EMPLOYMENT TRIBUNALS

Claimant: Dr S Vijaya-Dharma

Respondents: University of Sunderland

Heard: Remotely (by video link) **On:** 26, 29,30 and 31 March and 1 April 2021

Before: Employment Judge S Shore
NLM – Mr S Wykes
NLM – Mrs J Johnson

Appearances

For the claimant: In Person
For the respondent: Mrs J Callan, Counsel

JUDGMENT ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claim of unfair dismissal, (contrary to section 94 of the Employment Rights Act 1996) was not well-founded and fails. The principal reason for her dismissal was redundancy. There was a genuine redundancy situation and the respondent carried out a fair procedure.

2. The claimant's claim of automatic unfair dismissal for the reason or principal reason that she made a protected disclosure on 8 August 2019, (contrary to section 103A of the Employment Rights Act 1996) was not well-founded and fails. We find that the claimant did not make the protected disclosure asserted.

3. The claimant's claims that she was subjected to detriments short of dismissal because she made protected disclosures on 12 October 2018 and 15 February 2019, (contrary to section 47B of the Employment Rights Act 1996) were not well-founded and fail. We find that the claimant made no protected disclosures as asserted.

REASONS

Introduction

1. The claimant was latterly employed as University Advisor (Medical & Mental Health) by the respondent from 1 December 2005 until 2 January 2020, which was the effective date of termination of her employment for the stated reason of redundancy. The claimant started early conciliation with ACAS on 30 March 2020 and obtained a conciliation certificate on 1 April 2020. The claimant's ET1 was presented on 30 April 2020. The respondent is a University.

2. The claimant presented claims of:

    2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996).

    2.2. Automatic unfair dismissal for the reason or principal reason that she made a protected disclosure on 8 August 2019 ("Third Disclosure") (contrary to section 103A of the Employment Rights Act 1996).

    2.3. Detriment on the ground that she had made protected disclosures on 12 October 2018 ("First Disclosure") and 15 February 2019 ("Second Disclosure") (contrary to section 47B of the Employment Rights Act 1996), specifically that the respondent:

        2.3.1. did not make a room consistently available for the claimant to work in, causing her inconvenience (arising from the First Disclosure);
        2.3.2. did not refer students to the claimant from around March 2019 (arising from the First Disclosure);
        2.3.3. continued to fail to make a room consistently available for the claimant to work in and did not refer students to her (arising from the Second Disclosure);
        2.3.4. formulated a Business Plan to delete the claimant's role (arising from the Second Disclosure); and
        2.3.5. commenced redundancy consultation with the claimant (arising from the Second Disclosure).

3. From the joint bundle, we note that the claims were case managed by Employment Judge Jeram on 4 August 2020, when it appears that some considerable time was taken to establish the claimant's claims, the protected disclosures relied upon, the issues, and other matters that clarified the case. We saw no documents that suggested that the claimant has ever disputed the accuracy of the case management order and appendices produced by Employment Judge Jeram dated 5 August 2020 [pages 32 to 50 of the bundle]. The claimant was required to complete a table setting out further information about her claims, which she did. We have taken the matters recorded in the case management order and the further information produced by the claimant as being part of her case.

Issues

4. The case management order of EJ Jeram dated 5 August 2020 included a draft list of issues on determining liability only [47-48]. The parties used that as the template to produce an agreed list of issues (mistakenly titled "*Draft* List of Issues") as follows, with a few minor typographical amendments:

Unfair dismissal

1. *What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy.*

2. *If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:*

    2.1. The Respondent adequately warned and consulted the Claimant;

    2.2. The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

    2.3. The Respondent took reasonable steps to find the Claimant suitable alternative employment;

3. *Was dismissal within the range of reasonable responses?*

Protected disclosure

4. *Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?*

    The Claimant says she made disclosures on these occasions:

    4.1. On 12 October 2018 verbally to Katie Redhead;

    4.2. On 15 February 2019 to Oliver Pritchard and Kirsten Black; and

    4.3. On 8 August 2019 to Sam Seldon.

5. *Did the claimant disclose information and did she believe the disclosure of information was made in the public interest?*

6. *Was that belief reasonable?*

7. *Did she believe the disclosure tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation, viz criminal offences in breach of sections 148, 171, and 173 of the Data Protection Act 2018.*

8. *Was that belief reasonable?*

9. *If the Claimant made a qualifying disclosure, was it a protected disclosure because it was made to the Claimant's employer or other qualifying person as defined at ERA 1996 sections 43C, 43D, 43E, 43F, 43G, or 43H?*

Detriment (Employment Rights Act 1996 section 48)

10. *As a result of the alleged protected disclosure on 12 October 2018, did the Respondent do the following things:*

    10.1. Negatively impact the Claimant's working conditions in two ways; specifically:

        10.1.1. Not make a room consistently available to the claimant, causing her inconvenience; and

        10.1.2. Not referring students to the Claimant from around March 2019 onwards.

11. *As a result of the alleged protected disclosure made on 15 February 2019, did the respondent do the following things:*

        11.1.1. Negatively impact on the Claimant's working conditions in the two ways set out at paragraph 10.1 above;

        11.1.2. Formulate a business plan to delete the Claimant's role from the structure being formulated; and

        11.1.3. Commence of the consultation / redundancy process?

12. *By doing/omitting to do the things specified in paragraphs 10 and 11 above, did the Respondent subject the Claimant to detriment?*

13. *If so, was it done on the ground that she made a protected disclosure?*

Automatic unfair dismissal

14. *Was the reason or principal reason for dismissal that the Claimant made a protected disclosure?*

15. *Did the alleged protected disclosure made on 8 August 2019 materially influence the decision to dismiss the claimant?*

Schedule of loss

16. *Is the Claimant's calculation of the basic award correct?*

17. *What steps has the claimant taken to mitigate her loss?*

18. *What steps has the claimant taken to seek alternative employment?*

19. *Are the steps taken by the Claimant to seek alternative employment and mitigate her loss reasonable?*

4. Because of our findings of fact, we did not consider paragraphs *10* to *19* above because we found that the claimant had not made protected disclosures and had not been unfairly dismissed.

Law

5. For the purposes of the unfair dismissal claim, the relevant section of the Employment Rights Act 1996 is section 98.

> *"Section 98 Employment Rights Act 1996*
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it-*
>
> *(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) Relates to the conduct of the employee,*
>
> *(c) Is that the employee was redundant, or*
>
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
>
> *(3) In subsection (2)(a)—*
>
> *(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
>
> *(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

6. Section 103A of the Employment Rights Act 1996 states:

103A Protected disclosure.

"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."

7. A 'protected disclosure" is defined by section 43B of the Employment Rights Act 1996:

Disclosures qualifying for protection.

"(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."

8. The right not to be subjected to detriment short of dismissal on the ground that a worker made a protected disclosure is contained in section 47B of the Employment Rights Act 1996:

Protected disclosures.

(1) 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.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a)by another worker of W's employer in the course of that other worker's employment, or

(b)by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a)from doing that thing, or

(b)from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a)the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

(2) This section does not apply where—

(a)the worker is an employee, and

(b)the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K."

9. We were referred to a number of precedent cases by Mrs Callan, which we have quoted in this decision where appropriate:

    9.1. **Cavendish Munro v Geduld UKEAT/0195/09**
    9.2. **Easwaran v St George's University of London UKEAT/0167/10;**
    9.3. **Ibekwe v Sussex Partnership NHS Foundation Trust UKEAT/0072/214**;
    9.4. **NHS Manchester v Fecitt [2012] IRLR 64; and**
    9.5. **Ikejiaku v British Institute of Technology UKEAT/0243/19**.

Housekeeping

10. The parties produced a joint bundle of 405 pages. If we refer to pages in the bundle, the page number(s) will be in square brackets.

11. The case management order had set aside the first morning of the hearing for the Tribunal to read the documents and witness statements. The substantive hearing started at 2:00pm on the first day. We then heard evidence on the second and third days and heard closing submissions on the morning of day 4. We considered our decision after closing submissions had been made and delivered an oral judgment and reasons on the morning of the fifth day.

12. Evidence was given in support of the claimant by:

    12.1. The claimant herself, who was employed as University Advisor (Medical & Mental Health) in the respondent's Wellbeing Team. Her witness statement was dated 12 February 2021 and consisted of 19 paragraphs; and

    12.2. Ms Jackie Wilson, who was employed by the respondent from 2015 to 2019 and worked with the claimant in the respondent's Wellbeing Team. Her witness statement was dated 12 February 2021 and consisted of 9 paragraphs.

13. Evidence was given in person on behalf of the respondent by:

    14.1. Mrs Katie Redhead, who is a Senior Solicitor employed by the respondent. Her witness statement dated 8 February 2021 consisted of 14 paragraphs. The claimant alleged that the First Disclosure was made to Mrs Redhead on 12 October 2018.

14.2. Mr Oliver Pritchard, the Deputy Director in the respondent's Student Journey department (which included its Wellbeing Team). The claimant alleged that the Second Disclosure was made to Mr Pritchard on 15 February 2019. His witness statement dated 11 February 2021 consisted of 7 paragraphs.

14.3. Mr Sam Seldon, Head of Information Governance and Data Protection Officer for the respondent. The claimant alleged that she made the Third Disclosure to Mr Seldon on 8 August 2019. His witness statement dated 1 February 2021 consisted of 12 paragraphs.

14.4. Miss Kathryn Bagnall, Human Resources Business Partner for the respondent, who advised on the creation of the business plan that recommended the deletion of the claimant's post. Her witness statement dated 4 February 2021 consisted of 18 paragraphs.

14.5. Ms Tracey McKenzie, who is Head of Wellbeing for the respondent. The claimant alleges that she made a number of decisions that led to the claimant suffering detriment because of the First and Second Disclosures. Her witness statement dated 11 February 2021 consisted of 51 paragraphs.

14.6. Ms Kirsten Black, who is Director of Service for the respondent's Student Journey department. Her witness statement dated 5 February 2021 consisted of 19 paragraphs.

14.7. Mr Steve Knight, who is Chief Operating Officer of the respondent and was the dismissing officer. His witness statement dated 3 February 2021 consisted of 16 paragraphs.

15. The respondent also produced a witness statement from Paul Feechan, an Independent Governor of the respondent, who chaired the panel that heard the claimant's appeal against dismissal on 2 October 2020. His witness statement dated 5 February 2021 consisted of 16 paragraphs. The Tribunal could give little weight to the statement, as the witness was not presented to give evidence and was not made available for cross-examination.

16. In addition to the agreed bundle, list of issues and witness statements, the parties produced a cast list and list of key documents. The claimant produced an up to date schedule of loss.

17. At the end of the evidence, we received written and heard oral closing submissions from the claimant and Mrs Callan. We considered our decision and gave an oral judgment and reasons.

18. The hearing was conducted by video on the CVP application and ran intermittently, with some technical issues. We are grateful to all who attended the hearing for their patience and good humour in the face of the technical glitches.

Findings of Fact

19. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so we have dealt with the case on the basis of the documents produced to us. We make the following findings.

Background

20. The claimant is and was at all relevant times covered by this hearing a qualified medical doctor who maintained a right to practice by authority of the General Medical Council ("GMC"). At the time of her employment with the respondent, she was a member of the British Medical Association ("BMA") and received advice and representation from that body during the redundancy process. We also should note that the claimant held two separate positions with the respondent. This case only concerns her position as University Advisor (Medical & Mental Health) in the respondent's Wellbeing Team. It was agreed evidence that the claimant remains employed by the respondent in her other post.

21. The claimant was employed by the respondent in the post with which this case is concerned from 1 December 2005 to 2 January 2020. It was agreed that she was employed for a total of 5 hours per week for 36 weeks of the year. The full-time equivalent salary for the claimant's post was in excess of £150,000 per annum.

22. It was also agreed that the claimant had made a positive contribution to the respondent's Wellbeing Team over a long period, as evidenced by written references which the claimant had been provided and the evidence of the claimant's and respondent's witnesses. It appeared to the Tribunal that the claimant was well-liked and valued by all of her colleagues who gave evidence. There was no evidence presented to the Tribunal that the claimant was not good at what she did or that her competence was ever questioned. We appreciate that the claimant did not agree with what happened to her employment in the Wellbeing Team, but we do not find that that treatment was motivated or driven by any malice.

23. We also find that the claimant frequently went above and beyond what was required of her by her contract. It was not disputed that she would accompany students to hospital late at night and would see students out of term time, when she was not paid to do so. We were humbled by the passion with which the claimant described her work and the importance of the work to the students she helped.

24. We do not find it necessary to repeat much of the detailed history of the Wellbeing Team at the respondent that was provided in the evidence and documents, as we do not find it to be particularly relevant to the decision we have to make. The team originally consisted of three parts: Health and Wellbeing, Chaplaincy and

Counselling. Ms McKenzie was appointed to lead a combined Wellbeing team in 2016. She reported to Mr Pritchard, who reported to Ms Black.

25. We find that from the commencement of the claimant's employment to a time in or about 2016, her knowledge of and contacts with medical professionals in and around Sunderland was very valuable to the Wellbeing Team because she could make direct contact with GPs and suchlike in a way that other members of the team could not. We make that finding because of the evidence given by numerous witnesses, including the claimant.

26. We also find that the Wellbeing Team has never been a diagnostic or therapeutic service that offered medical treatment as is available at a GP surgery. It had no ability to prescribe medication. It offered counselling services and could refer students to external medical services. Although the claimant is a qualified doctor, she was not employed as such. That evidence was agreed. We also find that the claimant was at all times bound by her professional obligation to abide by the standards of conduct set by the GMC, as her evidence on the point was not challenged by the respondent.

Change in Service

27. The service changed after its three constituent parts merged in 2016. There was a restructure and the claimant was placed into a post as Medical Advisor/Advisor for Mental Health as evidenced by the letter to her of 1 December 2016 [78]. That letter referenced a Role Profile, which was enclosed [199]. The claimant says she did not receive this document until disclosure in these proceedings. We find it more likely that she was mistaken on this point because of the evidence of Miss Bagnall, who wrote the letter and the fact that the Role Profile was sent to the claimant as part of the pack of documents used in the redundancy process.

28. We find that the following changes to the Wellbeing Team's service occurred over the period 2016 to 2020:

    28.1. The Team expanded to include a Wellbeing Advisor, Counsellors, and Mental Wellbeing Advisors. The claimant remained to provide a specialist and expert role;

    28.2. The Team reached agreement with statutory mental health services that meant students who did not live within the boundaries of Sunderland could now access the Sunderland Initial Response Team if they were in crisis. This decreased the reliance on the claimant's in-house expertise;

    28.3. The Team began to require GP information from students on initial contact. This meant that the service no longer required the claimant's input as Medical Advisor;

    28.4. From October 2018, the respondent had a partnership with Sunderland Psychological Wellbeing Service (IAPT), which ensured that students could avoid long waiting times to access talking therapies;

28.5. All members of the team were able to connect directly with GPs when they needed to, which diminished the reliance on the claimant's contacts; and

28.6. Counselling supervision was extended beyond the claimant.

We make the findings above because we found the evidence of Ms McKenzie to be credible. We did not find the evidence of the claimant to be as credible as Ms McKenzie's. We were mindful of the evidence of the claimant's witness, Ms Wilson, which was that the claimant's role was diminished by the triage system of referrals that was introduced and a change in clinical supervision practices.

29. The claimant's evidence that the service remained the same throughout her employment was not supported by the evidence of the respondent's witnesses, the documents or, to any significant extent, by the claimant's own evidence.

30. Ms McKenzie decided in July 2018 to formalise the process by which students were referred to the various members of the Wellbeing Team. Previously, students could be referred to one another by members of the team, Academics, GPs and other sources. Ms McKenzie decided that the most effective use of the Team's resources was to allocate students to the most appropriate member of the Team. She therefore emailed the claimant on 19 July 2018 [339] with a copy of a draft referral form [341] for the claimant's comments. We note two things about this exchange: firstly, the claimant's views were sought – the change wasn't unilaterally imposed on her. Secondly, the idea of the referral scheme predates the First Disclosure by about three months.

31. It was agreed evidence, corroborated by an email from Ms McKenzie to the claimant dated 15 March 2019 [358], that the referrals to the claimant had reached 26 ongoing cases, which Ms McKenzie thought was too many cases for 5 hours a week post. We agree with Mrs Callan's submission that this was not the act of a manager trying to starve the claimant of work. However, when Ms McKenzie analysed the type of cases that the claimant was dealing with, she found that they were all matters that did not necessitate the level of expertise that the claimant possesses.

32. We find that as the triage system began to operate, the claimant received fewer referrals. We do not find the reduction in referrals to be a consequence of any protected disclosures for the reasons set out below. We do not find that the claimant has shown to the required standard of proof that Ms McKenzie operated the triage referral system unfairly against the claimant. We find that the net result of the introduction of the triage system on the claimant was a reduction of work referred to her, as corroborated by Ms Wilson's evidence.

33. We therefore find that the result of our findings above is that at July 2019, work of the type undertaken by the claimant had diminished, which is one of the definitions of redundancy contained in section 139 of the Employment Rights Act 1996.

Protected disclosures
First Disclosure – 12 October 2018

34. From 2016, the Wellbeing Team used a generic Microsoft Access database to record its interactions with students. The unanimous evidence of all the witnesses who commented on it was that the database lacked functionality.

35. It was agreed evidence that the claimant approached Katie Redhead, a Senior Solicitor in the respondent's legal department, without a prior appointment on 12 October 2018. The claimant and Mrs Redhead have different recollections of what was said at the meeting. The claimant's recollection, as set out in her further information [49] was:

> *As precisely as possible the words I uttered verbally were, "I am getting very worried about these confidentiality things; anyone being able to see what I write after seeing students with mental health problems. Anyone being able to access my database. My notes are going missing; getting deleted, dates of my entries have also been changed; make it difficult to give reports to academic tutors when doing Fitness to Study, Practice, referrals to GPs. I am worried about data protection and GDPR.*

The claimant did not make a contemporaneous note.

36. Mrs Redhead did keep a contemporaneous note [309]:

> *Swarana called into the office and asked to speak to the legal team. KR saw her. Swarana is employed as a GP by the health and wellbeing team. She sees students and occasionally staff. She is concerned about what her confidentiality requirements are and wanted to speak to legal before raising the issue with the GMC. She is concerned because her notes are accessible to all of the team. Some are nurses so are bound by confidentiality themselves but some are support staff. She is concerned because the information is highly confidential and should be on a need to know basis. Her notes can be amended and accessed by other staff. She is also concerned that staff are sharing logins because someone offered her their login when she was unable to log on and she refused.*
>
> *KR said that she was concerned about the issues raised from a data protection perspective and that she would speak to the DPO – Sam Seldon re this.*
>
> *After the meeting KR found out that Swarana is part of Student Journey and the head of that service is Tracey McKenzie.*

37. The notes are not consistent with one another. On balance, we find that Mrs Redhead's note is more likely to be accurate than the claimants' recollection for the following reasons:

    37.1. Mrs Redhead's note was contemporaneous. It was made at about the same time as the conversation itself, rather than being a recollection from some months later;

    37.2. Mrs Redhead is not part of the Wellbeing Team and therefore had no vested interest in making an inaccurate note that avoided mention of protected disclosures;

    37.3. Mrs Redhead emailed Sam Seldon on 16 October 2018 [311] with a copy of her attendance note [309]. Her email included the following:

    Her query to me was about her obligations as a GP. I can't advise her on her personal obligations but I hoped we could look into what she is saying before she goes to the GMC which she indicated that she would.

    As you will see from the brief note, she is concerned about the accessibility of her notes as a GP. I wasn't sure where to go with this. I have not yet spoken to her manager as I thought it best to touch base with you to see if you were aware of or had been involved in looking at the systems that they are using in that department?

    The email is consistent with the attendance note and Mrs Redhead's evidence; and

    37.4. The claimant never raised the fact that she had made this protected disclosure and that, as a result, she had suffered the detriments alleged in this case at any point in the redundancy process, including the appeal heard on 2 October 2020, which post-dated the ACAS early conciliation, the drafting and issue of the claimant's ET1, and the preliminary hearing before EJ Jeram. We find that the claimant was advised by a legal representative from the BMA throughout the redundancy process. We find that this person held herself out to be an employment law expert and senior advisor. We do not find the claimant's explanation that she did not raise the matter of protected disclosures during the redundancy process as credible when viewed through the lens of the legal advice that was available to her.

38. We therefore find that the discussion that the claimant had with Mrs Redhead on 12 October 2018 was no more than a normal business conversation about the claimant's frustration at a poorly-functioning piece of software and its effect on her professional obligations as a doctor. As we do not support the claimant's evidence as to what we said, we find that what she is most likely to have said (i.e. Mrs Redhead's account) is an allegation at most and does not contain information.

Second Disclosure – 15 February 2019

39. It was agreed that the claimant met Mr Pritchard on 15 February 2019. The conversation concerned a student who had been referred to an external agency. We see no need to name that agency in these reasons, as everyone who was at the hearing knows its name. It appears to us that it is not in the interest of justice to reveal the name, given the contacts between the agency and some of the witnesses in this case. The claimant's recollection of her disclosure in her further information [50] was:

> *As precisely as possible the words I uttered verbally were, "You referred that student to [AGENCY] who was also diagnosed as Spectrum Disorder. I was seeing him regularly once a week or fortnightly, he was improving. You said my notes were not available to look and you could not find any. There were no dates and no entries of his visits! Why didn't you phone me? It is a wrong referral; ideas he expressed regarding his family is related to the course he's doing.*

40. We find that the claimant's case at its highest does not meet the standard of proof required to be a protected disclosure. It was evident from the evidence that the claimant's further information (see above), the evidence she gave in writing and, especially, orally, together with the amount of time that she spent on the issue of the student (not the disclosure) in her closing submissions that the meeting with Mr Pritchard was driven by the claimant's desire to know who had referred the student to the agency and her upset at that referral. Her mention of the issues with the database were peripheral, even on her own account.

41. When we then consider Mr Pritchard's evidence and his email of 25 February 2019 to the claimant [316-317], we note that the only reference to the database is one paragraph out of seven:

> *We discussed the database and I explained that we are aware of the issues and that we are currently and actively exploring a common, digital case management system. You mentioned that your case notes have been altered on occasion. I would be grateful if you could provide me with specific examples of same. I will then share those with Tracey directly.*

We also note that despite Mr Pritchard's request for actual examples of the matters of which the claimant complains, she never provided any. We therefore find that no protected disclosure was made to Mr Pritchard because no information was given by the claimant.

42. We repeat our finding that the claimant never raised the fact that she had made this protected disclosure and that, as a result, she had suffered the detriments alleged in this case at any point in the redundancy process, including the appeal heard on 2 October 2020, which post-dated the ACAS early conciliation, the drafting and issue of the claimant's ET1, and the preliminary hearing before EJ Jeram. We find that the claimant was advised by a legal representative from the BMA throughout the redundancy process. We find that this person held herself out to be an employment law expert and senior advisor. We do not find the claimant's

explanation that she did not raise the matter of protected disclosures during the redundancy process as credible when viewed through the lens of the legal advice that was available to her.

43. The claimant alleges that this disclosure was made to Kirsten Black in an email dated 22 February 2019 [317]. This email prompted Mr Pritchard's email of 25 February 2019 [316]. We note that it discloses far less than the claimant's account in her further information (see paragraph 38 above). We also note that the claimant's email of 22 February is inconsistent with her further information.

44. The claimant's email raises seven points. Only three points relate to the database. We find that the email is not a protected disclosure because it does not disclose information.

Third Disclosure – 8 August 2019

45. It was not disputed that the claimant met Sam Seldon, Head of Information Governance and Data Protection Officer for the respondent on 8 August 2019. We found Mr Seldon to be a credible witness, who clearly understood the scope and gravity of his role and took his duties very seriously.

46. Mr Seldon had been in contact with the claimant vicariously previously. Mrs Redhead had brought the content of her discussion with the claimant on 12 October 2018 to his attention on 16 October 2018 [312-313]. His response to Mrs Redhead [313] was to agree with the claimant's complaints (as reported by Mrs Redhead) about the issues concerning the database, but had pointed out that it would not be acceptable for the claimant to be granted sole access to her notes of student meetings, as the Team was multi-disciplinary and had to be able to see each other's notes. He said he was disappointed with the allegation that passwords were shared and would take this up with the Team.

47. Mrs Redhead then wrote to the claimant on 17 October 2018 [314] and advised her that:

> *Following our conversation last week, I have contacted the University's data protection officer – Sam Seldon.*
>
> *Sam has explained to me that he is working with Tracy McKenzie to try to rectify some of the issues in this area, however it is not proving to be as straightforward as hoped. He is going to see what further action can be taken to provide some additional security in this area.*
>
> *I understand that Sam is going to contact yourself and/or Tracy to talk more about the work that can be done on improving the confidentiality and GDPR issues in this area.*

48. As things turned out, the claimant did not meet Mr Seldon until 8 August 2019. Her account of her protected disclosure in her further information [55-60] was:

> *As precisely as possible the words I uttered verbally were, "I have concerns about the database in the Health and Wellbeing. I think Katie advised you to meet me last October, after I spoke to her regarding my Medical-in- Confidence entries. The concerns are the ability to alter, delete and change names and dates by any Team member accessing the notes. Oliver is also aware of GDPR and confidentiality issues of clinical and mental health entries. Their protection should be the same as in NHS systems. I'm sure you understand the loopholes.*
>
> *Can you authorise a telephone line for me, as I haven't got a room still?"*

49. Mr Seldon said that there were some discussions about the lack of control in respect of the database and that he was discussing this with Ms McKenzie. A new system was to be commissioned. He said that the issues raised by the claimant were theoretical and there was no evidence of actual breaches. He said that there is no database which is entirely secure. His evidence was that the Wellbeing Team database was viewed as fit for purpose and the claimant failed to produce any examples of records being altered, or deleted to either himself or Mr Pritchard when requested for instances.

50. We find that the implications for Mr Seldon if he was to suppress or ignore a protected disclosure would have a devastating effect on his career prospects and this, combined with his credibility, led us to accept his evidence that disclosures could be put into three categories: general concerns, data breaches and criminality. In his opinion, what the claimant disclosed to him did not even meet stage 2 (data breach), as she had failed to give him or anyone else at the respondent evidence of actual examples of the matters that she complained of. We agree with his analysis.

51. We therefore find that the claimant did not disclose information to the respondent on 8 August 2019.

Redundancy

52. The claimant disputed very little about the redundancy procedure that the respondent went though. We have already made the finding that there was a genuine redundancy situation at the respondent in June 2019. We find that the claimant's position was unique, as she suggested as much herself. It was therefore in the band of reasonable responses to utilise a selection pool of one.

53. We find that the respondent informed the claimant that her position was at risk on 28 June 2019 [159] and invited her to a meeting to discuss the situation. There was some misunderstanding about whether the claimant's BMA representative could attend her meetings, but that was resolved, and the claimant was represented by the BMA at all stages to appeal. We find that there was no unfairness that impacted on the decision to dismiss caused by the confusion over the status of the claimant's representative.

54. The respondent's business case [200-202] was sent to the claimant on 25 July 2019. She met with Ms Black and others on 1 August 2019, after which she gave her feedback on 7 August 2019 [213-218].

55. We find that the claimant never raised the argument that the reason she had been selected for redundancy was the protected disclosure she had made to Mr Seldon in person or in writing at any point before she issued the proceedings in this case on 30 April 2020. We have already made the finding that the claimant's explanation for her failures to mention the disclosures as a reason for being selected was not credible. We are at a loss to understand why a claimant who alleged what this claimant did would not have been advised by her representative that such matters were relevant to the redundancy procedure.

56. Even after the claimant had clarified her claim following the preliminary hearing on 4 August 2020, she did not raise the issue of protected disclosures in her appeal hearing on 2 October 2020.

57. The claimant's sole issue with the redundancy process (aside from the protected disclosure issue) was the allegation that the dismissing officer, Steve Knight, was not impartial because he chaired a University-wide strategic group relating to student mental health. It was submitted that this meant that he had an obvious involvement in the future of the service and the outcome of the decision in the claimant's case. We reject this submission. There was no evidence put to this Tribunal that Mr Knight was not impartial. The submission by the claimant was not based on any evidence that he had any prior knowledge of the claimant's case or its impact on the delivery of the service. He was the COO of the respondent and at some distance from the day to day operation of the Wellbeing Team.

58. The evidence we saw and heard was of a very careful and conscientious redundancy selection procedure. It was not disputed by the claimant that the respondent offered her a number of alternative roles, which may or may not have been suitable of themselves, but all of which carried a guarantee that her salary would be ring-fenced for 12 months.

59. The minutes of the dismissal hearing disclose a thorough and impartial investigation of the circumstances [265a-265f] and the outcome letter was cogent and consistent.

60. We find that the respondent showed on the balance of probabilities that the reason for dismissal was redundancy. We find that the claimant was informed of the risk, the respondent adopted a reasonable selection decision, including applying a pool of one and made extensive and genuine efforts to find suitable alternative vacancies for the claimant, which she refused.

61. We find that the dismissal of the claimant was within a band of reasonable responses and was fair.

62. We find that the claimant had no issues with the appeal hearing and that there was nothing unfair in the way that the appeal hearing was conducted or in its outcome.

Applying the Findings of Fact to the Law and Issues

63. **Cavendish Munro v Geduld** is authority for the proposition that a protected disclosure must be a disclosure of information and not simply voicing of a concern or the raising of an allegation. We find that all the disclosures made by the claimant failed to contain sufficient factual content that was sufficiently specific to amount to a disclosure of information.

64. We applied the test in **Easwaran v St. George's University of London**:

    64.1. The claimant did not disclose any information, so we did not have to consider;

    64.2. If she believed that the information tended to show one of the prescribed matters, although our finding would have been that she did not; and

    64.3. If so, was that belief would not have been reasonable.

65. For a dismissal to be automatically unfair, the claimant has firstly to establish the fact of the protected disclosures. We have found that the claimant did not meet the required standard of proof to show that she made any protected disclosures, so her claim of automatic unfair dismissal falls at the first hurdle. It also means that all her claims of detriment short of dismissal also fail.

66. We find that the claims of detriment and automatic unfair dismissal were made in time.

67. Using the list of issues above, we make the following findings:

    67.1. The reason for the claimant's dismissal was redundancy.
    67.2. The respondent acted reasonably in all the circumstances in treating redundancy as sufficient reason to dismiss the claimant.
    67.3. The respondent adequately warned and consulted the claimant.
    67.4. The respondent otherwise acted in a procedurally fair manner.
    67.5. The respondent adopted a reasonable selection decision, including its approach to a selection pool.
    67.6. The respondent took reasonable steps to find the claimant suitable alternative employment.
    67.7. The decision to dismiss was within a band of reasonable responses.
    67.8. The claimant did not make any protected disclosures as defined by section 43B of the Employment Rights Act 1996.
    67.9. The respondent was not dismissed for the sole or principal reason that she made a protected disclosure. There was no protected disclosure that materially influenced the respondent's decision to dismiss the claimant.
    67.10. The claimant was not subjected to detriment because she made protected disclosures.

68. We should close this decision by noting and recording that we had a great deal of empathy for the claimant's position. We have no doubt that her expressed opinion that she was treated unfairly was genuine. We also have no doubt that she genuinely believes that the respondent's decision to make her redundant was the wrong one. She may be correct, but that is not the test of whether the dismissal was unfair in law. We wish her well for the future.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
1 April 2021