EMPLOYMENT TRIBUNALS

Claimant:	**Ms K Williams**
Respondent:	**All Health Matters Limited**
Heard at:	**Ashford**
On:	**13th, 14th and 15th January 2020 and in chambers on 16th January 2020 and 23rd January 2020**
Before:	**Employment Judge Pritchard** **Mrs R Butler** **Mr N Phillips**

Representation

Claimant:	Miss G Cullen, counsel
Respondent:	Miss B Venkata, counsel

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1 The Claimant's claim that she was unfairly dismissed for having made public interest disclosures is dismissed.

2 The Claimant's claim that she was subjected to detriments for having made public interest disclosures is dismissed.

3 The Claimant's claim that she was unfairly dismissed is well-founded and accordingly succeeds.

4 The basic and compensatory awards are reduced by 100%. The Tribunal makes no monetary award.

REASONS

1. The Claimant claimed that she had been automatically unfairly dismissed for having made public interest disclosures, alternatively that she had been unfairly dismissed under ordinary principles. She also claimed that she was subjected to detriments for having made protected disclosures. The Respondent resisted the claims.

2. The Tribunal heard evidence from the Claimant's witnesses: Holly Turner, Adele Deakins, Alexandra Proctor and Jane Lyons – former colleagues all then working in the Respondent's Administration Team. The Claimant also placed in evidence the signed statement of a former colleague named Emma Hopkins. Because Ms Hopkins did not attend the Tribunal to give evidence, which could not be challenged in cross examination, the Tribunal gave this evidence limited weight. The Claimant gave evidence on her own behalf. The Tribunal heard evidence from the Respondent's witnesses: Gillian (Gill) Monk, Managing Director; Alice Monk, Business Support Manager; Rachel Day, Practice Manager; and Andrew Llewellyn-Davis, Operations Manager.

3. The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing, the parties spoke to and amplified their comprehensive written submissions.

The Issues

4. The issues were agreed between the parties and set out in a list as follows:

Section 43 Employment Rights Act 1996

Limitation

5. On 18 July 2018, the Claimant notified ACAS, the ACAS certificate was issued on 20 July 2018, and the ET1 was submitted on 12 September 2018.

6. Prima facie limitation expires on 11 June 2018 (the Claimant has 3 months less a day from the act complained of to bring a claim. Time is paused during ACAS conciliation).

7. The Claimant submitted a second ACAS conciliation certificate on 12 September 2018, which was issued the same day, this has no consequence on time.

8. Whether the alleged detriments which occurred prior to 11 June 2018 are out of time s48(3) ERA [GOR para 7]? It is accepted that the dismissal and appeal against dismissal are in time. The Claimant states that the detriments are part of a series of similar acts.

9. Did the Claimant make a protected disclosure pursuant to Section 43B(1)(b), (d) or (f) of the ERA to:

    (a) Mr Llewelyn Davies on 30 June 2017 (confidential medical reports that had not been saved on the Respondent's computer system, medical

reports that had not been sent to the client and confidential paperwork that had not been locked away and was on full view to the public visiting the clinic for appointments) [para 5 of the ET1];

(b) Mr Llewelyn Davies on 14 July 2017 (confidential medical reports that had not been saved on the Respondent's computer system, medical reports that had not been sent to the client and confidential paperwork that had not been locked away and was on full view to the public visiting the clinic for appointments) [para 6 of the ET1];

(c) Mr Llewelyn Davies on 14 April 2018 (post was being left unopened for months and so medical reports for clients were not sent out/sent late and were not being saved on to the system) [para 15 of the ET1];

(d) Mr Llewelyn Davies and Rachel Day on 16 April 2018 with regard to the state of the clinic (post containing medical reports being left unopened for months and not saved to the system para 16 of the ET1].

10. In respect of the above alleged disclosures, did the Claimant disclose any information that, in her reasonable belief, tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, that the health or safety of any individual has been, is being or is likely to be endangered and that information tending to show any matter falling within one of the preceding paragraphs has been, is being or is likely to be deliberately concealed?

11. In respect of each of the above alleged disclosures, did the Claimant have a reasonable belief the disclosure was made in the public interest?

12. If the Claimant made any protected disclosures pursuant to section 43B ERA, was the Claimant subjected by the Respondent to the following alleged detriments on the ground that she made the protected disclosures:

(a) From 11 December 2017 unfairly performance managing the Claimant (with allegations of poor performance dating back to July 2017) [paras 8 - 10 ET1];

(b) Using a performance management process to "scare" the Claimant, causing her to worry about her job security [para 11 ET1];

(c) Unfairly criticising and undermining the Claimant at a performance review meeting on 12 March 2018 [para 12 ET1];

(d) From March 2018 causing the Claimant to suffer with anxiety and depression [paras 13 and 25 ET1];

(e) By letter of 9 May 2018 rejecting the majority of the Claimant's grievances [para 20 ET1];

(f) Failing to conduct a fair grievance appeal process [para 22 ET1];

(g) By letter of 29 May failing to uphold the Claimant's grievance appeal [para 24 ET1];

(h) By letter of 29 May threatening the Claimant with dismissal [para 24 ET1];

(i) At a meeting on 5th June 2018 undermining and embarrassing the Claimant by questioning if her anxiety was caused by the menopause [para 27 ET1];

(j) By letter of 12 June unfairly dismissing the Claimant on purported grounds of ill health without having obtained any medical report [para 28 ET1];

(k) Failing to follow a fair or any process prior to the Claimant's dismissal [paras 28 and 29 ET1]; and

(l) Failing to follow a fair appeal process with regard to her dismissal by appointing Rachel Day to consider the appeal when she had been instrumental in the decision to dismiss the Claimant [para 30 ET1].

Automatic unfair dismissal

13. Was the reason, or principal reason for the Claimant's dismissal that the Claimant made protected disclosures (section 103A, ERA 1996)?

Unfair Dismissal

14. Was there a fair reason for the Claimant's dismissal and was the dismissal fair in accordance with Section 98(4) of the Employment Rights Act 1996? The Respondent asserts that the Claimant was dismissed for the fair reason of some other substantial reason (breakdown of relationship between employer and employee). The dismissal letter refers to ill health and SOSR and the appeal outcome letter refers to capability and SOSR.

15. Was a fair process followed in respect of the Claimant's dismissal? Specifically did the following alleged failures by the Respondent mean that a fair process was not followed:

(a) Failure to obtain a medical report/evidence before dismissing the Claimant on alleged grounds of ill health;

(b) Failure to notify the Claimant in advance of her meeting with Rachel Day on 5 June 2018 that a consequence of that meeting could be her dismissal;

(c) Failure to notify the Claimant in advance of her meeting with Rachel Day on 5 June 2018 that it was her statutory right to be accompanied at that meeting;

(d) Failure to warn the Claimant that a consequence of her declining mediation could be her dismissal;

(e) Failure to give any real consideration to any alternatives other than dismissal;

(f) Failure to appoint an impartial person to hear the Claimant's appeal when Rachel Day had made the decision to dismiss the Claimant and the Claimant had previously raised a grievance against Andrew Llewelyn Davies.

Remedy

16. Is the Claimant entitled to an uplift of any compensation the Tribunal deem suitable to award having regard to the issues of Polkey, conduct and failure to mitigate?

17. The hearing proceeded on the basis that the Tribunal would consider liability only at this stage together with consideration of Polkey and contribution; a further hearing would be listed to consider remedy should the Claimant succeed in all or any of her claims.

Findings of fact

18. The Respondent is an occupational health provider. A core element of its business is providing employer clients with medical assessments of employees and potential employees as to their health and suitability for work. The Respondent is a small employer having approximately eighteen employees at relevant times. It has a small management team comprising its witnesses who gave evidence at the hearing. Alice Monk is Gill Monk's daughter.

19. The Claimant commenced employment with the Respondent on 15 September 2014 as an Administrator. In April 2016 she was promoted to Senior Administrator. During the early years of her employment, the Claimant had an extremely good relationship with Gill Monk who was caring, supportive and generous towards her, particularly in relation to certain personal matters about which the Tribunal heard evidence.

20. The Claimant was based at the Respondent's offices in Canterbury but, to provide cover when needed, she would occasionally attend the Respondent's clinic based in London ("E16"). Other members of the administration team would provide similar cover from time to time.

21. Confidentiality of documentation relating to occupational health is of prime importance to the Respondent whose employees are well aware of this. Upon the commencement of employment, the Claimant signed a confidentiality agreement, the terms of which illustrate the importance of such confidentiality.

22. On 30 June 2017 the Claimant attended the E16 Clinic and found it in a mess. The Claimant attended the E16 clinic again on 14 July 2017 and again found it in a mess.

23. There was a dispute as to what the Claimant reported to Mr Llewellyn-Davis following these visits. The Claimant's evidence was that she reported all her concerns to Mr Llewellyn-Davis, namely that confidential medical reports had not been saved on the Respondent's computer system, medical reports had not been sent to the client and confidential paperwork had not been locked away and was on full view to the public visiting the clinic for appointments. Mr Llewellyn-Davis's evidence was that the Claimant simply told him that the office was in a mess.

24. Before these proceedings commenced, the Claimant produced much written material regarding her employment. If the Claimant had communicated to Mr Llewellyn-Davis her concerns in full, in particular her concerns about potential breaches of confidentiality and no action was taken by the Respondent to rectify the situation, especially given the importance of confidentiality within the Respondent's business, the Tribunal finds it likely that she would have put those concerns in writing to the Respondent. Although the Claimant's witnesses say that they reported their concerns about E16 to the Claimant, none of these witnesses gave evidence that they overheard the Claimant disclose this information to the Respondent.

25. On balance, the Tribunal prefers the Respondent's evidence that the Claimant, while reporting that E16 was messy, did not disclose information relating to potential breaches of confidentiality.

26. In July 2017, following a dispute between the Claimant and a client, Gillian Monk made a telephone call to the client using the telephone on the Claimant's desk. The client expressed to Ms Monk his disappointment about the Claimant's performance. After the call ended, Ms Monk, who was cross, took the clinic list from the Claimant and said she would deal with the matter. This upset the Claimant.

27. In about July 2017, Gill Monk learned that the Claimant had recently completed the purchase of a new house in Folkestone after several months lodging with her ex-partner. On 30 July 2017, Gill Davis sent a video to the Claimant and other members of her team by way of a Facebook Messenger message. The video showed a woman dancing happily on the pavement outside an estate agency in Folkestone.

28. The Claimant's relationship with Gill Monk deteriorated. Rachel Day offered to mediate between the Claimant and Gill Monk but the Claimant declined the offer.

29. By letter dated 11 December 2017, Mr Llewellyn-Davis invited the Claimant to attend an informal meeting to discuss a number of performance issues which he clearly set out in the letter. The meeting took place on 13 December 2017 and was attended by the Claimant, Mr Llewellyn-Davis and Rachel Day. Among other things, discussion concerned the Claimant's role as Senior Administrator, the requirement for her to set an example, her management members of administration team and the desirability of delegating tasks to them. The transcript of the discussion suggests that both Mr Llewellyn-Davis and Rachel Day were supportive of the Claimant and were looking forward to having the performance issues resolved.

30. On 22 December 2017 the Claimant signed an action plan whereby training would be provided in relation to some aspects of the Claimant's role.

31. A performance review meeting was held on 12 March 2018 attended by the Claimant, Mr Llewellyn-Davis and Rachel Day. It was agreed that a further performance review meeting would take place on 8 May 2018. On 14 March 2018 Mr Llewellyn-Davis met with the Claimant to discuss what was expected of her in accordance with her job description.

32. Having given Rachel Day advance notice that she would do so, the Claimant raised a formal written grievance on 11 April 2018. In summary, she complained that: her performance management was unfounded; placing her on performance management to scare her into doing more work was tantamount to corporate bullying; errors were made because of increasing workload; performance management was imposed because of the company's situation and Gill Monk's personal feelings towards her; and the process was profoundly flawed.

33. On 13 April 2018 (not 14 April as pleaded) the Claimant visited E16 and again found it in a mess. She reported the mess to Mr Llewellyn-Davis and took photographs of what she found. In evidence to the Tribunal, the Claimant said that she informed Mr Llewellyn-Davis that there was "still unopened post, medical reports were not saved onto the system and confidential medical data was still left lying around in full view for anyone visiting the clinic to see". However, this alleged disclosure does not appear in the Claimant's Grounds of Complaint, paragraph 15 of which simply states that "the Claimant informed Mr Llewellyn-Davis that post was being left unopened for months". Nor is said to comprise the alleged disclosure in the agreed list of issues placed before the Tribunal for consideration.

34. On 16 April 2018 the Claimant met with Mr Llewellyn-Davis and Rachel Day when the Claimant handed over unopened post from E16. Again, the Claimant's evidence before the Tribunal did not reflect what she pleaded at paragraph 16 of her grounds of complaint. Nor was it reflected in the agreed list of issues.

35. Although both Mr Llewellyn-Davis and Rachel Day conceded that the Claimant told them about unopened post, showed them photographs of E16 in a mess at E16, they both denied that the Claimant disclosed information about anything further such as confidential information being left on open display to members of the public.

36. Had the Claimant disclosed information about confidential documentation being on public display, or other information matters relating to confidential data, it is likely she would have set it out in her claim form and included it as an issue for determination. The Tribunal is unable to identify from the photographs, photocopies of which were before the Tribunal, confidential information on public display. The witness evidence about the photographs takes the matter no further. The Tribunal prefers the Respondent's evidence that the Claimant simply reported that E16 was in a mess and that post was left unopened.

37. The Claimant was invited to attend a grievance hearing on 19 April 2018. It was proposed that Alice Monk would be present. By letter dated 23 April 2018, the Claimant informed the Respondent that on the advice of her GP she would not be attending work and requested a postponement of the grievance hearing. She also objected to Alice Monk, being Gill Monk's daughter, being present at the grievance hearing and asked for a neutral member of HR personnel to be present, not Rachel Day.

38. The Claimant was absent from work from 23 April 2018. She did not return to work thereafter.

39. By letter dated 3 May 2018, the Claimant informed Rachel Day of further grievances she had against Gill Monk.

40. A grievance meeting took place on 4 May 2018 and was chaired by Rachel Day. The Claimant was accompanied by a colleague. By letter dated 9 May 2018, Rachel Day informed the Claimant that her grievances were not upheld except that:

    40.1. The Claimant's complaint that the performance plan had been flawed was partly upheld to the extent that the Respondent could have managed the Claimant's expectations better, more notice of the performance concerns could have been given, and a clearer outline of expected timelines could have been provided;

    40.2. With regard to the Claimant's complaint about Gill Monk's unprofessional language, Gill Monk admitted that when speaking to the Claimant she had referred to the members of the administration team as "bitchy" and may have said that anyone who did not want to be part of the team could "fuck off".

41. Towards the end of her outcome letter, Rachel Day wrote:

> *During the grievance meeting you were unable to make suggestions as to how you thought your grievance could be resolved other than taking you off the performance management plan and removing it from your records. This is not an option as has been noted in point 1.*
>
> *Your grievance concerning your relationship with Gillian requires a totally different solution. I would like to suggest mediation through an outside organisation to facilitate a resolution with you and Gillian, and Andrew should you feel it necessary to include him.*
>
> *In summary, during the course of my investigations it has been apparent that no one intended to cause you stress or upset by putting you on a performance management plan. Gillian is direct in her approach regardless of her audience. No offence is ever intended but if you perceived this to be the case, then I apologise on behalf of the company.*
>
> *I would welcome a positive resolution to this situation and to see you back at work performing confidently at full capacity, and feeling supported by the company. When you return, your Performance Plan will continue until we are confident that you are able to meet the expected standards. I can assure you that you will be treated without prejudice on your return, and will be fully supported to resume your role.*
>
> *I would also like to refer you to occupational health for advice regarding an appropriate return to work plan. Should you accept this decision, please write to confirm this within five working days. Following your confirmation, I will initiate the occupational health referral process to begin the return to work plan, and ask for the OH specialist to discuss the offer of counselling with you.*
>
> *You have the right to appeal against this decision. The appeal will be heard by Alice Monk – Business Support Manager …..*

42. The Claimant did not confirm to the Respondent that she would accept the offer of an occupational health referral. Nor did the Claimant respond to Rachel Day's offer of mediation by an external mediator.

43. By email dated 17 May 2018, the Claimant appealed to Alice Monk while informing Rachel Day of her concern that Alice Monk could not be impartial.

44. By letter dated 23 May 2018, Rachel Day informed the Claimant that since her grievance was against Gill Monk and Andrew Llewellyn-Davis and since she, Rachel Day, had heard the grievance, Alice Monk was the only other manager available to hear the appeal.

45. Alice Monk held a grievance appeal meeting on 25 May 2018. The Claimant was accompanied by a colleague. During the meeting, the Claimant said that she did not believe mediation between her and Gill Monk was an option because she did not believe Gill Monk had the desire to change her approach. The Claimant said that she felt the relationship with Gill Monk had broken down – it had gone too far and too much had been said. The Claimant also said that her relationship with other members of the team had broken down. The Claimant felt that she could not return to work.

46. By letter dated 29 May 2008, Alice Monk informed the Claimant that her grievance was not upheld. In her letter, Alice Monk wrote:

> *I have considered the case and the further information supplied during the appeal hearing. I was not able to satisfy myself there were shortcomings in the Grievance Decision as alleged in your appeal, and so confirm that the appeal will not be upheld. This decision is final and there are no further opportunities for appeal.*
>
> *I was concerned that you felt that the suggestion of mediation was not possible and that you indicated that you felt unable to return to work. This is not the outcome that, as a company, we had been working towards.*
>
> *From this grievance, I feel that the company needs to investigate whether the relationship has broken down irretrievably. If it has, the reality is that there is nowhere to which we could relocate you and ultimately we might have to terminate your contract on the basis of the breakdown in the relationship. If this did happen, obviously you would be paid your contractual notice.*

47. The Claimant replied that she was disappointed with the decision and that the threat of dismissal had exacerbated her stress.

48. Because the Claimant's medical certificate was due to expire the following day, Rachel Day enquired by email whether the Claimant would be returning to work. The Claimant replied that she would not be returning and would provide a further medical certificate. The Claimant subsequently provided the Respondent with a medical certificate, issued retrospectively, confirming that she was not fit to work with the symptom of anxiousness.

49. By letter dated 1 June 2018, Rachel Day wrote to the Claimant as follows:

As you will know, I have seen the response you sent to Alice in respect of the appeal.

I am concerned that you have expressed the view that you cannot work with Gill and that mediation is not a practical proposition. Additionally, you are currently certified as unfit to work.

It is important that we have some clarity and I would like to invite you to a meeting on 6th June at 10 am with myself so that we can undertake a review of your health issues and any scope for adjustments. Leaving that aside, we also need to look at the work related issues and the apparent clash that you perceived between yourself and Gill. I have to say that in the course of my grievance investigation, Gill did not believe there to be a clash of personality but it is acknowledged that this is your perception.

There are normally 3 ways that resolution can be attempted:

1 Redeployment
2 A change of work patterns
3 Mediation

I have to say that I have investigated whether the first 2 can be accommodated, but in an organisation or our size, I cannot see that this can be achieved. This leaves the third option of mediation which you have declined. I would like to ask you to reconsider this and we can consider options at the same time as we undertake an absence review.

Neither of the two issues that I need to discuss are disciplinary….

50. The meeting took place on 5 June 2018. The Claimant declined the offer of counselling, said that her relationship with Gill Monk and other members of the management team had broken down, that mediation would not work, that she would need to look for another job, that she would not be returning to work for the Respondent and handed back her keys. She said her solicitor had suggested that the Respondent might offer an exit strategy.

51. Rachel Day wrote to the Claimant after the meeting. She recorded the Claimant as having said the relationship had irretrievably broken down. Rachel Day proposed that the Claimant's position be made redundant whereby she would receive a redundancy payment. By letter dated 8 June 2018, the Claimant confirmed that she had declined the offer of mediation and would respond to the offer of redundancy under separate cover.

52. By letter dated 12 June 2018, Rachel Day informed the Claimant that her employment with the Respondent would terminate the following day with four weeks' pay in lieu of notice. The reasons for the dismissal were set out in the letter:

It has been decided that your employment … should be terminated on grounds of ill health. The reason for this decision is that you have told me that you cannot contemplate returning and you have been signed off work with stress. You also made it clear that you would not return.

We have investigated whether there are options within the business we could move you to but none exist. Equally we have looked at what measures we could take to facilitate a return but you have declined mediation which we believe would have given you a way of returning.

Alternatively the employment has come to an end for Some Other Substantial Reason which is that we cannot find a way to get you back to work.

You have the right to appeal against your dismissal. …

53. By letter dated 13 June 2018, the Claimant appealed against her dismissal on the grounds that she had no advance warning that she was going to be dismissed, that at the last meeting she was assured that the Respondent had no intention of dismissing her, that a fair process had not been followed, and that the Respondent had no fair reason to dismiss.

54. By email to the Claimant dated 15 June 2018, Rachel Day said that she would be conducting the appeal and that she would treat her appeal as a re-hearing.

55. By letter dated 27 June 2018, the Claimant repeated her grounds of appeal. She said she believed the reason for her dismissal was to cut costs.

56. The appeal hearing was scheduled to take place on 9 July 2018. The Respondent subsequently decided that Alice Monk should conduct the appeal because Rachel Day had taken the decision to dismiss. By email dated 2 July 2018, the Claimant informed the Respondent that the appeal hearing would not be impartial and that she would not be attending. By email dated 9 July 2018, the Claimant informed Rachel Day that she did not feel Andrew Llewellyn-Davis would be impartial either because of his involvement with the grievance.

57. In the event, Alice Monk was not available on 9 July 2018 and it was Andrew Llewellyn-Davis who considered the Claimant's appeal upon the written representations she had made. By letter dated 10 July 2018, Mr Llewellyn-Davis informed the Claimant that her appeal was dismissed. His letter included the following:

    1 *You were asked at the meeting with Rachel on 5th June whether you could come back to work. You said not.*
    2 *A fair process was followed in the sense that there was a review meeting in respect of your ill-health absence. Because you refused any assistance to facilitate your return to work, it was clear that there was not going to be a return.*
    3 *It would only have been appropriate to seek independent Occupational Health advice if you had expressed any willingness to cooperate in a return to work process.*
    4 *A mediation process was proposed (which from my own knowledge and experience note to be appropriate where there is a relationship problem) and we used our own knowledge and experience in the process.*

This is clearly a sad experience for you but I cannot find that the company had any other alternative but the one it adopted. Your appeal is therefore dismissed.

Let me make it clear that this is no reflection on your ability and this is not a decision that has arisen from any disciplinary issues. You have said that the relationship has broken down and if this is your perception, I really do not know how we could have managed matters differently.

Applicable law

Public Interest Disclosure - Detriment Time Limit

58. Section 48 of the Employment Rights Act 1996 provides that a Tribunal shall not consider such a complaint unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of three months. This time limit is extended by virtue of the ACAS Early Conciliation Procedure.

59. In Royal Mail Group v Jhuti 2018 WL 01384927 it was held that it was not open to the Tribunal to find there was a connection or continuum between the established and acts that gave rise to detriments and a subsequent act relied on by the claimant which was not proven.

Public Interest Disclosure

60. Section 43A provides that a protected disclosure is a qualifying disclosure which is made by a worker in accordance with any sections of 43C to 43H.

61. Section 43B(1) provides, among other things, that 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:

- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject
- that the health or safety of any individual has been, is being or is likely to be endangered
- that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

62. In Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 the Employment Appeal Tribunal held that a protected disclosure must be a disclosure of information and not merely an allegation. The ordinary meaning of giving information is conveying facts. In Kilraine v London Borough of Wandsworth [2018] IRLR 846 the Court of Appeal held that the concept of

"information" used in section 43B(1) is capable of covering statements which might also be characterised as allegations and that there is no rigid dichotomy between the two. Whether an identified statement or disclosure in any particular case does not meet the standard of being "information" is a matter of evaluative judgment by the Tribunal in light of all the facts.

63. In determining whether an employee has made a qualifying disclosure, the Tribunal must decide whether or not the employee believes that the information he is disclosing meets the criterion set in one or more of the subsections of section 43B(1) and, secondly, decide objectively, whether or not that belief is reasonable; see: Babula v Waltham Forest College [2007] IRLR 346 CA.

64. Section 43C provides, among other things, that a qualifying disclosure is made if the worker makes the disclosure to his employer.

Public Interest Disclosure – Detriment

65. Section 47B 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 done on the ground that the worker has made a protected disclosure.

66. Section 48(2) provides that on such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. In London Borough of Harrow v Knight [2003] IRLR 140 the Employment Appeal Tribunal stated that the ground on which an employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which cause him to act. Merely to show that "but for" the disclosure the act or omission would not have occurred is not enough. In Fecitt v NHS Manchester [2011] IRLR 111 the Employment Appeal Tribunal held that once less favourable treatment amounting to a detriment has been shown to have occurred following a protected act, the employer has to show the ground on which any act or any deliberate failure to act was done and that the protected act played no more than a trivial part in the application of the detriment. The employer is required to prove on the balance of probabilities that the treatment was in no sense whatever on the ground of the protected act. Also see Eiger Securities LLP v Korshunova [2017] ICR 561 at paragraph 55.

Automatic unfair dismissal

67. Section 103A provides that an employee who is dismissed shall be regarded 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. The causation test is not legal but factual. A Tribunal should ask why the alleged discriminator acted as he did, consciously or unconsciously; see West Yorkshire Police v Khan 2001 ICR 1065 HL. That was a race discrimination case but it was cited with approval on this point in a section 103A case in Trustees of Mama East Africa Women's Group v Dobson EAT 0219-20/05. In that case the Employment Appeal Tribunal stated that it would be contrary to the purpose of the whistleblowing legislation if an employer could put forward an explanation for the dismissal which was not the disclosure itself but something intimately connected with it in order to avoid liability.

68. In Kuzel v Roche Products Ltd [2008] IRLR 530 the Court of Appeal held that the burden lay on an employee claiming unfair dismissal under section 103A to

produce some evidence that the reason for dismissal was that she had made a protected disclosure but that, once she had discharged that evidential burden, the legal burden lay on the employer to establish the contrary. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open to the Tribunal to find that the reason was what the employee asserted it was. This is not to say that the Tribunal must find that if the reason was not that asserted by the employer then it must be that asserted by the employee. It may be open for the Tribunal to find that the true reason for dismissal was not that advanced by either side. It is for the employer to show the reason for the dismissal; an employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it is.

Unfair dismissal

69. Under section 98(1) it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held ("SOSR").

70. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

71. Ms Venkata referred the Tribunal to Screene v Seatwave Ltd EAT 0020/11 as authority for the proposition that the fact that an employer may use an incorrect label to describe the dismissal does not render a dismissal unfair. Ms Venkata also referred the Tribunal to Ezsias v North Glamorgan NHS Trust IRLR 550 and Hutchinson v Calvert EAT 0205/6 as authorities for the proposition that a breakdown in relations between employer and employee is a potentially fair SOSR reason. Ms Cullen referred the Tribunal to an extract of the judgment in Governing Body of Tubbenden School v Sylvester [2012] ICR D29 per Langstaff J:

> *While it would not in be every case, in which there was a dismissal for some other substantial reason and that reason was a breakdown in trust and confidence, that a tribunal would have to have regard to how that situation came about, it could not be said that the tribunal was not entitled in an appropriate case to take such matters into account*

72. Ms Cullen also referred the Tribunal to Macfarlane v Relate Avon Ltd [2010] ICR 507 in support of her submission that Tribunals should be slow to accept fair dismissals on the ground of SOSR where there is another reason for the dismissal and that a form of mission creep should be resisted. The Tribunal is not persuaded that what was said in Macfarlane was referring to anything more than use of the terminology "trust and confidence" when it would be more helpful for a Tribunal to focus on specific conduct.

73. Under section 98(4) where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in

treating it as a sufficient reason for dismissing the employee; and must be determined in accordance with equity and substantial merits of the case.

74. The requirement for procedural fairness is an integral part of the fairness test under section 98(4). In Polkey v Dayton Services Ltd [1988] ICR 142, it was stated that if an employer could reasonably have concluded that a proper procedure would be "utterly useless" or "futile", he might be acting reasonably in ignoring it. In Phoenix House Ltd v Stockman 2017 ICR 84 it was stated that the ACAS Code of Practice on Disciplinary and Grievance procedures does not apply to SOSR dismissals.

75. It is not for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827. In British Leyland UK Ltd v Swift [1981] IRLR 91 in which Lord Denning MR stated:

> *The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view*

76. In Taylor v OCS Group Ltd [2006] IRLR 613, the Court of Appeal stressed that the Tribunal's task under section 98(4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a Tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, the Court considered that where the misconduct is of a less serious nature, so the decision to dismiss is near the borderline, the Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

77. The Polkey principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Guidance as to the enquiry the Tribunal must undertake was provided in Ms M Whitehead v Robertson Partnership UKEAT 0331/01 as follows:

    77.1. what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?

    77.2. depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the

reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?

77.3. even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?

78. In Hill v Governing Body of Great Tey Primary School UKEAT/0237/12/SM the Employment Appeal Tribunal held that a "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. The question as to what a hypothetical fair employer would have done is not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.

79. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.

80. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

Conclusion

Public Interest Disclosures

81. The Tribunal has found that, on the balance of probabilities, the Claimant's disclosure of information was limited to E16 being in a mess and post being left unopened.

82. The Claimant invited the Tribunal to find that her disclosure about unopened post amounted to a qualifying disclosure because it led to the risk that drivers and manual workers might be carrying out their duties without up to date medical reports which could pose a risk to health and safety of members of the public.

83. By reporting that there was unopened post at E16, the Claimant was conveying facts. However, that disclosure of information was at a high level of generality; as the Claimant admitted in evidence she did not identify the potential qualifying disclosure she now seeks to rely on: she did not articulate any endangerment to health and safety or breach of a legal obligation when making the disclosure. The Claimant has failed to show she held a reasonable belief as required by

section 43B(1). This conclusion is reinforced by the Claimant's evidence that she returned the post to the Respondent unopened: she could have had no idea what the envelopes contained.

84. The Claimant did not make protected disclosures. The Claimant's claims that she was subjected to detriments for having made public interest disclosures and her claim that she was automatically unfairly dismissed cannot succeed.

85. For completeness, it follows that, by application of the decision in Jhuti referred to above, the Claimant's claim in respect of any alleged detriment falling before 11 June 2018 was presented outside the statutory time limit. The Tribunal notes here that the Claimant conceded that if those claims fall outside the statutory time limit, she would not seek to argue that it was not reasonably practicable for her to have presented those claims in time.

Ordinary unfair dismissal

86. While reminding itself that the burden of proving the reason for the dismissal falls on the Respondent, the Tribunal first considers the possible reasons put forward by the Claimant.

87. Although the Claimant's claim that she was automatically unfairly dismissed for having made a public interest disclosure will not be considered, during the course of the hearing it appears to have been suggested that the Claimant was dismissed because she had become a troublemaker about E16. The Tribunal is not persuaded by this argument. There was no evidence, either oral or documentary, to suggest that the Respondent did not welcome the Claimant's observations about the state of E16. On the contrary, the Claimant was asked to take photographs of the state of the office at E16.

88. In her second appeal letter the Claimant suggested that the decision to dismiss her was to cut costs. However, there was no evidence at all before the Tribunal to suggest this was the case.

89. The Claimant submitted, in terms, that the Tribunal would fall into error if it were to determine that the Claimant was fairly dismissed for SOSR when the employer was to blame for circumstances preventing the Claimant from returning to work. The Tribunal agrees with that submission. As required by section 98(4), the question of fairness depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

90. The Tribunal therefore considers the alleged bullying treatment by Gill Monk and the imposition of the performance management process which, it is alleged, was unfair.

91. Taken in isolation, Gill Monk's actions and comments might be perceived as bullying. However, they must be placed in context. For example, Gill Monk's comments about the Claimant's cleaning came about by reason of the Claimant's extreme cleanliness; Gill Monk's comments to the Claimant during a car journey about members of the administration team were not directed at the Claimant; the Tribunal is not persuaded that Gill Monk's comments at meetings were made with any malice; in evidence, Gill Monk explained her

frustration about the telephone conversation she held with a client from the Claimant's desk and, given what she said in evidence, is understandable; the video which showed a happy dancing lady was sent after the Claimant had completed the purchase on a house. Gill Monk's actions and comments must also be considered in light of her previous close relationship with the Claimant. The Tribunal is not persuaded that the actions and comments of Gill Monk led to a situation whereby the Claimant could not return to work. In light of the evidence, the Tribunal has formed the view that the Claimant was demonstrating over-sensitivity to anything Gill Monk said or did.

92. As for the performance management process, although unwelcome to the Claimant, there was insufficient evidence to show that it was unfairly imposed. The Claimant herself admitted making errors. Others reported that the Claimant made errors. The evidence showed that the underperformance did not only relate to errors but also the Claimant's failure to meet the expectations of a Senior Administrator. The tenor of the discussions at the performance meetings suggest that the Respondent was supportive of the Claimant and sought to encourage her improvement. The Tribunal is not persuaded that the performance management process was unfair or, to the extent that it is being suggested, that it was implemented as precursor to dismissal.

93. The Tribunal next considers, importantly, whether the Respondent has shown the reason for the Claimant's dismissal. Although in its correspondence with the Claimant the Respondent gave one of the reasons for dismissal as ill-health / capability, the Respondent did not seek to justify its decision on those grounds at the hearing. Rather, the Respondent relied on its alternative reason: SOSR.

94. The set of facts known to the Respondent were that the Claimant had rejected offers of internal and external mediation, she could see no way back to work because of a breakdown in her relationship with Gill Monk and other members of management, and she made her position clear by handing back her keys. The Tribunal finds that the Respondent, in particular Rachel Day who took the decision to dismiss, and Andrew Llewellyn-Davis who handled the Claimant's appeal against dismissal, held a genuine belief that an impasse had been reached. The Respondent had done as much as reasonably possible to accommodate the Claimant's return to work who was unwilling to engage with the Respondent by entering into mediation. The Tribunal finds that the reason for the Claimant's dismissal was for some other substantial reason of a kind such as to justify the dismissal of the Claimant holding the position she held.

95. The Tribunal next considers the whether the Respondent acted fairly in accordance with section 98(4). The Respondent had fairly explored the Claimant's state of mind and her future intentions which she made clear. However, the Tribunal finds the procedure adopted by the Respondent led to unfairness:

    95.1. The Claimant was not warned of the possible consequences of refusing to enter into mediation;

    95.2. Although Alice Monk's letter of 29 May 2018 informed the Claimant of the risk of dismissal, this was not mentioned in Rachel Day's letter of 1 June 2018 when inviting the Claimant to a meeting. If it was the outcome of this meeting that led to the decision to dismiss the Claimant. The

Respondent acted unfairly by not warning the Claimant of the potential outcome of the meeting.

96. The Claimant was unfairly dismissed by reason of these procedural failures.

97. The Respondent did not act unfairly however because certain members of management dealt with various aspects of the grievance and dismissal process and appeals. The Respondent is a small employer with a small management team.

Polkey

98. In the Tribunal's view, had the Respondent acted fairly by informing the Claimant of the consequences of refusing to enter into mediation and given her advance warning of possible outcome of the meeting of 5 July 2018, the Claimant's employment would have been extended by two weeks while that procedure was carried out. The Tribunal concludes that the Respondent would have dismissed the Claimant at the conclusion of that procedure: the Claimant made her position clear in that she would not enter into mediation and would not return to work. In the Tribunal's view, a fair procedure would have made no difference to the eventual outcome.

Contribution

99. The Claimant refused to enter in mediation despite several offers by the Respondent. In the circumstances, this was blameworthy conduct whereby the Claimant wholly contributed to her dismissal. (In addition, the Claimant failed to confirm her agreement to an occupational health referral). It is just and equitable that the Basic Award and Compensatory Awards should be reduced by 100%.

100. The Tribunal makes no award of compensation. There is no requirement for a remedy hearing.

Employment Judge Pritchard
Date: 23 January 2020