment to be

embarrassing especially as it was written in bold. A further complaint was about the fact that on 15 March Mr Zawieracz had secretly taped a phone call between the claimant and a potential client. He then sent the recording by email to everyone in the team asking for their comments. Mr Zawieracz had carried out the recording as a training exercise but accepted that he should not have done what he did when Miss Harding later mentioned it to him following the claimant's complaint.

27. It is clear to the Tribunal that the claimant did not enjoy a good relationship with Mr Zawieracz. She complained that his behaviour was unpredictable ranging from being pleasant to shouting at her. She complained that he often pressured her to obtain phone numbers of all the people involved in accidents even though she would have assured him that the other passengers were absolutely fine and would not have a claim. She explained to the Tribunal that Mr Zawieracz wanted her to obtain these numbers so that they could be spoken to later to convince them that they were injured even though they were not.

28. It is clear that there were frequent exchanges between the claimant and Mr Zawieracz about claims and her view of how they were taken on. In oral evidence Miss Harding told the Tribunal that Mr Zawieracz had told her that the claimant would take calls from potential clients and often disagree with him about whether the case should be taken or not. It is also clear having heard from the claimant that she considered herself to be more knowledgeable than he was about the law as she had legal training whereas in evidence she refers to him coming from a hospitality background and working in Poland as a forest ranger.

29. It was not disputed that the claimant raised all these issues with Mr Zawieracz, and let it be known to him that she did not think what he was suggesting was right or that claims should be pursued if there was no prospect of success. The claimant was told that it was not a matter for her to decide whether a claim had good prospects of success or not. She was told that the role of the new business team was to capture information and pass it on to another team who would decide upon the merits of the claim. In evidence the Tribunal was told that additional information was taken from clients so that if necessary, follow up calls could be made to establish whether there were any further claims arising from the initial claim reported.

30. There is some dispute about the date upon which the claimant approached Miss Harding to escalate these issues. In oral evidence she was confused about the date upon which she had met with Miss Harding initially identifying the date as 5 April 2018 but then suggesting 4 April. The documentary evidence is of some assistance. On Thursday 5 April 2018 the claimant emailed HR confirming an agreement with Mr Zawieracz that she would take half a day TOIL that day and that the following day, Friday 6th, she would take as unpaid leave (Bundle C, page 27). In oral evidence the claimant explained that she was moving at that time and that was the reason she needed time off. Her email was acknowledged by HR at 11am. The Tribunal find that on the balance of probabilities she did not meet with Miss Harding on that morning and there is nothing to suggest in either email that a meeting had taken place that day of the day before whereby the claimant would send information to Miss Harding about her complaint. The claimant returned to work on 9 April, the date upon which Miss Harding says the meeting took place. The Tribunal find that on

the balance of probabilities this is the day that the meeting took place as the claimant sent emails to Miss Harding around 13.00hrs on 9 April 2018.

31. The Tribunal also note that on the same morning i.e. 5 April 2015 Miss Harding wrote to the senior management team at 11.29 (p107) advising them that Mr Zawieracz had continued problems with the claimant and that she had had numerous conversations with him in relation to the claimant's performance. She reported that Mr Zawieracz had tried a number of different methods to improve her attitude/performance but to no avail. Miss Harding reported that the claimant's overall attitude was not in keeping with the department and that she was showing an unwillingness to learn. She advised the senior management team that Jacek was proposing to terminate her contract. Miss Harding said that on the information she had been given by Mr Zawieracz she was in support of his decision. She said that following lengthy discussions with Mr Zawieracz it was proposed that they would retain the claimant until the new person, had received a minimum of two weeks training. It was therefore proposed that her contract would terminate on Friday 13 April following the meeting that would be held at 15:30.

32. Mr Germaine emailed back to say that he had had no direct involvement and therefore had no objections to the proposal. He observed that they had given her plenty of opportunity to develop. Another member of the team emailed to say that they were aware of the situation and that they had no objections to the proposal either. The claimant was subsequently called to a meeting on 13 April 2018 and told that her employment was to be terminated. It is Miss Harding's evidence that it was at this time that the claimant raised the issue of fraudulent claims for the first time. The dismissal letter (p116) on 13 April 2018 gives the reason for her dismissal as "it has been determined that you have not fulfilled the conditions of employment because of your lack of enthusiasm for the job, not fulfilling the tasks given to you, and failing to demonstrate the necessary competencies that would be expected from staff with your length of service". She was advised that she would be paid in lieu of her notice and a P45 would be sent under separate cover.

33. Returning to the issue of when the claimant met with Miss Harding and the Tribunal's reasons for making the finding that it was likely to have been 9th April, the Tribunal note that having obtained approval for her dismissal on the 5th April, Miss Harding then emailed Mr Germaine following receipt of the emails from the claimant on 9th April to ask if the allegations of bullying made any difference to their decision to terminate the claimant's employent. Whilst the Tribunal had regard to the submissions of the claimant that the notes of the meeting were not genuine, it is clear from the email chain that this was when the documentary evidence was sent from the claimant and received and forwarded to Mr Germaine.

34. The Tribunal also find that the allegations raised with Miss Harding at the time were of bullying and did not include allegations of fraudulent activity in relation to claims. The Tribunal find that the person the claimant raised the issues of claims with prior to the decision to terminate her employment being made, was Mr Zawieracz, although it is clear that other colleagues knew of her views.

35. Miss Harding did then go on to respond to the claimant's complaints about bullying and spoke to Mr Zawieracz about the telephone recording. Whilst the

Tribunal find the email to be somewhat disingenuous given that the intention was to dismiss the claimant the following day, she then sent a response to the claimant by email of 12 April 2018.

36. The claimant met with Mr Zawieracz and Miss Harding on the afternoon of 13 April 2018 where she was told that her employment was to be terminated. The Tribunal note that the decision to dismiss the claimant was taken a month before the end of her extended probationary period, which had been described as a new start by Mr Germaine, and without meeting with the claimant to discuss her progress during her probation.

37. Miss Harding confirmed that at the termination meeting the claimant had raised concerns about claims having no prospects of success claims being accepted by the respondent but that she had advised the claimant that this was a matter for her as it was for a solicitor to do this. At the end of the meeting Miss Harding accompanied the claimant to collect her belongings and offered to get her a taxi.

38. In addition to her claim that her dismissal was by reason of making a protected disclosure, the claimant complains that her dismissal amounted to unfavourable treatment arising out of her need to be absent from work to attend appointments relating to pre-cancerous cells of her cervix. It is accepted that the claimant did tell others that she was suffering from 'female problems' and in oral evidence accepts that this was how she referred to her condition to people at work. In the absence of any further evidence the Tribunal find that this is also how she would have referred to her problems to Mr Carpenter as well.

39. Return to work interviews were carried out with Miss Harding when the claimant had been absent from work but there is no reference to the claimant's condition or investigations. It is the claimant's case that she did tell Miss Harding in the back to work interviews but that she had left it open to the claimant to have the information put on the record of the interview. Having considered the evidence in the round and heard from the claimant in oral evidence it is clear that whilst she did tell Miss Harding and other colleagues at work that she was having problems, she only ever referred to these as female problems. It is clear from her evidence that the claimant thought that this was enough and expected the respondent to know what she was referring to. The Tribunal find that the term 'female problems' is used to cover many gynaecological conditions, ranging from minor to serious, but that not all of these are likely to meet the definition of s6 of the Equality Act 2010. In the absence of any further information from the claimant, or a significant change in her performance or circumstances, the respondent is not under a specific duty to make further enquiries about the problems and nor in most circumstances would it be appropriate to do so. The Tribunal find that whilst the back to work interviews do refer to some gynaecological problem experienced by the claimant which required treatment with antibiotics there is no reference to a diagnosis of pre-cancerous cells or ongoing investigation of the same and nor could it be inferred from the information provided.

The Law

40. It is the claimant's case that she was dismissed because she made a protected disclosure under Part IV A of the Employment Rights Act 1996.

Section 103 of the Employment Rights Act 1996 provides:

> "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."

Under section 43A a protected disclosure is defined as a qualifying disclosure which is made by a worker in accordance with any of the sections 43c-43H of the Employment Rights Act 1996. Under section 43B a disclosure will be a qualifying disclosure if it is a 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 and 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 one of the preceding paragraphs has been or is likely to be deliberately concealed.

It is clear therefore that there must be a disclosure of information and a further requirement that there must be both a reasonable belief on the part of the claimant and that the relevant disclosure is made in the public interest.

41. The Court of Appeal had provided recent guidance on what is meant by information in **Kilrane v London Borough of Wandsworth** [2018]EWCA Civ 1436. In this case the Court of Appeal explained that the concept of information as used in s43B(1) is capable of covering statements which might also be characterised as 'allegations'. But s43(B)(1) should not be glossed to introduce a rigid dichotomy between these two terms. The question in each case is whether a particular statement or disclosure is a 'disclosure of information which tends to show one or more of the [matters set out in paragraphs (a) to (f), Grammatically the word 'information' had to be read with the qualifying phrase 'which tends to show [etc]" There has to be sufficient factual content and specificity capable of tending to show one of the relevant matters in subsection (1). That was a matter for an evaluative judgment by the ET in light of all the facts. The Court of Appeal explained the concept with reference to a dirty hospital ward where a worker might bring his

employer down and gesture to the sharps left lying around when saying 'you are not complying with Health and Safety requirements, the statement there would derive force from the context in which it was made and taken in context would constitute a qualifying disclosure, in contrast to an employee who walks into an office and simply says 'you are not complying with Health and Safety requirements.

42. The reasonable belief test requires that the claimant must have a reasonable belief that the information disclosed tends to show that one of the relevant failures has or is likely to occur. Whilst the test is largely subjective there must be some basis upon which the claimant reasonably holds that belief. The EAT in *Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT*, held that reasonableness under S.43B(1) 'involves of course an objective standard', meaning that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe. The question for the Tribunal is whether on the facts believed to exist by the claimant, a judgment must be made as to whether or not: first, the belief was reasonable; and secondly, whether objectively on the basis of those perceived facts, there was a reasonable belief in the truth of the complaints *Phoenix House Ltd v Stockman and anor 2017 ICR 84, EAT*. The fact that the claimant may have been mistaken about the facts does not mean that he would be unable to avail himself of the statutory protection as long as his belief was reasonably held as above.

43. The public interest test will be satisfied if the claimant had a reasonable belief that his disclosure was made in the public interest. In to *Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 979* Underhill LJ stated that :

…..where the disclosure relates to a breach of the worker's own contract of employment or some other matter under s43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the interest of the worker… The question is one to be answered by the Tribunal on a consideration of all the circumstances…

He then went on to refer to four classification of relevant factors to be considered (subject to a strong note of caution in relation to the number of employees whose interests the matter disclosed may affect)

44. Under section 43C a disclosure will be a qualifying disclosure if it is made in accordance with this section if the worker makes the disclosure to his employer.

45. In respect of the claimant's claim of unlawful discrimination the respondent conceded at the Hearing that carcinoma in situ is a disability for the purposes of the Equality Act 2010 but maintains that (a) the claimant did not receive this diagnosis until after her employment had terminated an (b) it had no knowledge of the nature of the female problems experienced by the claimant and could not have been expected to know.

46. The claimant brings her claims under Section 15 Equality Act 2010 ("EQA") which provides:

> **"(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

It is clear therefore that a s.15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability. The Tribunals also has regard to the Equality and Human Rights Commission's Statutory Code of Practice on Employment ("the Code") as required by section 15(4)(b) of the Equality Act 2006, which suggests that "Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"" (para 5.14). The Code gives an example, at paragraph 5.15, of where a sudden deterioration in an employee's time-keeping and performance and change in behaviour at work should alert an employer to the possibility that these were connected to a disability and lead the employer to explore with the worker the reason for the changes and whether difficulties are because of something arising in consequence of a disability, in this example, depression.

Further, paragraph 6.19 of the Code says:

> **"The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend upon the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.**

Application of the Law and Secondary Findings of Fact

47. Turning first to the claimant's claim that by dismissing her the respondent had subjected her to unfavourable treatment under s15 of the Equality Act 2010. In order to succeed with this claim the respondent would need to have knowledge of the claimant's disability, or if not actual or imputed knowledge, it should have been put on notice of the same and made further enquiry.

48. In oral evidence it was clear to the Tribunal that although the claimant did ask for time off work to attend appointments and was at times unwell, she did not tell the respondent that she had pre-cancerous cell of her cervix and referred only to experiencing 'female problems'. The Tribunal find, in the absence of any deterioration in her attendance or performance, the respondent could not have known, nor have been expected to have known on the basis of the information she

gave to the respondent, that her condition had the potential to amount to a disability for the purposes of the Equality Act 2010. The Tribunal does not accept that the claimant told Dean Carpenter of her condition because even up to the date of this Hearing the claimant continued to refer to her condition as 'female problems' despite the fact that it was clear that while working in the new business team she had developed friendships with other colleagues but had not shared that information with any of them. The Tribunal find that it is unlikely that she would have told Dean Carpenter of her condition after such a short period of time working with him but failed to raise the issue with any of her colleagues. Although the Tribunal accept that the claimant may have told Miss Harding that she had experienced a potential miscarriage, of which there is no medical evidence, it does not accept that she told Miss Harding that she had abnormal cells in her cervix. Miss Harding noted that the claimant had been prescribed antibiotics for her gynaecological problem and on the balance of probabilities it finds that she would have noted the further information had it been given. On the basis of the evidence before the Tribunal, it finds that on the balance of probabilities, and at the relevant time, the respondent did not and could not have had knowledge of the claimant's condition and it did not form any part of the respondent's decision to dismiss the claimant. Consequently her claims of unfavourable treatment arising as a consequence of her disability is not well founded.

49. The Tribunal then considered whether the claimant had made a disclosure of information that amounted to a qualifying disclosure for the purposes of s43 ERA 1996.

50. The first question is whether the claimant made a disclosure of information to the respondent and if so whether she had a reasonable belief in the information she disclosed that tended to show one of the failures set out in of s43B.

51. The Tribunal accepts that the claimant did have a reasonable belief that the respondent was submitting claims that either had no prospects of success or were based on misleading information. The Tribunal note that whilst this is not a matter to be determined by the Tribunal there is nothing to suggest that this was in fact the case. Whilst the claimant's assertions may have been misconceived the Tribunal find that she did nonetheless have a reasonable belief that her assertions were true based on her basic understanding of the application of the law.

52. However, the Tribunal find that the disclosure of this information to Miss Harding was made after the decision to dismiss the claimant and cannot therefore have been the principle reason for the claimant's dismissal.

53. The Tribunal note that contrary to Mr Peel's submission that the claimant did not make a disclosure to anyone else other than Miss Harding, the claimant did in fact express her belief about the claims to Mr Zawieracz on a number of occasions which is agreed by all the parties. The Tribunal considered whether the information amounted to a bare allegation or whether it amounted to a disclosure of information for the purposes of s43 ERA 1996. The Tribunal find that the objections raised by the claimant to Mr Zawieracz's instructions about how to deal with potential claims did amount to a disclosure of information that tended to show a failing under s43B and amounted to a Qualifying Disclosure.

54. The Tribunal note that the decision to dismiss the claimant lay solely within the power of Mr Zawieracz and the information he gave to those with the authority to authorise her dismissal. The Tribunal note that It was he who told Miss Harding that the claimant was the poorest performer in the team relying on his own records to demonstrate this. These were the same records produced to the Tribunal which Mr Zawieracz was unable to show where the Tribunal would find evidence that the claimant was the poorest performer, indicating that he was not familiar with the document. Given that they were held out as his records and referred to as such in his evidence, it is not credible that he would not be familiar with the same. It may well be that the senior management of the respondent were unaware of the disclosure the claimant had made to Mr Zawieracz but it is clear that it is him that recommended that the claimant should be dismissed because of her poor performance. As found by the Tribunal the documents relied on by the respondent do not show that the claimant was the poorest performer in the team, and, in the absence of any other reason for her dismissal, the Tribunal find that the claimant was dismissed because she objected to Mr Zawieracz's instructions about how she should deal with new claims and told him why she was not prepared to do this. Whilst the Tribunal find that there may have been some concerns about the claimant's performance, the principle reason that the claimant was dismissed was because Mr Zawieracz decided that he no longer wanted her in his team because of her disclosure of information about her objection to the way in which he instructed staff to handle new claims.

55. The claimant's claim that her dismissal was automatically unfair by reason of her making a protected disclosure is well founded and succeeds. A remedy hearing will now be listed to determine the amount of compensation is to be awarded to the claimant.

Employment Judge Sharkett

Date: 4 November 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
5 November 2019

FOR THE TRIBUNAL OFFICE

[je]