Case No: 3332239/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs M Fitzmaurice	**v**	**Luton Irish Forum**

Heard at: Watford **On:** 20 to 30 January 2020 (excluding 24 January 2020)

Before: Employment Judge Manley
Mr I Bone
Mr D Bean

Appearances:

For the Claimant: Mr McCombie, Counsel
For the Respondent: Mr Crawford, Counsel

JUDGMENT

1. The claimant made some disclosures which were in the public interest and protected, between December 2014 and 25 August 2017.

2. There were no detriments because she made those disclosures.

3. The dismissal was not because she made those disclosures.

4. There was no fundamental breach of contract by the respondent and the claimant was not dismissed.

5. The claims of public interest disclosure and detriment and dismissal and constructive unfair dismissal are dismissed.

REASONS

Introduction and issues

1 There have been two preliminary hearings in this matter but the list of issues was not agreed until the commencement of the hearing. Rather than including that list here, those issues will be clear in the conclusions when our answers to the questions posed there are provided.

2 In summary, the claimant claims that she suffered two matters of detriment and dismissal because of having made public interest disclosures. Her case is that she raised concerns about health and safety and breaches of legal obligation around finance matters with her employer. She claims the instigation and continuation of disciplinary proceedings and the provision of a reference referring to those proceedings, as well as the dismissal, were as a result of her having raised those concerns. She also claims that amounts to constructive unfair dismissal and, also, separately from the public interest disclosure issues, there has been a fundamental breach of the implied term of mutual trust and confidence by the respondent which led to her resigning.

3 The respondent does not accept that there were public interest disclosures but, even if there were, its case is that the disciplinary process was commenced because matters about the claimant's conduct had been raised which required investigation. The respondent denies that there was any breach of contract on its part.

The hearing

4 At the hearing we heard from the claimant and three witnesses she called, as follows:

- Lucy Nicholson, who is the Chief Executive of a linked charity who had made a statement in the disciplinary process;
- Joanna Riley, a former colleague;
- Heather Roy, a former colleague.

5 From the respondent we heard from:

- Tom Scanlon, Chair of Trustees and Chair of the Stage 3 first grievance;
- Deborah Glinnan, who is the external HR Consultant and Chair of the appeal on the second grievance;
- Marion Curtis, a trustee;
- Pauline Sylvester, a trustee;
- Ewa Depka, Operations Manager;
- Michael Mahon, an independent Chair of the second grievance;
- Noelette Hanley, Chief Officer of the respondent.

6. We also had an extensive bundle of documents numbering over 1,200 pages but there was much repetition and many documents we did not look at. However, many were relevant.

The facts

7. On 1 October 2005 the claimant started employment with the respondent first as Advice and Outreach, then Welfare Advice and, latterly as a Welfare Caseworker. The claimant was very well respected and there were no complaints about the work she carried out.

8. The respondent is a small charity employing between 10 and 15 people. It supports those from the Irish community and those from other disadvantaged groups. The claimant's duties included providing advice and advocacy services.

9. Ms Hanley has been the Chief Officer for over 13 years having previously worked for many years in the not for profit sector. The respondent has an active board of trustees which meet regularly with their meetings recorded in minutes. Many of the trustees also volunteer at the respondent. There are also staff meetings which are minuted. There are articles in association and a memorandum association as well as several staff policies. Most relevant are the Disciplinary, Grievance and Whistleblowing policies.

10. As a charity the respondent is also guided and regulated by the Charity Commission. The respondent has received the PQASSO Level 2 Quality Mark. This involves independent assessment and many aspects of the running of the charity including interviewing staff, volunteers and trustees on organisation and financial controls.

11. The most recent report, written by Mr Hodgkinson, in respect of this case was December 2016. Part of it appears at page 226 where it is recorded that the respondent was "*particularly strong*" in planning, governance, user center service, managing money and working with others. It went on: "*Finance is clearly well managed by the treasurers who ensure that budget information is clearly communicated and that expenditure is tightly controlled*". It is a very detailed report running to 64 pages.

12. It appears not to be disputed that the claimant raised issues about various matters which might be categorised as health and safety matters. These include the main door being unlocked, which was raised between December 2014 and at various times in staff meetings and with Ms Hanley during 2016 and 2017. Ms Hanley's evidence was that this was an issue that the respondent was trying to address. The claimant also queried the effectiveness of the Lone Working Policy. Again in 2014 and during a later discussion about it in June 2017 when it was being revised particularly after there was an intruder incident. Again, Ms Hanley was trying to ensure the policy was effective. The lighting in the car park was discussed at staff meetings and the claimant raised it in November 2016 and during 2017. There were alarms in the interview rooms, but they did not always work and the claimant raised this with Ms Hanley in July and at a staff meeting in August 2017.

13. At a trustee meeting in September 2016, the claimant asked to speak to the trustees under the confidential agenda item. This was later accepted to be a grievance about her pay, and the extract from the minutes it appears at page 195 of the bundle.

14. In summary, the claimant asked the trustees to consider a pay rise for herself. She said that she had asked Ms Hanley and spoke about her work and worth to the respondent. She expressed concern that a colleague had been given a pay rise when the claimant herself had trained that colleague. She also said that she was upset at not having been allowed bereavement leave.

15. The outcome was that Ms Hanley asked an external person, Ms Hayes, who was known to the organisation, to listen to the claimant's concerns. It appears there were meetings, and in a document prepared later, Ms Hayes set out what the claimant had said. The substance was that the colleague had received a pay rise and the claimant had not, but she felt she was doing additional work. There were further meetings between Ms Hayes and Ms Hanley and the claimant's colleague. There were some suggestions, but no very clear steps taken.

16. At some point towards the end of 2016 or early 2017, a restructure was being considered partly because it was felt that the Chief Officer was overloaded with work. This followed an awayday and came out of some comments in PQASSO highlighting of issues. A report was prepared by Mr Hodgkinson on this issue in March 2017.

17. On 25 January 2017 the claimant wrote to Ms Hanley and indicated that she wished to take her grievance to Stage 3. She commented that the procedure gave no advice on "*employees right to a tribunal hearing*". Ms Hanley replied referring the claimant to the Grievance Policy and said the claimant should write to Mr Scanlon "*setting out what you want to achieve*".

18. As the Employment Tribunal understands the restructure was being finalised towards the end of March 2017 or early April. On 11 April the claimant and Ms Hanley met. There are no contemporaneous notes of this meeting and it is dealt with in paragraph 17 of Ms Hanley's witness statement and paragraph 20 of the claimant's. It is likely that it was to discuss the proposed restructure and there was mention about the new post of Operations Manager. The claimant alleges what was said by her in this meeting was a protected disclosure.

19. It is not entirely clear to the tribunal what exactly was said at this meeting. It is accepted that the Operations Manager role was discussed and the funding for the salary was raised by the claimant. At some point there was a suggestion that the salary of the Operations Manager post at the beginning of employment of around £6,000 might need to be taken out of reserves. The tribunal has seen that the charity had substantial reserves at this point.

20. After the meeting the claimant wrote an email to Ms Hanley, which is at page 329, saying she was concerned that her grievance was "*being part of a totally different issue*" which we understand to be a reference to the restructure.

21. On 13 April the claimant wrote to Mr Scanlon saying she wanted to escalate the grievance. After various written exchanges, there was a meeting with a trustee, Ms Rooney, to discuss the claimant's grievance. We have seen notes of that hearing between 340 and 344. The discussion centered on the claimant's request for a pay increase to recognise the work she was doing. She wanted a proper pay review. She agreed that the restructure was necessary but wanted her grievance to be dealt with separately.

22. An outcome to what was then decided to be Stage 2 grievance was

provided on 15 May. The grievance was not upheld but a recommendation of an annual pay review separate from cost of living increase was made.

23. During May there was correspondence between Ms Hanley and the claimant about the Lone Working Policy. And in June, there was an intruder incident while Ms Hanley was working alone and she told other staff about it and it was later discussed by email.

24. Ms Ewa Depka was appointed Operations Manager on 12 July 2017, having attended an away day before taking up the post. On 24 July the claimant approached her and said that other local organisations should be informed about the intruder incident in June. Ms Depka disagreed it was necessary and was worried about reputational issues for the respondent.

25. Ms Depka's witness statement to the tribunal and one prepared during the disciplinary investigation said that she found the claimant rather difficult and unwelcoming. The tribunal makes no findings about that as it is not part of our issues.

26. The claimant, having appealed the grievance outcome, there was a Stage 3 hearing with three trustees and Mr Scanlon in the chair on 28 July 2017. We have seen lengthy notes about that meeting which extended to over three and a half hours. It is true to say that the notes show the claimant took a rather competitive stance mentioning constructive dismissal arising from the process. She talked about the valuable work she was carrying out and gave her views on the management structure. She stated that she had not been treated fairly. The main areas of the claimant's concerns were recorded as salary, equal opportunities and compassionate leave. It was recorded that the claimant there "*queried the use of reserves*", and why the Chief Officer's salary was not shown on an organisational chart. She did say that her grievance was not all about money and recommended the board of trustees consider Charity Commission Guidelines. She referred to her health issues and said that she might consider going to a tribunal.

27. By detailed letter of outcome of 15 August, the claimant's grievance in relation to a pay rise was not upheld and neither was her equal opportunities complaint about her colleague who had been given a pay rise with extra responsibilities. Further steps of clarification were to be taken about compassionate leave. Mr Scanlon did also respond to some of the claimant's other comments about the running of the organization, but they did not form part of the grievance.

28. On 31 July 2017, there was an informal gathering of three staff and two volunteers/trustees in the reception area. The tribunal has heard considerable evidence about this as it is in dispute what was said. It is agreed that the claimant was present with her colleagues Heather Roy and Joanne O'Reilly. Also present were Pauline Sylvester and Marion Curtis, who are trustees and volunteers. There is no contemporaneous note of what was said in this informal discussion so we need to look at statements that were all made later when the matter was investigated, statements made at internal hearings, statements made for this hearing and cross examination during this hearing.

29. Ms Hanley's evidence, which accords with Ms Sylvester's is that in her return from holiday on 7 August, she was told by Ms Sylvester that the claimant had threatened Ms Sylvester with losing her home and had made a comment about Ms Depka being "*Hitler's Henchman*". She said that Ms Curtis was also there. Ms Hanley asked both women to consider making a formal statement. Ms Hanley was then away again until 26 August. When she returned Ms Sylvester told her about another incident with the claimant on 25 August where she repeated the comments about losing of homes.

30. Ms Hanley asked Ms Sylvester and Ms Curtis to consider making formal statements but they were reluctant. Ms Hanley agrees that she pressed them to consider making statements.

31. Ms Hanley was also considering some other matters of concern about the claimant during early September. One related to an interaction between Ms Hanley and the claimant about how the claimant communicated with a colleague on reception, Ms Brennan.

32. She also spoke to Lucy Nicholson, whose organisation, Healthwatch, used space at the respondent's building. She had witnessed some behaviour by the claimant which concerned her. Legal advisers drew up a statement for Ms Nicholson which she asked for some amendments to. Ms Nicholson's evidence before us is that not all the amendments that she asked for were made. She wanted to emphasise the management failings, as she saw ithem, with dealing with the claimant. She has not suggested any changes were needed to her evidence about hearing the claimant shouting in the office, so that is presumably what she witnessed.

33. A trustee meeting was arranged for 12 September 2017 which discussed the allegations against the claimant. Ms Sylvester and Ms Curtis agreed to write statements and they appear at pages 475 and 476 of the bundle.

34. The first sentence of both statements is identical save for the names. Ms Sylvester and Ms Curtis could not account for this saying they wrote the statements alone except, in one instance, with Ms Curtis' daughter. Ms Hanley believes they might have had assistance from legal advisers but they did not give that evidence.

35. The rest of the statements are not identical, although there are some similarities. The relevant parts are that Ms Curtis said that the claimant said:

> *"The trustees are not doing their job properly and we will lose our houses and that the charity commission will be coming, see what's going on and will close the forum down. I took this as a threat".*

She went on

> *"Mary also made a comment about ED, the forum's new Operations Manager, saying that she was "Hitler's Henchman". This was out of order and not appropriate in the workplace. Again, I felt very uncomfortable especially as Ewa is Polish".*

36. Ms Sylvester's statement says:

> *"Mary said to both of us that we would lose our houses because she is going to the Charity Commission. They would close us down tomorrow". Mary walked towards Joanne and said Ewa is like Hitler's Henchman. Heather Roy was also present. Ewa is Polish I thought the comment was disgusting"*

37. Both those statements were signed on 19 September. Ms Sylvester also reported another discussion on 25 August meeting where she said that the claimant had "*said we would lose our house and our money and the Charity Commission would close us down*".

38. The claimant agrees that she raised concerns with Ms Sylvester and Ms Curtis in the discussion in the reception area on 31 July. She says that she suggested to those trustees that they check with the Charity Commission. She told them that they might be liable. She denies saying that she was going to the Charity Commission, that they would lose their houses and the Hitler's Henchman comments.

39. Ms O'Reilly and Ms Roy were not spoken to at that point. They gave evidence that they did not discuss matters about the claimant after she was later suspended. It was not for almost a year that they were asked about the meeting on 31 July 2017.

40. First, Ms O'Reilly was asked by the claimant in late May 2018, after the claimant had resigned, to meet with her. Ms O'Reilly wrote a statement on 30 May (page 1250). She was then spoken to by Ms Hanley on 7 June. Ms O'Reilly's evidence to us is that she told Ms Hanley in that discussion that she did not agree with Ms Sylvester and Ms Curtis' statements. Ms Hanley followed up the discussion with an email to Ms O'Reilly recording that Ms O'Reilly had said she "*did not recollect*" the Hitler's Henchman comment. Ms O'Reilly did not reply to that email saying that that was not correct, but she has shown us a handwritten note which she says is a draft of an email that she intended to send to Ms Hanley. In any event, she did not do so. In her evidence to the tribunal Ms O'Reilly disputes that the claimant made threats about losing of houses and the Hitler's Henchman comment.

41. Ms Roy was approached first by Ms Hanley in June 2018 and received a similar email recording that she did not recollect the Hitler's Henchman comment. She did not go back to Ms Hanley to say she did not mean that. She also made a statement for the claimant a little later, on 14 June, which denies the Hitler's Henchman comment and the threats to losing of houses.

42. The tribunal must decide, on all the evidence before it, what happened on 31 July. There are difficulties with the witnesses' evidence, partly because of the passage of time between the incident and the first statements and also up to this hearing. It seems to the tribunal that all witnesses are doing their best to recall what was said.

43. Doing the best we can, the tribunal finds, on the balance of probabilities, that the claimant did say that she was going to the Charity Commission, that

trustees might lose their houses and that she made the Hitler's Henchman comment. There are several reasons for this. The most contemporary statements are those of Ms Sylvester and Ms Curtis. The claimant could give no reason for those witnesses to make up such a version of events. She said they were trustworthy people that she was friendly with. She had already prepared a draft complaint to the Charity Commission so it is not unlikely she might had referred to going to the Charity Commission. Both Ms Sylvester and Ms Curtis clearly remember the mention of losing of houses; they said that to Ms Hanley and repeated it in their statements.

44. It is suggested to the tribunal that Ms Hanley had a hand in persuading those trustees to make the statements, and, by implication, that she told them what to write. The tribunal can see no reason for that to have occurred. We know that the claimant was unhappy; we know that she often took issue with organisational matters. If there had been a desire to concoct a story, then it makes no sense to manufacture statements when Ms O'Reilly and Ms Roy were present. The tribunal feels that Ms O'Reilly and Ms Roy's statements were written with the intention of trying to help their ex-colleague and many months after the incident itself. It is more likely that they said, when asked by Ms Hanley, that they did not recall the comment as recorded by Ms Hanley then that they denied to her that it was said.

45. Bearing all this in mind and being aware that a disciplinary panel or an investigation, might have formed a different view if it had proceeded at the time, we find that Ms Sylvester and Ms Curtis' versions more accurately record what was actually said on 31 July 2017.

46. We turn to 25 August 2017, when there was a further conversation in the kitchen when the claimant mentioned her concerns about finances and the Charity Commission and so on to Ms Sylvester and Ms Curtis. Ms Curtis does not mention this in her September statement but Ms Sylvester did and again she suggests that she felt it was a threat. Given our findings in relation to 31 July, it is likely that this occurred in the way described by Ms Sylvester.

47. On 20 September 2017 the claimant was suspended by Ms Hanley with Mr Scanlon present. She was invited to a disciplinary hearing on 25 September. The reason for suspension was set out in a letter. There were three allegations - one about the communication matter involving Ms Brennan; one about the alleged threatening of trustees losing their homes and the alleged derogatory comment about Ms Depka. The claimant received a pack of copy documents with that letter. These included the statements from Ms Sylvester, Ms Curtis, Ms Nicholson and Ms Depka as well as copies of emails, policies and so on.

48. Not surprisingly, the claimant was shocked and upset by being told of the suspension. Ms Hanley asked her if she wanted to collect personal things from her desk and walked with her to reception. Ms Hanley recalls the claimant shouting that she was being sacked. The claimant perceives this as being marched off the premises. The tribunal does not accept that this is what happened. It is not unusual when somebody is being suspended for them to be invited to take any personal things home, and it is very common

for there to be a suspension where there is likely to be a dispute about what was actually said at a particular date. Staff were told that the claimant would not be in and that they were to tell clients that she was on leave.

49. On 22 September the claimant emailed Ms Hanley to say that she was traumatised and had been signed off sick. She said she would not be attending the disciplinary hearing. In the meantime, she went to see solicitors, and, on 5 October, she submitted a grievance about the disciplinary action through those solicitors. This appears between pages 486 and 492 of the bundle. It is a long and detailed letter which goes into considerable detail. It alleges several public interest disclosures. It states, amongst other things that the allegations against the claimant were "*exaggerated, taken out of context and some were untrue*". The letter asks for an independent investigation into the letter as a grievance and for the disciplinary process to be terminated.

50. The respondent appointed Mr McMahon to deal with what we refer to as the second grievance. The claimant was therefore invited to a meeting which took place on 13 and 14 December 2017 for the grievance to be discussed. Mr McMahon was an external consultant who had some knowledge of the respondent and, indeed, of the claimant. He had 45 year's experience with Luton Borough Council in senior roles. Before the grievance hearing it was agreed that Mr McMahon would look at the question of whether to reinvestigate the disciplinary action. The claimant's other concerns about the running of the respondent would be looked at elsewhere. Mr McMahon took the view that he was looking at whether there was a causal link between matters of concern raised by the claimant and the taking of the disciplinary action. There are detailed notes of the hearing.

51. At the conclusion of the meeting with Mr McMahon, Ms Hanley is recorded as saying this:

> *"I have worked with Mary for 11 years during which time she has challenged me with regard to operations. I have taken her views on board and we are the better for it but sometimes I do not agree with her views."*

52. She went on to say that the main driver for disciplinary action were the allegations about comments made by the claimant on 31 July.

53. On 29 January 2018 Mr McMahon's findings report was produced. Again, it is a relatively lengthy document between pages 593 and 600. The summary reads as follows:

> *"On that basis I dismiss MF's claim that disciplinary proceedings were linked to the issue she had raised regarding the operation and management of the LIF.*
>
> *However, I do have a recommendation in relation to the outstanding disciplinary proceedings. Whilst at the time management made the decision to instigate disciplinary proceedings their view was that there was not the need for an investigation at that stage and a disciplinary hearing would*

> *enable all the evidence to be heard. However, it seems to me that there is an opportunity now to revisit the issue of an investigation.*
> *My recommendation to the LIF is that they now suspend the disciplinary proceedings and whilst MF remains away from work, NH undertakes a full and speedy investigation into all allegations, particularly in relation to the two most serious allegations of threatening behaviour and derogatory remarks and on the outcome of those investigations, review the pervious decision to commence disciplinary hearings."*

54. At this hearing, Ms Hanley was cross examined on her failure to speak to the claimant after this report was sent. She gave evidence that she had begun to look for an independent person to conduct an investigation, but she did not communicate with the claimant before the claimant appealed on 7 February, within the 10 days suggested by Mr McMahon's report. The claimant's appeal was contained in a detailed letter from her solicitors.

55. On 13 February the trustees met and were told by Ms Hanley that Mr McMahon had found in the respondent's favour but that the claimant had appealed.

56. An appeal hearing was arranged with another experienced external consultant, Ms Glinnan, for 10 April 2018. This time the hearing was recorded. Again, it is a lengthy and detailed meeting. Ms Glinnan also spoke on the phone with Ms Hanley who confirmed that the claimant had raised issues, particularly the health and safety issues, which she said she had tried to resolve within budget.

57. On 21 May 2018, Ms Glinnan produced a grievance appeal report. Again, it is relatively lengthy and appears between pages 770 and 783. The claimant's grievances were not upheld but Ms Glinnan echoed Mr McMahon's recommendation that an independent arbitrator consider the disciplinary matters.

58. On 24 May 2018, the claimant resigned. Her email appears at page 786 addressed to Ms Hanley and reads as follows:

> *"Following the outcome of my grievance appeal it is with great sadness that I feel I am left with no alternative but to resign my position with LIF with immediate effect.*
>
> *As I have made clear I believe that the disciplinary action against me was, at least in part, based on the protected disclosures I made and, therefore constitutes detriments under the whistleblowing legislation. I also believe that I became a target for disciplinary action/dismissal and that much of the evidence collated against me has been exaggerated, steered or manipulated in some way so as not to give a full or rue picture of events and in some cases, is blatantly untrue, with the aim of showing me in a bad light. This includes the statements given by the trustees. The forum has therefore acted in a way that breaches its duty of trust and confidence to me and I consider*

myself to have been constructively dismissed."

59. As we have stated it is was after this that the claimant contacted Ms O'Reilly and Ms Roy for their statements.

60. After the claimant left, the respondent was approached by Luton Borough Council for a reference and they completed the reference. Under what appears to be a dropdown menu the respondent selected "*under investigation at time of leaving*". There is no reference to the claimant having been suspended.

61. On 23 August 2018, the claim form was presented and at some point, but we do not know when, the claimant did indeed start work at Luton Borough Council.

The law and submissions

62. The law with respect to public interest disclosures is set out in part IVA of Employment Rights Act 1996 (ERA). Section 43A ERA 96 defines a 'protected disclosure' *as a qualifying disclosure (as defined by s43B) which is made by a worker in accordance with any of sections 43C to 43H".*

63. The relevant parts of section 43B of ERA 96 state:

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

64. Pursuant to s43C a qualifying disclosure is made if the worker makes the disclosure to his employer.

65. When considering whether there has been a 'disclosure' within the meaning of s43(B)(1) the employee must disclose 'information'. It is not sufficient that the employee has made an 'allegation' (**Cavendish Munro Professional Risks Management Ltd v. Mr. M Geduld** [2010] ICR 325) as clarified by the Court of Appeal in **Kilraine v London Borough of Wandsworth** [2018] ICR 1850. The tribunal must consider whether the disclosures contain sufficient factual content and specificity to amount to a reasonable belief in the breach alleged.

66. The claimant must show that she reasonably believed the disclosure was in the public interest. There is no requirement to show that the breach actually

occurred. Our task is to consider, in relation to the alleged disclosures, whether, in the claimant's reasonable belief there was information which was in the public interest and tended to show one of the matters in s43B (1) b) or d), namely that there had been or was likely to be a breach of a legal obligation or a health and safety risk.

67. Guidance is provided to tribunals hearing public interest disclosure cases in **Blackbay Ventures Ltd T/A Chemistree v Gahir** [2014] ICR 747. It is suggested that each disclosure should be separately identified; that each failure to comply with a legal obligation or health and safety allegation should be separately identified; that the legal obligation may need to be identified; that the issue of whether the claimant had a reasonable belief that it was in the public interest and, where detriment is alleged, that the detriment should be identified.

68. Section 103A ERA 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".*

69. If we find that there were one or more public interest disclosures, we must then consider whether the dismissal was because the claimant made the disclosure(s). With respect to the burden of proof where the claimant claims automatically unfair dismissal under s103A ERA, the case of **Kuzel v Roche Products Ltd** [2008] IRLR 530 states that the claimant must challenge the employer's reason and produce some evidence of a different reason for dismissal.

70. Section 47B ERA provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure. Section 48(2) ERA provides that on a complaint under section 47B :- "*it is for the employer to show the ground upon which any act, or deliberate failure to act was done*". The tribunal must decide what caused the detriments (if any are found) and the dismissal. Helpful guidance in assessing causation is provided in the Court of Appeal's judgment in **Fecitt v NHS Manchester** [2012] ICR 372 where it was said:

> "*section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than trivial influence) the employer's treatment of the whistleblower".*

71. The tribunal is concerned to decide whether there has been a dismissal in accordance with Section 95(1) Employment Rights Act 1996 which states:-

> *"For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)….only if)-*
>
> *a)-*
> *b)-*

> *c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct"*

72. This is what has become known as "constructive dismissal". The leading case of **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221 remains good law and makes it clear that the employer's conduct has to amount to a redudiatory breach. The employee must show a fundamental breach of contract that caused them to resign and that they did so without delay.

73. In summary, we are concerned to decide whether there was a disclosure, that is whether there was information which tends to show, in the reasonable belief of the claimant, either a breach of a legal obligation or a breach of health and safety. If there was such disclosure, we have to consider whether, in her reasonable belief, it was in the public interest.

74. What we often concentrate on, is whether, if there were disclosures, there was any causal link between them and any detriment or dismissal. The claimant relies separately on the way in which the matter was handled as constituting a fundamental breach. If there is such a breach the tribunal must determine whether the claimant resigned because of it and without delay.

75. The tribunal had helpful written and oral submissions from both representatives. They relied heavily on what they said should be our interpretation of the evidence that we heard. There are no significant disputes on the legal tests to be applied.

Conclusions

76. These then are our conclusions. We first record the agreed issue and then provide the answer.

77. The agreed list of issues dealt first with the communication about a breach of a legal obligation. Issue 1 is whether the claimant communicated the following five matters and these read as follows:-

    Issue 1.1 "*the new post of Operations Manager could and should not be funded from the charity's reserves*".

    We find that the claimant did communicate something to that effect. She mentioned the use of reserves in a way which showed concern. She communicated it with Ms Hanley in the meeting of 11 April and on 28 July at the grievance hearing, along with possibly an oblique to it on 31 July and 25 August with Ms Sylvester and Ms Curtis. So that was communicated.

75 Issue 1.2 "*spending by the respondent on alterations to the top floor of the respondent's premises were exposing respondent to undue financial risk".*

    Although the tribunal can see a reference to this at a staff meeting at page 193, we are not sure whether it was the claimant who raised it or how. There is insufficient evidence on what was communicated. We are not

satisfied that it necessarily reflected any concern about undue financial risk. This is not made out.

76 Issue 1.3 "*spending by the respondent on a new IT system to enable Healthwatch staff to work remotely was exposing the respondent to undue financial risk".*

Again, there is a reference to this at a staff meeting (page 2930 but it is not clear that it was the claimant who was making a point about it or that any point was being made about financial risk. We are not satisfied that the evidence points to that communication having been made by the claimant.

77 Issue 1.4 "*The respondent was failing to deal effectively with ongoing staff problems and low morale and not effectively communicating with staff".*

This is something where we heard very little evidence and we cannot find that this was communicated by the claimant.

78 Issue 1.5 "*The trustees were not ensuring the respondent complied with Charity Commission rules and were not familiar with their own duties under Charity Commission rules".*

We find that this was communicated. The claimant referred to the Charity Commission and its rules in discussions as indicated on 31 July and 25 August as well as at the meeting with trustees on 28 July.

79 We therefore turn to Issue 2 which sets out when those matters were made.

We have indicated above when those communications we have found were made. We find that two matters at issues 1.1 and 1.5 were communicated. The other three matters between issues1.2 to 1.4 were not.

80 Issue 3 "*The legal obligations relied upon by the claimant are evidenced in particular about Charity Commission Guidance CC3 "the essential trustee; what you need to know, what you need to do" and CC19 Charity reserves; building resilience" and are:-"*

Three matters are then set out between issues 3.1, 3.2 and 3.3. The tribunal is satisfied that there were legal obligations with respect to trustees' fiduciary duty, to act in the best interests of the charity and exercise prudence.

81 Issue 4 (Health and safety) sets out the matters relied upon.

82 Issue 4.1 "*The main door to the respondent's premises was being left unlocked and so it was easy for people to access unsupervised. The claimant raised this in December 2014 and in staff meetings on 11/5/16, 23/11, 16, 25/1/17, 20/2/17 and 18/9/17; further she raised the concern orally with Noelette Hanley in around March 2017*".

The tribunal is satisfied that those matters were communicated on at least some of the dates set out there.

83 Issue 4.2 "*Staff were working alone in the building particularly at night with no adequate Lone Working Policy in place. The claimant raised this in December 2014; in the staff meeting on 11 August 2017; at the end of June 2017*"

The tribunal is satisfied that this matter was communicated by the claimant on at least some of the dates set out there.

84 Issue 4.3 "*There was a lack of lighting in the car park and entrance areas of the building. The claimant raised this in the staff meetings on 13/1/16, 23/11/16 and 25/1/17*".

The tribunal is satisfied that this issue was referred to by the claimant in staff meetings.

85 Issue 4.4 "*The alarms in both interview rooms were not functioning and could not be reached by staff. The claimant raised this in an email to Noelette Hanley on 1 July 2016 and in the staff meeting on 11 August 2017".*

The tribunal is satisfied that was communicated as set out above.

86 Issue 4.5 *"The respondent was putting the health and safety of others at risk by not informing other charities or organisations in the area about an intruder incident in June 2017. The claimant orally asserted to Ewa Depka on 24 July 2017 that the respondent had a duty of care to do so".*

The tribunal finds that this was raised by the claimant as set out in the facts.

87 Issue 5 asks whether any disclosures were qualifying and protected. Issue 5.1 *"what information, if any, did the claimant disclose within the meaning of section 43B (1) ERA 1996, the respondent's case being that they were merely allegations or expressions of opinion?"*

On balance, the tribunal find that, whilst not all that the claimant communicated, can be categorised as information, as it was often more like allegations and/or expressions of opinion, there is sufficient in what she said about the Charity Commission, about the use of reserves and some of the things that she said with respect to health and safety to amount to information. Some of it is clearly factual in content. For instance, reference to lack of lighting in the car park and alarms not working is specific. All those matters the tribunal find as having been communicated contained at least some information.

88 Issue 5.2 "*Did the claimant reasonably believe that there was or likely to be a breach of legal obligation or risk to health and safety as applicable?"*

We find, on balance, that the claimant did have a reasonable belief that there were concerns which amounted to a health and safety risk or breach of a legal obligation. Although we find that her concerns were, initially in 2016, about her own position and pay, we do also find that changed over time so that matters raised about the use of reserves and Charity Commission rules did amount to a reasonable belief in a breach of legal

obligation. Her concerns about health and safety were also a reasonable belief that there may be some risk.

89 Issue 5.4 concerns whether disclosures were protected, and we find they were because they were made to her employer, through the Chief Officer and Trustees.

90 The claimant therefore did make some public interest disclosures. Some of those were health and safety concerns and some of them related to an allegation of a possible breach of a legal obligation.

91 We consider then whether she suffered either of the two "non dismissal" detriments as at issue 6 - "*Did the respondent subject the claimant to a detriment on the ground that either (a) she made a protected disclosures above or any of them (in accordance with s.47B ERA 1996) and or (b) that she brought to the respondent's attention, by reasonable means, health and safety issues (in accordance with s44 (1) c) ERA 1996 by?"*

92 Issue 6.1 "*initiating and pursuing disciplinary proceedings against her*".

93 The respondent has satisfied the tribunal that the reason for starting the disciplinary process was the concerns raised by Ms Sylvester and Ms Curtis about the claimant's comments on 31 July and 25 August. Our findings of fact make it clear that we find that there is no conspiracy; that the words reported to have been said were in fact said. On any account, that has a potential to lead to a disciplinary investigation. Even if those words were not said, there was still enough information to lead a reasonable respondent to conduct an investigation into the allegation. Given the claimant's own evidence about the time over which health and safety concerns had been raised by her, there is no explanation for the respondent to begin disciplinary proceedings when it did, except for the allegations about the claimant's conduct. There is no evidence that the respondent was at all concerned by the claimant raising those concerns.

94 There were three reasons initially for the disciplinary proceedings. The first related to the Ms Brennan issue which had no connection at all with any of the disclosures. The comments about the Charity Commission guidelines which included the reference to the possibility of trustees losing their houses, could amount to a disclosure but that was only one of the disciplinary matters. The tribunal finds that the respondent was much more concerned about the way in which that concern was raised rather than the fact of the claimant raising it. The Hitler's henchman comment that we have found as a fact was made, has no connection at all to any of the disclosures. The disciplinary proceedings were not initiated or pursued on the ground of any of the disclosures found by the tribunal.

95 Issue 6.2 "*supplying a reference to a prospective new employer in around July 2018 stating that she had been suspended pending a disciplinary hearing"*.

The tribunal cannot find any connection between those disclosures and the provision of the reference. It is an entirely factually correct reference. There is no reference to suspension, only to the investigation. It was not made on

the grounds of the claimant having made public interest disclosures but because it was requested, and honest answers were required.

96 We do not need to deal with any time points under issue 7 so we turn to issue 8 on constructive unfair dismissal. "*Did the respondent without reasonable or proper cause breach the implied term of trust and confidence such that the claimant was entitled to resign and claim constructive dismissal under s.95)1)(c) ERA 1996 by way of any or all of the following?:*

97 Issue 8.1 "*Two trustees and the respondent's Operation Manager producing witness statements which were contrived to show the claimant in a misleading bad light by being false and/or exaggerated*"

The tribunal's findings of fact make it clear that we do not accept that those witness statements were contrived to show her in a misleadingly bad light or were exaggerated.

98 Issue 8.2 "*The respondent's management seeking to contrive and/or build a disciplinary and/or SOSR case against the claimant with the aim of removing her from her employment"*.

As indicated, we find that there was no such contrivance. There is also no evidence that management had the aim of trying to remove the claimant from her employment as evidenced by the lengthy grievance process with external consultants and comments made by Ms Hanley within that process.

99 Issue 8.3 "*Basing the case against her on complaints about her having raised the issues and complaints about the alleged breaches of legal obligations, in the management of the respondent, which constitute her alleged protected disclosures".*

100 Issue 8.4 *"Basing the case against her on complaints about her having raised issues and complaints about the alleged risk to health and safety which constitute her alleged protected disclosures".*

The tribunal has already answered these questions. There is no connection between the public interest disclosures as found by the tribunal and the disciplinary proceedings. Whilst the some of the comments made by the claimant on 31 July and 25 August constituted disclosures, others did not and were part of the reason for the disciplinary proceedings being brought.

101 Issue 8.5 "*In any event, and taking in isolation from the above, initiating and pursuing a disciplinary and SOSR case against the claimant".*

This appears to relate to a complaint about how the disciplinary proceedings were handled by the respondent. It seems to the tribunal that the claimant has some difficulty criticising the respondent's actions. Ms Hanley was performing her role as Chief Officer when she informed the trustees of progress of the proceedings and the grievance; the respondent appointed independent and experienced people to look into the claimant's grievance, presumably at no little cost to the respondent. There were very detailed and lengthy discussions and thoughtful and lengthy outcomes. Given that there

was likely to be another independent person looking at 31 July discussion, the claimant had little or no reason to believe that there would not be a fair process. It had been made clear that Ms O'Reilly and Ms Roy would be spoken to in any investigation as would the claimant.

102 The tribunal must determine whether there were any breaches of contract and, if so, whether any of them singly or cumulatively amounted to a repudiatory breach of contract. As is clear from our findings of fact, there is no such repudiatory breach. The claimant did resign, as the question at Issue 9 points out, because she was unhappy with the process and because she faced disciplinary investigation. The tribunal finds that that was not in response to any breach of her employment contract as there was none. Issue 10 deals with whether there was a delay before she resigned. There is no real argument about that. Her resignation came immediately after the outcome of the grievance appeal but, as indicated, the tribunal finds that it did not relate to any breach.

103 Finally, we deal with Issue 11 "*Alternatively, did the respondent breach the implied term of trust and confidence in a cumulative matter by some or all of the following"*? There are 7 suggested failures between issues 11.1 and 11.7. They have been answered in our earlier conclusions, but we make it clear below what our findings are.

104 The tribunal do not find any fault with the decision to initiate and pursue a disciplinary process. The facts as found by us do not support any problem with the manner in which the claimant was dealt with. The respondent has been criticised for not following recommendations about suspending the disciplinary process after the outcome of the grievance. However, the tribunal cannot find a breach there. After Mr McMahon's outcome there was 10 days to appeal. There was nothing wrong with waiting to see if the claimant appealed, which she did. We have accepted that Ms Hanley was looking for an independent person but that was not pursued because of the appeal. There was simply no time, after the appeal outcome and before the claimant resigned, for the respondent to do anything at all. There is no cumulative breach.

105 To put it plainly, the claimant has not been able to show that the respondent intended not to be bound by its contract of employment with her. All evidence is to the contrary. The time and resources spent on looking into her concerns, suspending the disciplinary process whilst matters were investigated by independent people, indicates a respondent trying to address concerns whilst being aware that a serious allegation had been made. There was no breach of the implied term of mutual trust and confidence.

106 We do not need to answer issues 13-17 as they follow only if there has been a dismissal and findings of public interest disclosure detriment and dismissal

107 In summary, we find that the claimant did make some public interest disclosures, but not all those alleged. Those disclosures were not the cause of any actions taken by the respondent. There is no fundamental breach of contract and no dismissal. The claims fail and are dismissed.

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Employment Judge Manley

Date: …05/02/2020

Judgment sent to the parties on

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..10/02/2020
For the Tribunal office