EMPLOYMENT TRIBUNALS

Claimant: Mrs E Morton

Respondents:
1. Point to Point Education PTY Ltd
2. P2P Education Limited
3. Carly Liddell-Lum
4. Kate Liddell

Heard at: Manchester **On:** 27-31 January 2020
3 February 2020
(in Chambers)

Before: Employment Judge Ainscough
Mrs C Bowman
Ms S Ensell

REPRESENTATION:

Claimant: Mr M Mensah of Counsel
Respondents: Mr S Davies of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim for protection from suffering detriments on the ground of making a protected disclosure contrary to section 47B of the Employment Rights Act 1996 is unsuccessful and is dismissed.

2. The claim for unfair dismissal on the ground of making a protected disclosure contrary to section 103A of the Employment Rights Act 1996 is unsuccessful and is dismissed.

REASONS

Introduction

1. The claim was brought by way of a claim form dated 18 January 2019 in which the claimant claimed she had been subject to detriments and unfairly dismissed because she had made protected disclosures. The claimant was the

Education Sales Director for the respondent until she was made redundant on 19 October 2018.

2. The response form dated 20 February 2019 defended the proceedings. The respondent asserts that the claimant was dismissed by reason of redundancy and disputes that the claimant made protected disclosures. The respondent is a recruitment company based in Australia that recruits international teachers to teach in United Kingdom schools.

The Issues

3. Following a preliminary hearing before Employment Judge Franey on 16 April 2019 the following issues were identified:

A. Preliminary Issues

(1) Was the claimant employed by R1 or R2 at the time her employment ended?

(2) Can the claimant establish that she made a protected disclosure on any of the following alleged occasions in that:

(a) She disclosed information;

(b) She reasonably believed that information tended to show one of the matters in section 43B(1) Employment Rights Act 1996; and

(c) She reasonably believed that her disclosure was made in the public interest?

PD1 A verbal disclosure to R3 on 24th September 2018, the information disclosed being that R3 had disclosed personal data about teachers to a third party without permission from the data subjects.

PD2 A verbal disclosure to R3 on 4th October 2018 the information disclosed being that R1/R2 was in breach of its contract with the Department for Education.

PD3 A verbal and written disclosure to R3 and R4 on 7th October 2018 of the same information as **PD2**.

PD4 A verbal disclosure on 15th October 2018 to R3 about teachers not having required qualifications and R1/R2 being in breach of its contract with the Department for Education.

PD5 A written disclosure in the claimant's grievance addressed to R3, R4 and Karen Howe on 18th October 2018?

B. Detriment in Employment Section 47(B) Employment Rights Act 1996

(3) If the claimant made one or more protected disclosures, and bearing in mind the burden of proof provisions, was the claimant subjected to a detriment by any act or deliberate failure to act done by R1 or R2 (as her employer) on the ground that the claimant had made a protected disclosure contrary to Section 47B(1), and/or by R3 or R4 in the course of her/their employment by R1/R2 on the ground that the claimant had made a protected disclosure contrary to Section 47B(1)A in any of the following alleged respects:

D1 in being provided with a new set of objectives by R4 that were knowingly impossible to meet, and in being invited to a meeting on 25th September to discuss her contribution to the loss of a contract, in accusing the claimant of failing to meet a deadline and questioning her performance, and in telling the claimant inaccurately that a number of complaints had been made against her, thereby manufacturing performance concerns as a way to dismiss the claimant;

D2 in failing to acknowledge or to address an email from the claimant of 25 September 2018 showing that the allegations made against her were incorrect (R3 and R4);

D3 in removing responsibilities from the claimant on 5th October 2018, including removing her from leading the DfE STEM programme (R3);

D4 in excluding and isolating the claimant between 26 September 2018 and 18 October 2018 by failing to provide her with information vital for her to do her job, excluding her from decisions, stations and weekly meetings, by holding few daily catch up meetings between team members, by changing the claimant's role and replacing aspects of her job without cause or consultation, and by setting impossible expectations and work guidelines (R3 and R4);

D5 in failing to deal with the claimant's grievance lodged on 18 October 2018 (R3) and in notifying the claimant of a meeting to discuss the possibility of her redundancy (R4);

D6 in deciding that the claimant would be dismissed (R3 and R4), and

D7 in withholding the claimant's final pay from 19th October to 29th November 2018 (R3 and R4)?

C. Unfair Dismissal Section 103A Employment Rights Act 1996

(4) Can the claimant show that the reason or principal reason for her dismissal by R1 or R2 was that she had made one or more protected disclosures?

D. Remedy

(5) If any of the above complaints succeed, what is the appropriate remedy in relation to:-

(a) Injury to feelings for any detriments under Section 47B;

(b) Financial losses resulting from any detriments and/or

(c) Loss of earnings following dismissal?

The Evidence

4. The parties agreed a joint bundle of written evidence running to 593 pages. During the course of the proceedings the Tribunal was provided with additional documentation which it inserted into the bundle and considered when making its decision.

5. The claimant gave evidence but did not call any witnesses. The respondent called two witnesses: the third respondent, Carly Liddell-Lum, the respondent's Director of Business Development and the UK Education Director and owner of the company. The respondent also called Kate Liddell, the fourth respondet, the respondent's Director of Staffing and owner of the business.

Relevant Legal Principles

Protected Disclosures

6. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B which is made by a worker in accordance with any of Sections 43C to 43H.

s43B(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:

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

7. The Employment Appeal Tribunal ("EAT") (HHJ Eady QC) summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17,** a decision of 13 October 2017:

"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:

> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**
>
> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."**

8. The decision of the EAT in **Kilraine** was subsequently upheld by the Court of Appeal at **[2018] EWCA Civ 1436**. The concept of "information" used in section 43B(1) is capable of covering statements which might also be characterised as allegations.

9. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong, or formed for the wrong reasons. In **Chesterton Global Ltd and anor v Nurmohamed [2017[IRLR 837** the Court of Appeal approved a suggestion from counsel as to the factors normally relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest.

10. In **Chesterton** Underhill LJ addressed the question of the motivation for the disclosure in paragraph 30, saying that:

> "… **while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."**

11. Sections 43C – 43G address the identity of the person to whom the disclosure was made. Section 43C provides that a disclosure will qualify if it is made to an employer. There was no suggestion in this case that the claimant made any alleged disclosures to anybody other than her employer.

Detriment in Employment

12. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"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."**

13. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

14. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

15. In **International Petroleum Ltd and ors v Osipov and ors UKEAT/0058/17/DA** the EAT (Simler P) summarised the causation test as follows:

> **"...I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**
>
> **(a) The burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.**
>
> **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see <u>London Borough of Harrow v. Knight</u> [[2003] IRLR 140]at paragraph 20.**
>
> **(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."**

16. The case came before the Court of Appeal in October 2018 (**Timis and Sage v Osipov and Protect [2018] EWCA Civ 2321**). The main point in the appeal was that of vicarious liability, and the approach of the EAT to causation was not disturbed.

17. Section 48 of the Employment Rights Act 1996 provides any detriment claim must be brought within 3 months of the last detriment. There can be a series of detriments which occur outside the three month time limit provided the last detriment occurred within the 3 months before the claim was brought. If not, a claim will be out of time unless the claimant can show it was not reasonably practicable to bring the claim within the primary time limit, and it was brought within such a further period that the Tribunal determines was reasonable.

<u>Unfair Dismissal</u>

18. Section 103A of the Act deals with protected disclosures and reads as follows:-

> **"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".**

19. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

20. In **Beatt** the Court of Appeal described the reason for dismissal as

> **"the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what 'motivates' them to do so…"**

21. In a case within section 103A the Tribunal has jurisdiction over the claim even though the employee has not been employed continuously for two years: section 108(3). However, in such cases it is for the claimant to establish that the Tribunal has jurisdiction, so the claimant bears the burden of showing that the sole or principal reason for dismissal was the protected disclosure: **Jackson v ICS Group Ltd UKEAT/499/97.**

Relevant Findings of Fact

A Claimant's employer

22. The claimant was employed by the respondent from 10 February 2018 to 19 October 2018. The first respondent, Point to Point Education PTY Ltd is an Australian company based in Queensland that specialises in recruiting science, technology, engineering and maths teachers from outside the United Kingdom to teach in United Kingdom schools. The third and fourth respondents are co-owners and Directors of Point to Point Education PTY Ltd.

23. Prior to commencement of employment, the claimant was provided with the job description for the role of Education Director. On 6 January 2018 the claimant signed terms and conditions for a Business Development Manager role. The role was performed predominantly from the claimant's home.

24. The contract of employment identified Point to Point Education PTY Ltd as her employer. However, during the course of her employment, the claimant received payslips in which P2P Education Limited was identified as her employer. The claimant's P60 document identified P2P Education Limited as the claimant's employer.

B Claimant's role

25. On 29 January 2018 the claimant was given the job title "Educations Sales Director". In February 2018, the claimant, Belinda and Alice started to work in the UK for Point to Point Education PTY Ltd. Belinda left her role the same month.

26. In March 2018, following completion of training, the claimant was provided with the job description for the role of Business Development Manager. The claimant gave evidence that her role became a hybrid of Business Development Manager and Education Sales Director.

27. The claimant was given lead responsibility for the Department for Education contract. This contract enabled Point to Point Education PTY Ltd to receive a recruitment fee from the Department for Education, for each teacher recruited in accordance with the terms of the contract.

C Contract with Department for Education

28. On 27 April 2018 the claimant signed the Department for Education contract on behalf of Point to Point Education PTY Ltd. The Department for Education contract required Point 2 Point Education PTY Ltd "to ensure overseas teachers met all legal and professional requirements" which included "ensuring the Qualified Teacher Status ("QTS") was in place before commencing employment".

29. Point to Point Education PTY Ltd also had to ensure that they had undergone adequate training in the use of personal data. The contract stated the obligations about the protection of customer data were to be clarified, due to the imminent implementation of General Data Protection Regulations (GDPR), by way of Change Control Notification ("CCN").

30. In April/May 2018 Carly Liddell-Lum and Kate Liddell met with their Chief Financial Officer, Andrew Gibbs, about the company financing and forecasting.

D Change Control Notification

31. On 15 May 2018 the Department for Education emailed the claimant with the CCN setting out the obligations required of the first respondent in regard to protection of customer data prior to the implementation of GDPR on 25 May 2018.

32. The CCN required Point to Point Education PTY Ltd to have a compliant data protection policy and required the company to return a signed copy of the CCN accepting this change by close of play on 24 May 2018.

33. On 19 May 2018 the claimant forwarded that email and attachment to Carly Liddell-Lum and Kate Liddell and asked them to review and come back to her.

34. On 21 May 2018 Carly Liddell-Lum emailed the claimant and copied Kate Liddell, to inform the claimant that the UK lawyer was completing the GDPR for Point to Point Education PTY Ltd and once done, the claimant could sign and return the CCN to the Department for Education.

35. Prior to 9.00am UK time on 24 May 2018, the claimant sent Carly Liddell-Lum a WhatsApp text message asking if the GDPR documentation was ready to be sent so she could forward to the Department for Education.

36. An email was sent to the claimant at approximately 10.00am UK time on 24 May 2018. The attachments identify the claimant as the Data Protection Officer and the claimant was asked to review Point to Point Education PTY Ltd's draft data protection policy. This email did not attach the CCN itself nor was the claimant asked to sign the CCN.

37. At 10.24am UK time, there was a call between Carly Liddell-Lum and the claimant. The CCN was returned to the Department for Education by post.

E Summer 2018

38. On 26 June 2018 a teacher known as “EA” was advertised as a Maths Teacher with QTS (DFE).

39. The claimant was required to complete a six month probationary period. On 9 July 2018 the claimant successfully completed her probation period some five weeks early.

40. In July 2018 the claimant and her colleague, Simon, spoke about Kate Liddell asking Simon to remain with Point to Point Education PTY Ltd unpaid, during the summer break. This prompted the claimant to ask Kate Liddell whether the company was in financial difficulty. Kate Liddell assured the claimant there were no such problems. Kate Liddell acknowledged in evidence that she had suggested to Simon that he take a summer break unpaid because he had not met his KPIs and that he return to work in September to hit the ground running.

41. Also in July 2018 Alice left Point to Point Education PTY Ltd because she had not passed her probation. Simon did not return to work for Point to Point Education PTY Ltd. At the beginning of September 2018, the claimant’s colleague, Aidan, joined the team but left his job at the end of that month.

42. From 31 August 2018 to 20 September 2018 Carly Liddell-Lum and Kate Liddell visited the UK and met with the claimant as well as accompanying her on visits to schools.

43. In September 2018 Point to Point Education PTY Ltd was not paid an anticipated £100,000, owed by its payroll supplier, Transition to UK, who had been placed into liquidation.

44. On 11 and 17 September 2018 the claimant attended a team meeting.

45. On 14 September 2018, Carly Liddell-Lum raised with the claimant, negative feedback she had received from schools about the claimant.

F Request from Department for Education

46. Part of the claimant’s job involved preparing weekly audit information for the Department for Education about the placement of teachers. On 19 September 2018 the Department for Education contacted the claimant and requested that she provide details of salaries of teachers placed by Point to Point Education PTY Ltd. The claimant received this email late on 19 September 2018 whilst travelling home on a train following a school visit. Carly Liddell-Lum and Kate Liddell were in transit to Australia.

47. On 19 September 2018 Carly Liddell-Lum and Kate Liddell created a document to send to their HR Adviser, Karen Howe, about concerns they had with the claimant's performance.

48. On 20 September 2018 the claimant emailed various schools where teachers had been placed, asking if she could disclose the salary data.

49. On 21 September 2018 the claimant was chased by Victoria Jones from the Department for Education for the provision of the salary information. The claimant responded saying she was seeking authority from each school. Victoria Jones reminded the claimant that there was no issue with disclosing salaries as the GDPR agreement was in place. The claimant responded stating that she disputed that the GDPR agreement allowed such disclosure. Victoria Jones asked for the data in anonymised format and copied her request to Carly Liddell-Lum.

50. In response to Victoria Jones, the claimant offered to provide average salary details. Victoria Jones confirmed in response that she wanted actual salaries. The claimant responded with the average salary details and was subsequently reminded by Victoria Jones that the contract allowed for the provision of pay details.

51. On the afternoon of 21 September 2018 Carly Liddell-Lum spoke to Victoria Jones at the Department for Education.

52. On 24 September 2018 Australian time, Carly Liddell-Lum sent the details she and Kate Liddell had prepared about the claimant's performance to Karen Howe. At the same time, Carly Liddell-Lum disclosed the actual salary details of placed teachers to Victoria Jones.

53. Between 7.30am to 8.00am UK time, the claimant attended a team meeting. At 8.37am UK time, the claimant received an email from Kate Liddell setting out a weekly plan. At 8.57am, the claimant called Carly Liddell-Lum and raised concerns about sending of the salary data and whether in fact Point to Point Education PTY Ltd had authority to disclose this information.

G Providing feedback to claimant

54. Later that day, the claimant received an email from Kate Liddell about the need to discuss the feedback the claimant had received from Carly Liddell-Lum on 14 September 2018. Kate Liddell also requested a discussion about the recent loss of a tender. It was suggested that the meeting take place, online, on 25 September 2018 at 5.00pm Queensland time.

55. On 25 September 2018, 6.00am UK time, the claimant, Carly Liddell-Lum Kate Liddell and Karen Howe met over Zoom. During that meeting there was a discussion about the feedback received from the schools and the claimant's role in the recent loss of a tender.

56. On 25 September 2018 at 9.44am UK time, the claimant sent an email responding to the feedback given on 14 September 2018 and the allegation that she had been responsible for the recent loss of the tender.

57. On 26 September 2018 the claimant created a draft grievance on the Point to Point Education PTY Ltd email system. This document was subsequently seen by Carly Liddell-Lum, Kate Liddell and Karen Howe.

H Department for Education concerns

58. On 27 September 2018, Carly Liddell-Lum sent the claimant a WhatsApp text message regarding a teacher known as "ML" stating, "Fingers crossed for QTS".

59. On the same date, Carly Liddell-Lum and the claimant attended a difficult meeting with Victoria Jones and a competitor.

60. On 28 September 2018, the claimant sent an email to Victoria Jones complaining about the tone and the behaviour of the competitor at the meeting.

61. On the same day, Carly Liddell-Lum met with the Victoria Jones because the claimant was unable to do so following a bereavement. When speaking with Victoria Jones, Carly Liddell-Lum was told by Victoria Jones of concerns that the Department for Education had with the claimant.

62. Following that meeting, on the evening of 28 September 2018 UK time and the morning of 29 September 2018 Australia time, Carly Liddell-Lum sent the claimant an email stating that Carly Liddell-Lum would deal with all future meetings with the Department for Education.

63. On 1 October 2018 Victoria Jones emailed Carly Liddell-Lum and thanked her for the opportunity to have an open conversation the previous Friday.

I Claimant's QTS concerns

64. On the same day, Kate Liddell cancelled a meeting with the claimant. There were also WhatsApp messages between the claimant and Carly Liddell-Lum about the lack of QTS in regard to "ML" and the need to find out the reason.

65. On 4 October 2018 the claimant spoke to ML about his QTS status. ML confirmed that the QTS had been rejected on 28 September 2018. The claimant looked at recruitment online and noticed that there was no QTS uploaded. The claimant then attempted to contact Carly Liddell-Lum to discuss and eventually spoke to her at 10.00am UK time for 47 minutes.

66. During that conversation, Carly Liddell-Lum informed the claimant that she should not notify the Department for Education or the school that had offered ML a place that there was a problem with the QTS.

67. Prior to speaking to Carly Liddell-Lum at 2.32am UK time the claimant had been copied into an email from Carly Liddell-Lum about a teacher known as "JH" and the fact that she did not have her QTS. JH was already working as a teacher in a school.

68. Later that day the claimant contacted the school, known as Woodbridge, to inform them that ML had an issue with his QTS and it was not in place. As a result of that information, the school withdrew the offer of employment.

69. On 5 October 2018 the claimant called Carly Liddell-Lum to inform her that the school had withdrawn the offer.

70. On the same day, Victoria Jones, sent an email to Carly Liddell-Lum stating that the concerns she had about the claimant included aggression, the significant amount of time taken to deal with a matter, lack of flexibility and trust.

71. On 5 October 2018 Carly Liddell-Lum and Kate Liddell met with their Chief Financial Officer, Andrew Gibbs, and were told they needed to restructure their business due to an approximate £300,000 loss in the previous financial year which ended on 30 June 2018.

72. On 7 October 2018, the claimant sent a WhatsApp to Carly Liddell-Lum and an email to Carly Liddell-Lum and Kate Liddell about EA and the lack of QTS. Between 7 October 2018 to 8 October 2018 the claimant spoke to Carly Liddell-Lum and advised her that this was a serious breach of the contract because EA had been placed in a school.

73. On 8 October 2018, Carly Liddell-Lum emailed EA and asked her to buy more time by telling the school it was being processed. EA was informed that she will be receiving assistance from the DFE with a QTS so they needed to sort it quickly. EA was asked not to alarm the school.

74. On the same day, Carly Liddell-Lum, Kate Liddell and their sister (and Business Partner) Emma Liddell met to discuss the advice from the Chief Financial Officer and agreed to close the UK branch and bring the business development role back to Australia. The claimant's role was identified for a potential redundancy.

75. That same day, Kate Liddell cancelled a meeting with the claimant.

76. On 11 October 2018 the claimant emailed JH chasing her QTS.

77. On 12 October 2018 JH submitted a new application for QTS which would take up to 20 days to process.

78. On 14 October 2018 the claimant and JH spoke. JH informed the claimant that Point to Point Education PTY Ltd compliance team were aware that she had no QTS and that it had been rejected three times but had not raised it again.

79. On 15 October 2018, Kate Liddell cancelled a meeting with the claimant.

80. On the same day the claimant was made aware of an email from Carly Liddell-Lum to the school that EA had no QTS. Carly Liddell-Lum told the school that it had been caused by a technical issue.

81. At 8.17am on 15 October 2018 Carly Liddell-Lum and the claimant spoke for ten minutes and 45 seconds. During that call the claimant told Carly Liddell-Lum she was concerned about the compliance and the need to inform the Department for Education about the lack of QTS and the potential consequences for the teachers already in post.

82. At 11.55am Carly Liddell-Lum and the claimant spoke for one hour and eight minutes about JH, EA and LC. When discussing LC, the claimant raised concerns that she was a newly qualified teacher (NQT) and therefore would not qualify for a QTS. The claimant raised the issue that the school was paying for a teacher who was not qualified. The claimant told Carly Liddell-Lum she would not withhold such information from the Department for Education. The claimant asked to attend the next meeting with the Department for Education on 26 October 2018.

J Termination of claimant

83. On 18 October 2018 at 7.59pm Australian time, Kate Liddell invited the claimant to a meeting to discuss her role becoming redundant.

84. On the same date at 4.58pm UK time, the claimant sent her grievance to Carly Liddell-Lum and Kate Liddell. This was received in the early hours of the morning in Australia.

85. On 19 October 2018, the claimant acknowledged the invite and queried whether she was subject to a formal procedure.

86. On 19 October 2018 at 9.00am the claimant attended a meeting with Kate Liddell and Karen Howe. The claimant informed them that she was recording the meeting. The claimant was told that for purely financial reasons, her role was redundant and the work was to be done by Carly Liddell-Lum and Kate Liddell in Australia.

87. The claimant asserted that the role was redundant because she had raised GDPR and QTS issues. The claimant also raised the recent employment of a Julia Thompson. Kate Liddell told the claimant that Julia Thompson had only been employed for six hours per week. The claimant was told by Karen Howe that the company was no longer retaining her as a HR consultant. At approximately 9.30am there was a break in the meeting for one hour.

88. The meeting resumed at 10.30am and the claimant raised her grievance. Kate Liddell advised the claimant she wanted to finish things up and that the redundancy would be effective immediately. Kate Liddell then asked the claimant for return of the phone. The claimant asserted that the phone belonged to her. The claimant also asserted that she was protected as a whistle-blower.

89. After the meeting, the claimant emailed Kate Liddell and Karen Howe at 12.13pm and asked for acknowledgement of the grievance by 1.00pm or she would contact ACAS.

90. On 20 October 2018 the claimant sent an email to Kate Liddell and Karen Howe and asked for an explanation of her redundancy.

91. On 22 October 2018, Kate Liddell responded and confirmed the claimant's redundancy was for financial reasons and asked for the SIM card out of the claimant's phone.

92. On the same day, the claimant received a termination letter citing the reason as redundancy but that it was in no way a reflection of her performance. The claimant was required to return company property before her final payment would be released.

93. On 25 October 2018 Kate Liddell confirmed details of the final payment once the property had been returned.

94. On 30 October 2018 Kate Liddell sought return of the property.

95. On what the Tribunal suspects is 2 November 2018 (though it is dated 2 October 2018) Whistle-blowing UK wrote to Point to Point Education PTY Ltd seeking final payment on behalf of their client, the claimant.

96. On 13 November 2018, Point to Point Education PTY Ltd's lawyers responded disputing any whistle-blowing claims and seeking return of the property. The claimant was also advised to cease and desist contacting Point to Point Education PTY Ltd clients.

97. Between 15 November 2018 to 19 November 2018 the claimant and Kate Liddell agreed to the return of the property and the claimant received her final payment.

Submissions

Respondent's submissions

98. The respondent submitted that the only reason for the claimant's dismissal was the respondent's finances. The claimant's role had been moved back to Australia and was being performed by the owners of the business. This was a business decision and not because the claimant had made protected disclosures or poor performance.

99. The respondent submitted that the claimant's employer had always been the first respondent and the claimant herself accepted that she was never employed by the second respondent.

100. The respondent also submitted that if the Tribunal found that the reason or principal reason for the dismissal was a business decision, then no act that preceded it would be within the primary three month time limit.

101. The respondent accepted that the first four disclosures amounted to information, but not the fifth disclosure. That, the respondent submitted, amounted to allegations. The respondent also submitted that for the first two disclosures, the claimant did not have a reasonable belief that there was a breach of a legal obligation, because she was the Data Protection Officer. The respondent did however accept that the claimant had a reasonable belief in the making of the third disclosure but not reasonable belief that it was in the public interest.

102. The respondent submitted the claimant had not suffered any detriments. The dismissal itself was merely restructuring because the owners of the business were faced with financial ruin and had no choice. The respondent submits that the dismissal was fair, the role was moved back to Australia and there was no other role for the claimant to fulfil.

Claimant's submissions

103. The claimant submitted that before she made disclosures her future was bright. It was submitted that if the first respondent was the claimant's employer, the claim was in time because the detriments culminating in the dismissal would be a series of acts which were brought within the primary time limit.

104. The claimant submitted that the proper test for reasonable belief was subjective, looking at this claimant and her individual characteristics. It was submitted that the claimant did not know she was the Data Protection Officer and had a genuine belief in the public interest of her disclosures.

105. It was submitted that the grievance did provide sufficient information to attract the protection of a qualifying disclosure. The respondents chose not to reply to the grievance but had every opportunity to do so.

106. The claimant submitted that the explanation given for the dismissal has only been provided during the course of this hearing. It is the claimant's case that the respondent has tried to muddy the waters with performance and quite simply wanted rid of the claimant because she made protected disclosures.

107. The claimant submitted that the decision to make her redundant was a foregone conclusion and there was no genuine consultation. It was submitted on behalf of the claimant that no reasonable employer would have dealt with the matter in this way, and the irresistible conclusion from the chronology and the speed with which the dismissal was dealt with, it was not a genuine redundancy but rather because the claimant had made protected disclosures

Discussion and Conclusions

A. Who was the claimant's employer?

108. The claimant’s employer was the first respondent, Point to Point Education PTY Ltd. Whilst there are documents within the bundle suggesting that P2P Education Limited had some liability, this only appears to be in relation to pay because that name only appears on the claimant’s payslips and the P60.

109. The Tribunal accepts the evidence of Carly Liddell-Lum that this company was unbeknown to Carly Liddell-Lum and Kate Liddell as it had been set up by Transition to UK, their payroll provider, in order to make payments to the UK staff. Carly Liddell-Lum maintained that the claimant was, an employee of Point to Point Education PTY Ltd.

110. The claimant admitted herself in evidence that she was never employed by P2P Education Limited, she only thought she was, but in fact never received any change to her terms and conditions of employment.

B. Disclosures

PD1

111. The was a disclosure of specific information to Carly Liddell-Lum on 24 September 2018. The claimant had a reasonable belief that the provision of the salary details was a breach of a legal obligation. Carly Liddell-Lum admitted in evidence that the claimant had a genuine conviction and this is why she took it so seriously.

112. The data protection policy that identified the claimant as the data protection officer followed the CCN. The CCN was not signed by the claimant, and we accept

her evidence that she had not read it when she forwarded it to Carly Liddell-Lum and Kate Liddell and was in fact awaiting their instructions.

113. The Tribunal finds it is likely that the claimant got the email of 24 May 2018 but did not read or deal with it as it did not specifically deal with the signing of the CCN. It is likely that the claimant was unaware of her appointment as a Data Protection Officer until disclosure in these proceedings.

114. The claimant sent a copy of her own signature by email at 6.02pm UK time on 24 May 2018. This would have been past the deadline for the return of the document to the Department for Education and the Tribunal does not find that it is relevant to the issue.

115. It was the evidence of Carly Liddell-Lum that the CCN had been returned to the Department for Education by courier in order to comply with the deadline. However, the Tribunal has seen an email from the Department for Education dated 5 December 2019 in which the Department for Education confirmed that the document was received by post. The Tribunal is unclear as to what date the document was received by post.

116. The relevance of all this is that the Tribunal does not accept that the claimant knew she was the Data Protection Officer when making the disclosure on 24 September 2018. The Tribunal finds that the claimant did have a reasonable belief that there had been a breach of a legal obligation. She had spoken to a representative of NELTA, an Education Association, and the various schools involved, and all had objected to the disclosure of such data. The claimant had reminded herself of the content of the Department for Education contract which did not specifically deal with the issue of pay and was unaware of the data protection policy and the CCN which did specifically deal with the provision of data in regard to pay.

117. The Tribunal also finds that the claimant had a reasonable belief that it was in the public interest because this amounted to data of a group of teachers. The claimant had already formed the view that the teachers were sensitive over their data, some had even refused to sign a disclaimer prepared by Point to Point Education PTY Ltd. At paragraph 19 of the claimant's witness statement the claimant states that whilst her main concern was that Point to Point Education PTY Ltd was not breaching the contract, her bigger concern was that it was a sharing of data that was not harvested by Point to Point Education PTY Ltd and the teachers were fiercely private.

118. The Tribunal finds this was a protected disclosure.

PD2 and PD3

119. It is asserted that on 4 October 2018 the claimant made a verbal disclosure to Carly Liddell-Lum and subsequently on 7 October 2018 made the same disclosure of information in both verbal and written form to Carly Liddell-Lum and Kate Liddell. The respondent has conceded that both would amount to information for the purpose of qualifying disclosures.

120. The Tribunal finds that the claimant did have a reasonable belief that there was to be a breach of a legal obligation. ML had been offered and accepted a role at Woodbridge with no QTS. At paragraph 34 of the claimant's witness statement she is clear it was not just moral but also a contractual and legal obligation as per the Department for Education contract. The Tribunal does not accept the respondent's position that the obligation was that of the teacher. The contract requires Point to Point Education PTY Ltd to ensure that the QTS was gained prior to commencement of employment. ML was leaving imminently for the UK and had accepted an offer from the school. The claimant therefore had a reasonable belief that there was likely to be a breach of the legal obligation. The claimant had that same day seen an email from JH confirming she had no QTS, despite starting employment in a school.

121. The Tribunal also finds that the claimant had a reasonable belief that such information was to be concealed following the conversation she had with Carly Liddell-Lum about what she could and could not say to both Woodbridge and the Department for Education.

122. The Tribunal finds that the claimant also had a reasonable belief that the disclosure was in the public interest. The Department for Education is a public sector contract. Whilst the breach would have commercial consequences for Point to Point Education PTY Ltd, the claimant knew that placing a teacher without QTS in schools would mean a teacher would receive Department for Education assistance when they were not entitled to do so. The claimant made protected disclosures on both occasions.

PD4

123. The fourth disclosure was a verbal disclosure on 15 October 2018 to Carly Liddell-Lum. The respondent accepts that this amounts to information and that the claimant had a reasonable belief of a breach of a legal obligation. The Tribunal finds that the claimant repeated her disclosures about ML, JH and EA. The claimant also made a disclosure about LC and the possibility that she may in fact be a newly qualified teacher who would not qualify for a QTS. The claimant provided evidence to the Tribunal that this teacher in fact worked in a special school where there is a legal requirement that all teachers have a QTS. This is not just a legal requirement of the DFE contract, but also more generally. The claimant was concerned that the school was paying for a qualified teacher who was a newly qualified teacher. By this date the claimant was also concerned that she was being kept out of Department for Education meetings and had a reasonable belief that it was in the public interest to raise this issue. This was a protected disclosure.

PD5

124. The fifth and final disclosure that the claimant seeks to rely upon is the repeating of all previous disclosures in her grievance. The Tribunal has read the grievance in detail and whilst the disclosure about the lack of QTS does not name specific teachers or specific circumstances, there is sufficient information within the grievance to alert the employer that there was an issue over ensuring a QTS is in place before a teacher is placed. It was more than an allegation.

125. The repeating of the GDPR disclosure is more detailed and sets out the resistance from specific schools about the disclosure of that data. The Tribunal therefore disagrees with the respondent's submission that neither disclosure amounts to a conveying of information. As the Tribunal has already found, the claimant did have a reasonable belief that there was a breach of a legal obligation and the same was in the public interest. This amounted to a protected disclosure.

126. In summary, the Tribunal concludes that all five disclosures are protected disclosures for the purposes of the relevant provisions of the Employment Rights Act 1996.

C. Detriments

D1

127. Kate Liddell sent the claimant a weekly plan. The Tribunal finds that this email was sent before the claimant made her disclosure to Carly Liddell-Lum.

128. The provision of a weekly plan was something new for the claimant who previously had autonomy over her working day. However, this email was sent immediately following the provision of the respondents' concerns to their HR Adviser, Karen Howe, on 24 September 2018. The Tribunal finds that it is likely that this weekly plan was borne out of the concerns raised by Carly Liddell-Lum and Kate Liddell rather than the making of any disclosure by the claimant.

129. The Tribunal finds the invite to the meeting on 25 September 2018 and the meeting itself came after the claimant had made her first protected disclosure. However, the Tribunal does not find that the cause of the invite for the meeting itself was motivated by the protected disclosure. By this date, Carly Liddell-Lum had received a number of complaints from schools.

130. The respondent was also entitled to enquire why the tender had been lost. The Tribunal does not view the invite as a suggestion that it was the claimant's fault.

131. The meeting on 25 September 2018 was an appropriate business discussion and whilst it might not have been pleasant for the claimant, it was necessary to explore what had gone on.

D2

132. The claimant complains of a failure by the respondent to acknowledge or address the email sent by the claimant on 25 September 2018. Carly Liddell-Lum gave evidence that it was Kate Liddell's responsibility to respond because it was addressed to her. Kate Liddell said she did not feel the need to respond: she had dealt with the issues in the meetings and moved on. Both gave evidence that their business was very much a "deal with it and move on" rather than dwell on past mistakes.

133. The Tribunal understands why the claimant would want a response and an acknowledgement of her position. However, the Tribunal finds that the lack of response was not because of the disclosure but rather that the issue had been

raised and discussed at the meeting. As far as Carly Liddell-Lum and Kate Liddell were concerned, they had moved on from that issue.

D3

134. During the course of the hearing, the claimant clarified that the third detriment was that she had been removed from direct contact with Victoria Jones by 5 October 2018. The Tribunal concludes that this was not because of the protected disclosures. By 5 October 2018 Carly Liddell-Lum had met with Victoria Jones and received her email outlining her concerns with the claimant. Carly Liddell-Lum gave evidence that given the concerns raised by the DFE, which was the respondent's guaranteed source of income, she felt she had to step in and deal directly with Victoria Jones.

D4

135. The Tribunal has looked through the various social media messages and correspondence between the claimant and the respondent during the course of these proceedings. During that period the respondent had received complaints from both schools and the Department for Education about the claimant's conduct. The respondent had also been advised to restructure in order to save the business.

136. During this period Carly Liddell-Lum and Kate Liddell took back control of business development. They had been advised that the business was failing. There was a risk that their guaranteed income would disappear should they not remedy things with the Department for Education. By 8 October 2018 the business had made the decision that the claimant's position was redundant. The Tribunal finds that any cooling off between the claimant and the respondent was for these reasons, rather than to isolate the claimant because she had made protected disclosures.

D5

137. The claimant asserts that the respondent failed to deal with her grievance lodged on 18 October 2018. The respondent received the grievance in the early hours of the morning in Australia on 19 October 2018. This was only a matter of hours before the meeting with the claimant to discuss her redundancy. Prior to the submission of the grievance, a decision had already been made to make the claimant redundant. The respondents say this is why they did not deal with the grievance.

138. The respondent had made a business decision to make the claimant redundant and chose not to deal with the grievance because the claimant was leaving the business.

D7

139. Following the termination of the claimant's employment, there was a dispute over who owned the claimant's mobile phone. The claimant asserted that it was her phone which the respondent paid for, and the respondent asserted that it was entitled to the return of the phone. As a result of this dispute, the respondent did not make the final payment to the claimant. It was finally resolved that the claimant

would provide the SIM details to the respondent and once this had been agreed, a final payment was made.

140. The Tribunal therefore does not conclude that the making of protected disclosures caused the respondent to withhold the final payment but rather the disagreement over the ownership of the phone and the SIM.

D. Detriment 6 and Dismissal

141. The Tribunal's decision about the claimant's dismissal applies to both the detriment claim under section 47B and the dismissal claim under section 103A.

142. The Tribunal was reminded by both representatives that section 103A requires the tribunal to enquire whether the reason or principal reason for a dismissal is a protected disclosure. As the claimant has less than two years' service, the burden of proof was on the claimant to prove that a protected disclosure was the reason or principal reason.

143. Over the course of the hearing, the Tribunal heard no direct evidence that the protected disclosure was the reason or principal reason for the dismissal or that it caused the respondent to make the decision to dismiss for the purposes of the section 47B claim nor was that an inference the Tribunal was able to draw from the evidence we heard.

144. The Tribunal concludes that the reason or principal reason for the claimant's dismissal and the decision to dismiss the claimant, was the financial situation of the company. Whilst the Tribunal notes that performance issues were raised, it is clear that from 5 October 2018 the performance issues were being dealt with in that Carly Liddell-Lum has regained control of the Department for Education contract and Karen Howe was advising. The only live issue was the financial status of the company.

145. From that date, the respondent was trying to sort out its finances. Evidence was given by Kate Liddell that the company had lived from one pay quarter to the next and had hoped that money received in September 2018 would resolve the financial issues from the year end of June 2018. But that month, the payroll provider, Transition to UK, liquidated and the respondent became a creditor of the liquidated company for approximately £100,000.

146. The Tribunal is satisfied that Point to Point Education PTY Ltd was in financial difficulty by the time a decision was taken on 8 October 2018 to make the claimant's position redundant. The finances of the company were operating in the mind of Carly Liddell-Lum and Kate Liddell at the time the decision was made to dismiss. The Tribunal finds that the protected disclosures had no material influence on the decision – the finances of the company left them with no choice.

147. Therefore, the Tribunal concludes that the decision to dismiss and the dismissal itself, were not caused by the making of protected disclosures and the reason or principal reason for the dismissal was in fact the financial situation of Point to Point Education PTY Ltd.

148. The claim for detriments caused by protected disclosure and dismissal caused by protected disclosure are unsuccessful and are dismissed.

Employment Judge Ainscough

Date: 13 March 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

16 March 2020

FOR THE TRIBUNAL OFFICE

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