



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J. Climer-Jones (C)

**Respondent:** Hywel Dda University Local Health Board (R1)  
Ms J. James (R2)  
Ms A. Williams (R3)

**HELD AT:** Cardiff **ON:** 28-31 January 2020  
(in chambers 18.03.20)

**BEFORE:** Employment Judge T. Vincent Ryan  
Ms W.E. Morgan  
Mr. M. Pearson

## REPRESENTATION:

**Claimant:** Mrs Climer-Jones represented herself (a Litigant in Person) assisted by her husband Mr Climer-Jones.

**Respondent:** Mr. J. Walters, Counsel

**Non-Legal Members observing (day 3):** Ms A. Burge & Ms C. James  
**(day 4):** Mr A. McLean

**Interpreter (Welsh/English):** Ms. N. Hurford (day 3 only)

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant's claims that the second and third named respondents subjected her to detriments on the ground that she made a protected disclosure(s) are dismissed upon the claimant's withdrawal.
2. The claimant made protected disclosures in a DATIX Report at 22:01 on 16<sup>th</sup> October 2018, disclosing information which in her reasonable belief tended to show that a criminal offence had been committed and/or that the health and safety of an individual had been endangered.

3. The claimant's claim that she was subjected to detriment by R1 on the grounds of her having made the said protected disclosure(s) is not well-founded, fails and is dismissed.

## REASONS

1. **The Issues:** In a situation where: (a) the claimant, a nurse engaged by R1 (henceforth just referred to as "R" in the light of the withdrawn claims against named individuals) via an agency who was managed by R2-R3 (a Senior Sister and a Senior Nurse Manager respectively, employed by R1), completed a report (via an internal system called Datix) relating to a patient (X) which raised concerns about X's treatment and care and (b) whose shifts were cancelled ostensibly because of issues related to her conduct for a number of stated reasons, the following issues arose for determination:
  - 1.1. Did C make a protected disclosure that:
    - 1.1.1. a criminal offence had been committed against X and/or
    - 1.1.2. that X's health and safety had been put at risk?
  - 1.2. Did C reasonably believe that the disclosure was made in the public interest?
  - 1.3. Did R subject C to the following detriments on the ground that she had made one or more protected disclosures:
    - 1.3.1. Her previously booked shifts in R's A&E Department at Glangwili Hospital Carmarthen were cancelled (which the respondent confirms occurred);
    - 1.3.2. "False allegations" about her conduct at work were made about her (matters which the respondent says were genuine and the reason for the cancellation of C's shifts).
  - 1.4. If C was subjected to detriment as alleged, to what extent was the act or failure to act on the part of R caused or contributed to by C's actions and what, if any, reduction in compensation would it be just and equitable to make having regard to that finding?
    - 1.4.1. In view of our findings in respect of the other issues above we did not have to resolve this latter issue.
    - 1.4.2. In view of our findings however we concluded that the extent that the claimant caused or contributed to the respondent's actions was relatively minor; while she was open to criticism by some colleagues her behaviour was arguably irritating and a nuisance rather than amounting to serious misconduct;

1.4.3. R's reaction when it cancelled C's shifts was exacerbated or accelerated by the fact that she was an agency nurse rather than an employee; Sr James' upset on the morning in question was due to a mistaken belief rather than egregious behaviour by C; there would have been a relatively modest reduction in any award, if one had been appropriate at all.

## 2. The Facts:

### 2.1. The respondent (R):

2.1.1. Witnesses who gave evidence this hearing in addition to C, who gave her evidence over the first two days of the hearing, (in alphabetical order):

2.1.1.1. Gemma Brady: Qualified Nurse

2.1.1.2. D.J. Evans: Health Care Support Worker (HSCW)

2.1.1.3. J. James: Band 6 Nursing Sister (day 2)

2.1.1.4. J. Owen: HCSW

2.1.1.5. L. Peregrin: Band 7 Senior Sister (day 3)

2.1.1.6. F. Plater: HCSW (day 3)

2.1.1.7. G. Premkumar: Consultant in Obstetrics and Gynaecology (Obs & Gynae) (day 3)

2.1.1.8. L. Standeven: Band 7 Senior Nursing Sister. (day 3)

2.1.1.9. E. Stokes: Doctor, at that time F2 (day 2)

2.1.1.10. H. Straddling: Staff Nurse at the time (now Band 6 Junior Sister)

2.1.1.11. A. Williams – Clinical Lead Nurse for Unscheduled Care/ Senior Nurse Manager (managing Band 7 Nurses).

2.1.2. Staff grades and roles:

2.1.2.1. The senior Nurse manager (Ms Williams) managed

2.1.2.2. Band 7 Senior Sisters (including Sister Standeven) who in turn manage

2.1.2.3. Band 6 Junior Sisters (including Sr James) and they manage

2.1.2.4. the nurses (including at that time Ms Straddling, and Ms Brady) and HCSWs (including Ms Evans, Mr Owen, Ms Plater).

2.1.2.5. HCSWs are assigned to nurses to assist them.

2.1.2.6. Senior Sisters have management days when they deal with reports, complaints (matters such as any Datix/Datices (sic)), and general ward management which they carry out in an office; in addition, they would have days for ward duties when they would be termed "Navigators", responsible for the deployment of all nursing staff and their HCSWs within and around the A&E Department.

2.1.2.7. The employed nursing staff is augmented by the regular use of Agency Nurses.

2.1.2.8. All nurses and HCSWs worked a shift pattern.

2.1.3. The events described below all took place in the A&E Department of Glangwili General Hospital, Carmarthen. It is common ground that the department was (is) busy, and that at times resources were (are) stretched save that there is a relatively high ratio of HSCWs to patients (1:6) whereas some other Trusts operate HSCW : Patient ratios nearer 1:12.

2.1.4. DATIX: There is a computerised system for reporting incidents of concern, harm or for learning and training purposes (but not usually for personnel or grievance issues). Any member of staff may alert colleagues and management to such matters by completing a Datix Report (usually just referred to as a Datix) setting out details of the matter in a free form narrative section but with boxes to identify patients, locations, dates, and the author. The seriousness of the incident is graded and colour-coded affecting its distribution and priority. There is an automatic distribution list dependent upon the classification of severity and nature of the issue. Whilst most Band 6 and all Band 7 Sisters in the A&E Department were routinely copied in there were exceptions, such as Sr James; Sr James was said to have been nearing the end of her career at the material time; she did not get involved in considering Datix reports and did not receive them; she was reluctant to use emails; she wanted to work as Navigator in A&E without dealing with extraneous matters.

## 2.2. The claimant:

2.2.1. Career: The claimant is an experienced nurse. She has had a long and varied, (in terms of disciplines and projects), nursing career and latterly at least as an agency nurse.

2.2.2. Work as Agency Nurse with R1: the claimant was a Band 5 nurse and worked for R via an agency from April 2018 to 16 October 2018, initially mostly doing day duty but latterly working predominantly at weekends or on night duty in A&E.

## 2.3. 25<sup>th</sup> April - 13<sup>th</sup> October 2018:

2.3.1. The claimant's relationship with Sister James:

2.3.1.1. In general: Sister James did not consider C to be a “team player” and she felt that she displayed challenging behaviour, undermining Sr James’ decisions and at times being “unpleasant”. The claimant felt that Sr James did not like her and was dismissive of her, and agency nurses generally, (although we heard no evidence to support the latter assertion and we note that Sr James herself had been an agency nurse for some 12 years before attaining a substantive role with R). The claimant found some of Sr James’ management decisions to be “totally and utterly unacceptable”; she accused Sr James of compromising standards in A&E, such as by admitting patients when there were inadequate resources and doing so to curry favour with ambulance crew queued outside A&E. The tribunal accepts C’s evidence that they did not have “a great relationship”, and that C “struggled with her (Sr James’) decisions” (without us in any sense making a judgment or finding as to the wisdom of those judgements). Whereas sister James believed that C questioned and challenged her a lot, the claimant gave evidence that she “bit (her) tongue” and did not question Sr James enough but kept apart from her. Sister James was uncomfortable managing C.

2.3.1.2. Form of address: the claimant would, on occasions, adopt informal modes of address to colleagues for example referring to nursing sisters (her superior line managers) as “sis”. The nursing sisters who gave evidence confirmed that they did not like this informality as it was disrespectful and inappropriate; it grated with them. Sister James asked C to desist and she did for some months prior to the termination of her shifts on A&E. C also had a practice of referring to then Staff Nurse Straddling as “nurse squeaky” or “squeaky”; Ms Straddling did not like this familiarity and the claimant’s use of a nickname that she may have tolerated from a close friend; she did not consider C to be a close friend. The tribunal did not accept C’s explanation that she was invited to use that name or that she did not know Ms Straddling’s proper name (which was on a name badge worn by her and featured on all staff lists and rotas).

2.3.1.3. Respect for seniority and decision-making: as quoted above C struggled to appreciate some of the staff deployment decisions made by Sr James in her capacity as Navigator and C considered that some of her management was “totally and utterly unacceptable”. C did not hesitate to make this known. For example, on 15 August 2018 there were 2 emergency situations in A&E during an electricity blackout and failure of the backup system such that even the telephones failed. Nursing staff were deployed and offered assistance as required coming away from their usual duties to cover the emergencies. The claimant considered that certain other patients had priority and she questioned the deployment of Ms Straddling. The tribunal does not have to make a finding of fact as to the optimum use of available resources at that time however there was a clear difference of opinion, which was freely stated and debated,

between C on the one hand and Sr James with Ms Straddling on the other. Sister James was the Navigator; she considers that C's questioning and intervention was challenging and undermined her management. In a similar vein, and again the tribunal makes no finding as to the optimum deployment of staff, C would depute HCSWs to assist with various tasks as she saw fit even if that was contrary to the view of Sr James.

- 2.3.1.4. Health Care Support Workers: in addition to C's preparedness to ask HCSWs to perform various tasks, some of them formed the view that she was generally unhelpful, would not "double up" to assist in onerous tasks, and made some of them feel both isolated and struggling with a bigger workload than usual when assigned to work with C. Some felt that she was not supportive or helpful. This finding is based on the evidence we received from HCSWs who would on occasion raise their niggling concerns to their Band 6 manager or any available doctor on the ward.
- 2.3.1.5. In general, all such matters were raised with Sr. James over a period of months and she would raise them with a Band 7 Sister or Ms A Williams (Band 8). None of the complaints were so serious that they formed the basis of a formal complaint, DATIX or grievance; none was escalated to disciplinary proceedings. Both Ms Williams and Sr Standeven repeatedly asked Sr James to put any complaints about the claimant in writing but she did not do so prior to 18 October 2018 (see below). Miss Williams appropriately described these matters, being those raised by HCSW, Ms Straddling concerning name-calling, and Sr James regarding respect for her authority as "little niggling concerns". C was not seen as a core member of the A&E team; the tribunal considers it more likely than not (on the balance of probabilities) that being an agency nurse and not one of the core team, those who complained about these niggling concerns were less tolerant of C than they may have been of each other. In any event, and to an extent, some of the staff took against C because of work-related matters and they felt that she was not contributing well to the team effort.
- 2.3.1.6. On one occasion C removed from the ward certain confidential patient records that ought not to have been taken home by her. She was completing a report and says that she inadvertently picked up some records; on realising what she had done she informed her manager. This was a potentially serious matter and at least some of her colleagues considered that she may have deliberately taken the records home to complete an essential report in her own time and at her leisure. The tribunal makes no finding as to whether this act was deliberate or inadvertent but it was a matter for the respondent to investigate in due course as there was a potential breach of confidentiality, policy and procedure. We were unable to make a finding as to the exact date of this potential security breach which C says happened some months before October 2018 and the respondent's witnesses dated at approximately 8 October 2018. It

was to be, but had not been, investigated by the date C's shifts were cancelled by R. The tribunal finds that this was more than a "niggling concern" but nevertheless it was not viewed by R as a matter of such seriousness that an urgent investigation was carried out or disciplinary action taken; it was however to be addressed in due course.

2.4. Sunday 14<sup>th</sup> October – Thursday 18<sup>th</sup> October 2018:

2.4.1. 14.10.18 – disclosure by patient X: on the night shift of 14<sup>th</sup> – 15<sup>th</sup> October 2018 X, an elderly patient, told the claimant in confidence that some 3 to 4 years previously she had undergone a procedure which she did not understand and to which she had not consented, that was carried out by a male doctor alone (that is without any chaperone present), which caused her excruciating pain and seemed to her to have resulted in the loss of her clitoris. X was upset relating these circumstances which she told the claimant she had been unable to share with her husband. The procedure was not undertaken at this hospital but at another hospital in the same Trust and X did not know the name of the doctor; none of the staff at Glangwili was implicated.

2.4.2. Examination of patient X by Dr Stokes with C as chaperone: the claimant asked Dr Stokes, at the time an F 2 junior doctor, to examine X while she observed as chaperone. They could not locate or identify X's clitoris. It appeared to the claimant as if it had been scooped out with a spoon. She knew that this seemed unlikely, as did Dr Stokes. They were however concerned as they could not explain the situation and the matter was referred for examination by a consultant in Obs & Gynae.

2.4.3. C was not rostered to work on Monday 15<sup>th</sup> October 2018.

2.4.4. Tuesday 16<sup>th</sup> October 2018 – night shift:

2.4.4.1. Conversation between C and Sr James: the claimant asked Sr James what had happened to X. Sr James explained that X had been examined, the matter was historical and X had been discharged to a different hospital; the concern over X had been resolved. Sr James had not been involved in the care of X and was relying on information that she had been told about the involvement of Obs & Gynae. This was not an issue that directly affected or unduly concerned Sr James. In fact, Mrs Premkumar, Consultant in Obs & Gynae, had spoken to X and examined her. She located and identified X's clitoris and noted that she had "age and menopause related atrophy"; X told her that she had consented to a procedure related to a urinary tract infection but did not understand what had happened to her clitoris and felt that the claimant had "jumped the gun" in suspecting the worst. Age and menopause related atrophy is fairly common and not suspicious. X was therefore approved for transfer to Prince Phillip Hospital (PPH) and her notes were copied, and one set was amended to include Mrs Premkumar's clinical observation; the amended notes were sent to PPH with X. The

copied notes retained at Glangwili ended prior to Mr Premkumar's intervention ("the retained notes"). Sr James did not know or go into that level of detail with the claimant.

- 2.4.4.2. C looked for X's records and found, and read, only the retained notes. She was genuinely concerned that the retained notes (which she thought were complete whereas they were limited) did not reflect the steps taken by her and by Dr Stokes; she felt that they read as if they had failed to escalate matters appropriately whereas they had; she wanted to ensure that there was a record of her involvement and that matters were escalated so that X's disclosures and the claimant's concerns were not overlooked but investigated and acted upon.
- 2.4.4.3. C's DATIX (pp101 -107) timed at 22:01: C completed a Datix (pp 106ff). It disclosed:
  - 2.4.4.3.1. That X reported to her about something that occurred to her in a hospital in the same Trust 3 years or so previously;
  - 2.4.4.3.2. That X had no idea what the medical procedure she underwent was;
  - 2.4.4.3.3. That she considered that her clitoris had consequently disappeared;
  - 2.4.4.3.4. That she had felt excruciating pain;
  - 2.4.4.3.5. that the only record of these matters contained within the nursing notes for patient X (the retained notes) were those of the claimant and Dr Stokes, giving the appearance that they had not escalated their concerns whereas they had done so;
  - 2.4.4.3.6. that patient X said she had not given consent for a medical procedure;
  - 2.4.4.3.7. that there was no chaperone with patient X when the male doctor performed the procedure;
  - 2.4.4.3.8. that X's clitoris could not be observed in a situation where it was unlikely that she would have undergone its removal for cultural reasons;
  - 2.4.4.3.9. that the claimant was subsequently informed that the above matters were historical and that patient X had been seen by a gynaecologist.
- 2.4.4.4. Conversation between C and Sr James at 03:00: during the shift, after the claimant had submitted her Datix, Sr James, oblivious



to the Datix, pointed out an error on the rota that adversely affected C and she spoke to C about it so that the matter could be rectified. This was an amicable and constructive conversation. There was no further discussion about patient X or the Datix at this time.

2.4.4.5. Report by NW to Sr James: During this shift a nursing colleague, NW, said to Sr James that C was lodging a formal complaint about her. Another colleague referred to C making a complaint about Sr James. Sr James believed that C had or was preparing a Datix about her; she was not told the context or specific grounds for complaint being raised.

2.4.4.6. Sr James' knowledge, understanding and belief (and her reaction): Sr James understood from what she had been told that C was raising matters of concern about her practice by means of a Datix although she did not know the reason for criticism or what had prompted C to take this step. She knew nothing of the contents of the actual Datix presented by C during that shift (as detailed above) until she read it during this litigation. She did not at the time understand that the Datix in question related to patient X or any aspect of her treatment either current or historical, or record-keeping in respect of it. She became very upset believing that, after some months of irritation and frustration with C over matters that HCSWs had raised with her and that she had raised with her line managers, and issues that she herself had with C, the claimant sought fit to complain about her. Sr James did not feel criticism was due of her practice or management. She became upset and tearful.

2.4.5. Wednesday 17<sup>th</sup> October 2018:

2.4.5.1. Handover Sr James and Sr Standeven: Sr Standeven, a Band 7 sister and therefore senior to Sr James, arrived on the ward for work at 7 AM; this shift was one where she was to act as navigator and it was not one of her managerial days. She went to the ward and not to her office; she did not check emails before arriving on the ward and speaking to Sr James. Upon arrival she found that Sr James was upset and she became very tearful when explaining the cause of her upset, as above. Sr James had reached the point where she felt that she could no longer work with the claimant and she said this to Sr Standeven. She did not say that she wanted the claimant to lose her job or that her shifts should be cancelled. She said that she could no longer work with the claimant and that is how she genuinely felt in the circumstances. Sr Standeven was not prepared to see her colleague in such an emotional state in circumstances where she knew that she had had issues with C over some time and that there were outstanding matters that still needed to be resolved (the case notes taken home). Sr Standeven was supportive of Sr James. As on previous occasions she advised Sr James to put in writing her earlier complaints about C and to put together details of what it was that concerned the HCSWs. Sr Standeven resolved to cancel C's engagement in A&E because of the upset felt by Sr James and as

the claimant, being an agency nurse, was subject only to booking as and when required via the agency; cancelling agency bookings and not rebooking were relatively straightforward matters. Sr Standeven therefore knew that Sr James was expecting a complaint from C which upset her but she did not know that C had submitted a Datix concerning patient X or disclosing any of the information contained, mentioned, or referred to in it; she did not know the details of any intended or actual complaint about Sr James. The Datix does not read as a complaint about Sr James anyway, and upon reading it was not so understood by the senior staff.

2.4.5.2. Sr James' email (p.126): Sr James canvassed the views of some of the HCSWs and composed an email addressed to, amongst others, Sr Peregrine, Sr Standeven and Alison Williams setting out what she called the "problems encountered" with C. That email was not sent by her until 06.49 on 18<sup>th</sup> October 2018 and effectively corroborated Sr James' view that she had reached the end of her tether with C and supported Sr Standeven's prior decision to cancel the claimant's shifts in A&E. That said, the final straw as far as Sr James was concerned was being told that, despite everything, the claimant was making a formal personal complaint about her.

2.4.5.3. Decision to cancel C's shifts and correspondence with the Agency: Sr Standeven wrote an email to the agency, Nurse Bank Hafan Derwen, at 07:27 on 17 October 2018 cancelling the claimant's shifts (that is those already booked in A&E) and asking the agency to reallocate them. She gave as her reason that the claimant had been "upsetting a large number of staff" and that she, Sr Standeven, had come to work to find a "very tearful sister" (Sr James) because of behaviour described within that email. The email was sent within 27 minutes of her arrival at work during which time she had been dealing with Sr James. Sr Standeven was familiar with the niggling complaints raised about C over several weeks and sister James had reiterated them that morning. She did not need to await written confirmation from Sr James but she did want it to back-up her decision. She sent a copy of that email to Louise Peregrine, Alison Williams and Sr James. The decision to cancel the claimant's shifts that had already been booked in A&E was that of Sr Standeven; Sr James did not have the authority to do so and neither was it her intention that R would cancel the claimant's work all together. She was just not prepared to work with her again and that could be accommodated as far as she was concerned because of the shift pattern. The reasons for cancellation and reallocation of the C's shifts were the reasons set out in Sr Standeven's email to the agency.

2.4.5.4. C's attendance at A&E for the night shift: C attended work for what she believed was her next rostered shift only to find that it had been cancelled. She had not been informed and in fact had been led to believe that she was required to work that shift. She immediately believed that cancellation of the shift was related to her Datix about

patient X; in that belief, she was angry. She made her views known. R's staff were not understanding of C's indignation which she believed was righteous, but rather took a dim view of C's spontaneous reaction in these circumstances.

2.4.5.5. Further action by the respondent:

2.4.5.5.1. At 08:16 on 18 October 2018 Alison Williams sent an email to the agency (page 121), copying in other officers at the respondent Trust saying that C had been verbally aggressive and threatening when she had arrived for work following cancellation of her last shift; she asked Ms Major to contact the Agency. Mrs Williams did not know the contents of the Datix. In the light of Mrs Williams' email Donna Major spoke to the Agency on the same date about the situation. We were taken to her email of 12:15 (page 120) to Mrs Williams and some of the nursing sisters summarising her call saying that she had informed the Agency that C's attitude and behaviour were unacceptable, and the Trust was imposing a ban "going forward" on C, whose booked shifts were to be removed. The future "ban" and support for Sr Standeven's decision about booked shifts appears to have been made by Sonia Briggs (Head of Nursing Bank & Rostering) in consultation with Ms Major (but we did not hear evidence from either of them directly); Mrs Williams confirmed that her understanding was that this was the case and we believed her. We also accepted Mrs Williams' evidence, and find as facts, that she became aware on 16<sup>th</sup> October, from a colleague at the hospital to which patient X was transferred and after the intervention and clarification by Mrs Premkumar (that the matter was historical, innocent and had been misunderstood), that there had been what she considered to be an allegation of female genital mutilation and she only became aware that this was contained in a Datix on 17<sup>th</sup> October; that she only read the Datix in connection with preparation for this hearing. The fact a Datix is submitted is not considered in general to be an issue as this one was not; a Datix is raised to flag up a concern and is a legitimate and common method of doing so without any implications or likely repercussions for the person who submits it. In this case, by the time Mrs Williams was aware of the Datix she was already satisfied that the matter had been dealt with appropriately by Obs & Gynae and resolved; to her mind it was now a non-issue. She was mindful of the niggling concerns raised by Sr James and the HCSWs, but as regards the claimant she was more concerned with the removal of confidential patient notes from the hospital and C's behaviour on the ward upon finding out that her shift had been cancelled.

### 3. The Law:

- 3.1. S.43A Employment Rights Act 1996 (ERA) defines protected disclosures, in the context of public interest disclosures generally and colloquially referred to as “whistle blowing”. S. 43B ERA lists the types of disclosures that qualify for protection at 43B (1) (a) – (f) ERA including disclosures that a criminal offence has been committed, and that the health and safety of any individual has been, is being or is likely to be endangered. Any such disclosure must be made appropriately as required by sections 43C – s. 43H ERA.
- 3.2. A worker has the right not to be subjected to any detriment by the employer done on the ground that the worker has made a protected disclosure (S. 47B ERA).
- 3.3. It is for the employer to show the ground on which any act, or deliberate failure to act, was done (s.48 ERA). Consideration must be given, therefore, to the mental processes of the individual or individuals concerned on behalf of a respondent; there may have been a number of influences, and more than one material influence, on the mind of the individual or individuals concerned when they acted or omitted to act as they did.
- 3.4. It is good practice to decide why an employer acted as it did before becoming involved in lengthy esoteric debate about whether there has been a protected disclosure, so as to ensure the relevance of any such finding; if the tribunal were to find that the employer’s actions were not influenced by any potential disclosure but have a clear and obvious innocent explanation for action or inaction then there is no need to over-deliberate to establish whether in fact the comment or observation made by the employee amounted to a qualifying or protected disclosure. The tribunal should establish the employer’s motivation and rationale for action or deliberate inaction.
- 3.5. **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] [IRLR 285](#) on the concept of detriment
- 3.6. In **Fecitt & Ors v NHS Manchester** [2012] [ICR 372](#), the Court of Appeal held that the correct test in relation to a detriment claim is whether the protected disclosure “materially influenced”, that is that it had more than a trivial influence upon, the employer’s treatment of the whistle-blower; this is different from the test in the context of an unfair dismissal claim, of whether the protected disclosure was the sole or principal reason for the dismissal.
- 3.7. In **Royal Mail Group Ltd (respondent) v Jhuti (appellant)** [2020] [IRLR 129](#) [2019] [UKSC 55](#) it was held that where a person in a hierarchy of responsibility above a claimant determines that they should be dismissed for a reason (the real reason e.g “whistleblowing”) but hides it behind an invented reason (e.g poor performance or misconduct) and the decision-maker adopts the invented reason, the effective or actual reason for the dismissal is the real reason; the reason for dismissal is not the invented reason. It is for the tribunal to determine the real reason; it must look beyond and through an invented reason. The state of mind of the person who

concealed the real reason is attributed to the employer even if the ostensible decision maker is deceived.

**4. Application of law to facts:**

**4.1. Did C make a protected disclosure that a criminal offence had been committed against X and/or that X's health and safety had been put at risk?**

4.1.1. C submitted a Datix that contained information suggesting improper medical treatment (without consent or explanation, performed in the absence of a chaperone when one was appropriate, causing excruciating pain and continuing distress).

4.1.2. Those matters are issues of personal health and safety in a medical context; the medical environment or context is heavily regulated for the protection of the health and safety of patients; the disclosures made at very least showed allegations of breaches of best practice but more likely breaches of applicable regulations. In a situation where an experienced nurse and a qualified doctor have genuine concerns about what they saw and heard in the circumstances described by C, then it is clear that patient X may have had her health and safety compromised and that the disclosure was information tending to show that.

4.1.3. Furthermore, the matters reported upon in the Datix are suggestive of unwanted physical contact which might amount to assault.

4.1.4. The report received from X and re-iterated in the Datix by C tended to show both endangerment in the past to X's health and safety and that she had been assaulted, or at very least that C considered that to be the case. C ought not to be expected to decide on whether what occurred was in fact a criminal offence; that is a matter for a court following prosecution; it is enough that the information tended to show that this was the case. The only way of reading the Datix in any other way would be by completely discounting what patient X said at the time and doing so when a visual inspection and examination appeared to the two professionals involved to bear out what she was saying.

4.1.5. On the basis of the above paragraphs 4.1.1 – 4.1.4 the Datix was a disclosure qualifying for protection. It would then become a protected disclosure if it was disclosed to the people or authorities described at section 43C – 43H Employment Rights Act 1996. By its very nature a Datix is submitted to a health professional's employer and those responsible to consider such concerns who are employed by the health trust or those upon whom it relies for matters such as safeguarding. This situation is covered by section 40 3C ERA.

**4.2. Did C reasonably believe that the disclosure was made in the public interest?**

4.2.1. On the strength of what she heard and saw on examination, C had reason to believe that something untoward had happened to patient X;

certainly, something had happened that caused her distress because she was emotional at the time that she made the disclosure to C.

- 4.2.2. However unlikely it may have been that patient X had undergone female genital mutilation it was not impossible. Even though the claimant thought it was unlikely that this was what had happened nevertheless she was genuinely concerned for patient X's welfare. That concern was born out of patient X's emotional distress, report of excruciating pain in circumstances that she did not know what had happened, had not given consent and informed C that she was subjected to whatever the procedure was by a male clinician in the absence of a chaperone.
- 4.2.3. This was a potentially extremely serious matter and one of public scandal taking place in an NHS hospital. Whatever had happened it gave rise to questions as to the clinical practice and propriety of an unnamed medical practitioner practising in a local health trust. These were not merely issues of historical note that ought to be recorded in a patient's personal records but reflected on the individual practitioner and possibly the trust. It could therefore give rise to concern for the health and well-being of other patients. It could give rise to concern about practices generally within the trust in question. These are all matters of public interest.
- 4.2.4. Whether or not C believed that this was an actual case of FGM, nevertheless she had good reason to believe the matters that were included in the Datix, and of course it is noted that at no stage did C purport to disclose that this was a case of FGM; she and her colleagues may have used that acronym in conversation at the time but the disclosure was not that FGM had occurred; it was not so explicit. The disclosure was about circumstances that may have led to such a suspicion but the tribunal had no doubt that C believed that something untoward had occurred that needed fuller investigation; she believed this based on an oral account given to her and the physical examination that she and Dr Stokes carried out; her belief was reasonably held, that is a belief that something untoward that had endangered patient X's health and safety and may have amounted to an offence had occurred.
- 4.2.5. We may have taken a different view but for the fact that C and Dr Stokes visually examined patient X and neither could explain the perceived absence of a clitoris; in those circumstances however, she had reason to believe patient X. The tribunal was in no doubt that C was genuinely professionally concerned at what she had heard and seen, and that she was motivated by two factors in completing the Datix, firstly to ensure that the matter was drawn to the attention of the appropriate authorities within R, and secondly to make it clear that she and Dr Stokes had acted properly initially (something not evident from the retained notes), again a matter of public interest and confidence in those in the medical profession.
- 4.2.6. We did not read the Datix as a complaint about Sr James; R's witnesses who were asked did not either; C asserted that it was such in

that she felt Sr James had been dismissive of her concerns and gave a bland and unacceptable answer to her enquiry about patient X. That may have been in C's mind but it was not obviously so; it sounded more like an attempt to link talk of a complaint about Sr James (the final straw leading to cancellation of C's shifts) to the Datix.

4.2.7. C did not make a public interest disclosure about Sr James.

4.3. Did R subject C to the following detriments on the ground that she had made one or more protected disclosures:

4.3.1. *Her previously booked shifts in R's A&E Department at Glangwili Hospital Carmarthen were cancelled (which the respondent confirms occurred);*

4.3.1.1. Cancellation of booked work with loss of income and congenial employment was a detriment.

4.3.1.2. C's shifts were cancelled because Sr Standeven was being supportive of her colleague Sr James (who was annoyed about the prospect of an unwarranted complaint), mindful of the niggling complaints of the HCSWs, and at the same time saw no need to be tolerant of C and to either keep her or follow through any performance or conduct procedures with her. Bluntly, Sr Standeven had heard and seen enough. Sr James did not want to work with her. The easiest way out for R was for Sr Standeven to cancel her shifts. The disclosures in the Datix had no bearing on the decision; it was not the ground for the cancellation. At the time of the decision Sr Standeven was unaware of the disclosure. Sr James, likewise, was unaware of it.

4.3.1.3. Sr Standeven's intolerance (in the sense described above) and pragmatic approach to solving the perceived problem caused by C's conduct towards Sr James and the HCSWs, was the real reason for cancellation of her shifts. It was not an invented reason. Sr Standeven was not deceived by Sr James and what Sr James' said to her had nothing to do with matters raised about patient X. Sr James therefore did not decide to get rid of C by dripping poison into Sr Standeven's ear, fooling her that this was about conduct and performance when she really wanted C out because of a protected disclosure; that scenario does not work in the light of the facts.

4.3.2. "False allegations" about her conduct at work were made about her (matters which the respondent says were genuine and the reason for the cancellation of C's shifts).

4.3.2.1. Sr James and the HCSWs had raised niggling concerns or allegations about C over a period of time; they were not major issues but a running gripe about matters that Sr James found difficult to manage and the HCSWs found a nuisance. In addition to that C did leave the hospital with confidential notes and this was a breach of

procedure that rightfully called for further consideration. Sr James was upset and tearful when she told Sr Standeven about the fact of an anticipated professional complaint about her. All of that is true and none of what was set out in Sr James' post-cancellation email to Sr Standeven was false.

4.3.2.2. That email was used as corroboration and to support the decision to cancel that had already been taken. C felt that the complaints about her were unjustified; that is understandable and to be expected by someone who loses their livelihood over such matters. That said, they were the opinions and judgments of those who complained; that is understandable too as they felt that working with C made their workload heavier. Their views and opinions were based on their subjective experience of working with C; they were not fabricated; there was no conspiracy to concoct allegations against C. Significantly the concerns had been aired over time by HSCWs to Sr James and by her to the Band 7 sisters and to Mrs Williams; that all predated C protected disclosure. Ultimately the decision was made because Sr James was upset with those matters as the background or the foundation but the allegations were real and present.

4.3.2.3. The tribunal would have had very different considerations had this been an "ordinary" unfair dismissal claim; it is not. It is not an issue as to whether R had a potentially fair reason for dismissal and acted fairly and reasonably in treating that reason as sufficient reason for dismissal. There was no link between the allegations, which were not false anyway, and C's protected disclosure.

Employment Judge T.V. Ryan

Date: 25.03.20

JUDGMENT SENT TO THE PARTIES ON 26 March 2020

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FOR THE TRIBUNAL OFFICE