Case: 2402530/2019

EMPLOYMENT TRIBUNALS

Claimant: **A McDermott**
Respondents: **(1) Sellafield Ltd.**
(2) Nuclear Decommissioning Authority
(3) H Roberts

AT A HEARING

Heard at: **Leeds (partly in person and partly by CVP video conferencing)**
On: 14th, 15th, 16th, 17th, 18th, 21st, 22nd, 23rd, 25th, 28th, 29th and 30th June , and 1st & 2nd July 2021

Before: **Employment Judge Lancaster**
Members: **L Anderson-Coe**
K Lannaman

Representation
Claimant: Mr. J Arnold, counsel
Respondents: (1) & (3) Mr. D Panesar QC
(2) Ms R Levene, counsel

JUDGMENT

All claims are dismissed.

REASONS

The Hearing

1. The case was heard over 13 days, including reading days, with day 14 being reserved for the tribunal to deliberate in private. Written reasons for the decision, which is unanimous, are therefore now provided.

2. The tribunal heard evidence from the Claimant, and from K Connor (a former employee of the First Respondent) and R Denwood (from the GMB union) on her behalf. Other witnesses whose statements had been duly served, were not required to be called to be cross-examined.

3. For the First and Third Respondents, in addition to the Third Respondent H Roberts, the following gave evidence: A Rankin (Equality, Diversity and Inclusion Lead); R Weston (Chief Operating Officer); E McDonnell (Head of Resourcing); J Petrie-Rout (then Head of Talent and Leadership); A Lohan (People Services Lead); A Thompson (then head of Organisation and Reward - by CVP); F Shand (then Organisational Development and Reward Specialist) and L Bowen (then People and Transformation Lead). T Morris (Head of Portfolio Office) was unavailable to be called.

4. The Second Respondent called M Barber (HR Director -by CVP); D Vineall (Group Chief People Officer), and P Vallance (Group Chief Communications and Stakeholder Relations Officer).

5. There is an agreed bundle of 1713 pages.

6. The parties have helpfully referred us to the relevant authorities within their respective written submissions, though in reality it is agreed that the law is not controversial.

Introduction

7. The Claimant is a consultant specialising in the field of Equality, Diversity and Inclusion (EDI). She has extensive experience and has provided evidence of the high regard in which she is regarded by those with whom she has worked.

8. The First Respondent is a limited company operating the Sellafield nuclear site in Cumbria, which forms part of “the estate” of the Second Respondent. Since 2016 it has been a wholly owned subsidiary company of the Second Respondent.

9. The Third Respondent was the First Respondent’s director of HR. She joined the company in 2016 as deputy director, with extensive experience in accountancy and in HR. In September 2017 she was promoted following the premature departure on health grounds of the then director of HR. She had therefore been in post, at the relevant time, for about a year.

10. The Second Respondent is a non-departmental government body created pursuant to the Energy Act 2004 responsible for decommissioning seventeen nuclear sites (“the estate”) and sponsored by the Department for Business, Energy and Industrial Strategy.

11. From 2016 the Claimant had worked for the Second Respondent, to whom her services were supplied by Capita. Initially this was as an agency worker, but latterly

she was engaged by Capita through her own company Interim Diversity Ltd. (IDL). She worked for the Second Respondent across its estate, including at Sellafield, and was instrumental in developing its EDI strategy.

12. After Capita's contract with the Second Respondent ended in August 2018, IDL was commissioned by the HR department to be engaged directly by the First Respondent. This was under a contract commencing on 1st September 2018 and for an 18-month fixed term. The daily rate payable, on an anticipated two days per week, was £1500 plus expenses. L Bowen, on behalf of the HR department had submitted a business case to the First Respondent's procurement board to authorise this direct engagement of IDL without going to tender. The cost was no more than the Second Respondent had previously paid Capita to secure the Claimant's services and the business case acknowledged the Claimant's expertise in EDI and emphasised the importance of continuity. Internal correspondence however clearly recognises the awareness of the need for IDL to continue to provide "added value".

13. The Claimant, albeit the only one, was at all times the employee of IDL. The precise nature of the services to be supplied was never, however, clearly defined. A "scoping meeting" on 15th October 2018 between the Claimant, L Bowen and A Rankin only went so far towards mapping out the projected EDI work plan up to the end of the contract.

14. That contract with IDL was lawfully terminated upon 30 days' notice given on 29th October 2018 to expire on 27th November 2018. Under the terms of the contract termination on notice could be "for convenience" and did not require any reasons to be given.

15. It is not therefore accurate to speak of the Claimant as having been dismissed, nor of "her contract" having been terminated.

16. It is however accepted that the Claimant was a worker for the First Respondent within the extended meaning of section 43K of the Employment Rights Act 1996.

17. She was also a contract worker supplied by IDL to the First Respondent as defined by section 41 of the Equality Act 2010.

The Issues

18. The claims are of being subjected to a detriment because of having made a protected qualifying disclosure under section 47B of the Employment Rights Act 1996, and/or having been victimised under section 27 of the Equality Act 2010. The protected act relied upon for the purposes of victimisation is, where applicable, the same as the protected qualifying disclosure.

19. There are 8 alleged disclosures relied upon. Only the first 6 of those are in fact properly so described, because disclosures made to the Second Respondent

cannot form the basis of any liability on its part for any alleged detriment to which it therefore subjected the Claimant.

20. The Second Respondent will only be liable if in committing any act of victimisation the First Respondent was acting as its agent (section 109 Equality Act) or if it instructed, caused or induced an act of victimisation – the "basic contravention"- (section 111) or if it aided it (section 112).

21. The Second Respondent is not in any event liable in respect of any alleged protected disclosure detriment.

22. The issues in the case are therefore can the Claimant prove that she made a disclosure, and, if so, what were the precise terms? Does that disclosure amount to a protected qualifying disclosure (section 43B (1) of the Employment Rights Act) or the doing of a protected act (section 27 (2) of the Equality Act)? Was the Claimant subjected to a detriment? If so, was the making of a protected qualifying disclosure a material factor in her being subjected to that detriment, or has she proved facts from which we could decide in the absence of any other explanation that she has been treated unfavourably because of doing a protected act, in which case has the Respondent proved that the treatment in question was on no grounds whatsoever because of that protected act?

23. This case is not about whether there was a so-called "toxic culture" at Sellafield.

24. Nor is it about the experience or capability of the Third Respondent to perform in the role of HR director. It is, however, clear that although she had the support of the CEO of the First Respondent, she did not similarly enjoy the confidence of P Vallance or D Vineall of the Second Respondent.

25. Nor is it for this tribunal to make any findings in respect of allegations of harassment against any individual, particularly where that person has not been able to defend themself.

The Alleged Disclosures

26. The alleged disclosures are identified in the list of issues as follows.

Disclosure 1

27. On 12th September 2018, the Claimant advised Ms Roberts that an investigation should be conducted immediately to address harassment in the workplace.

Disclosure 2

28. On or around 24th September 2018, the Claimant stated to Ms Roberts in unequivocal terms that whilst she was happy to speak to the employee in question

the correct course of action was a formal investigation since the Claimant did not have the authority to conduct such an investigation.

29. This is not now pursued as a protected act but only as a protected qualifying disclosure.

Disclosure 3

30. On 28th September 2018 and following discussion with RS and JN on the same day, the Claimant stated to Ms Bowen that immediate action be taken, not least so as to avoid compounding the impression that systemic issues were ignored or mishandled.

Disclosure 4

31. On 2nd October (now amended to 1st October) 2018, and following a concern expressed by FW as to the wellbeing of CL the Claimant urged Ms Bowen to take prompt and meaningful actions to investigate how the HR team had allowed the situation to develop.

Disclosure 5

32. On 15th October 2018, after having been told that Ms Roberts had disclosed an August "Safecall" to A Rankin of the First Respondent's HR department, the Claimant stated to Ms Weston that Ms Roberts had breached the confidentiality requirements of the "Safecall" procedure.

33. This allegation is now withdrawn in its entirety.

Disclosure 6

34. On 16th October 2018, the Claimant submitted her draft report to the HR department.

Disclosure 7

35. On 17th October 2018, the Claimant informed Mr Vallance (NDA Executive of EDI) of her concerns as to the functioning of the HR department and its ability to address systemic workplace issues "in its own yard" and beyond.

Disclosure 8

36. On 29th October 2018, the Claimant informed Mr Vallance that L Bowen/the First Respondent had served notice to terminate her contract and that he might want to obtain a copy of her recent HR EDI Report to provide context that she had a strong

suspicion that she had been served notice on her contract in a bid to suppress wrongdoing.

The Alleged Detriments

37. The alleged detriments to which the Claimant was subjected are identified in her list of issues as firstly ("Detriment 1") failures to investigate or take action in relation to disclosures 1 and 3 to 8, including in respect to disclosure 1 the Third Respondent "attempting to pressure the Claimant into being part of an ill-conceived covert investigation and caused or contributed to acute anxiety and distress", and in respect of failure to investigate disclosure 8 after 29th October 2018 this contributing to the eventual termination of the IDL contract at the end of the notice period.

38. Secondly, ("Detriment 2") it is alleged that the aiding or inducing of the decision to dismiss is somehow in itself a detriment, rather than something which may give rise to liability under section 111 of the Equality Act 2010. This is in relation to representations in writing made to the Third Respondent by T Morris, E McDonnell and A Thompson who are all of course employees of the First Respondent but are not named individual respondents. It is also in relation to representations purportedly made by D Vineall of the Second Respondent to the CEO of the First Respondent in circumstances where the Second Respondent cannot itself be liable as a primary party for the alleged basic contravention, which is the termination of the IDL contract.

39. Thirdly ("Detriment 3") the decision of the Third Respondent to "dismiss the Claimant" and also, ("Detriment 5") the fact of the "dismissal" on notice are both said to be detriments.

40. It is accepted that the lawful early termination of the contract with IDL before the expiry of its limited term, nonetheless, constitutes a detriment to the Claimant as an individual worker employed by IDL.

41. Fourthly, ("Detriment 4") it is alleged that the "approving, authorising or failing to prevent dismissal" is also somehow itself a detriment, rather than something which may give rise to liability under section 112 of the Equality Act 2010. In so far as this relates to the CEO of the First Respondent, he was of course its employee but is not a named respondent. In so far as it relates to D Vineall or P Vallance of the Second Respondent, this is again in circumstances where the Second Respondent cannot itself be liable as a primary party for the alleged basic contravention, which is the termination of the IDL contract.

42. Fifthly, ("Detriment 6") the manner of the Claimant's "dismissal" is also said to be a detriment. That is, the telephone call from L Bowen was brusque, the Claimant was not thanked for her previous work, A Rankin was listening in on the phone call and there was then no further communication from the HR team.

The Facts

43. It is convenient to set out the material facts in their immediate context by grouping them by reference to those alleged disclosures. It is only necessary to set out those facts that are relevant to the issues we have to decide.

    Disclosure 1

44. On Thursday 6th September 2018, following an HR team away day on 5th September and apparently prompted by something which had happened then, there was an anonymous message sent to "Safecall" outlining allegations against VC, a member of the First Respondent's HR lead team: (doc 763-765).

45. On Friday 7th September 2018 this was forwarded by Safecall Ltd. in a report to A Carr who is the First Respondent's legal counsel: (doc 773).

46. Although the report is titled "HR-Sexual Harassment" it should be noted that it does not in fact contain any statement that any person (or persons) submitting the complaint via "Safecall" has themselves been the direct victim of any such act. Nor does it describe any acts which might properly be categorised as overtly sexual molestation or "groping". It speculates as to those who may have been subject to inappropriate touching, but this was only understood to have been on the arm or shoulder. The complaint of the use of inappropriate language is similarly not made directly and the precise comments which are alleged to have been overheard by others are not particularised. Whilst any raised concern about sexual harassment is necessarily to be taken seriously, this report does not, as initially submitted, condescend to any great detail.

47. On Monday 10th September 2018 it was forwarded by A Carr to T Houghton, the First Respondent's Head of Complaints and Compliance, and the Third Respondent was also notified (doc 773).

48. On Tuesday and Wednesday 11th and 12th September 2018 the Third Respondent has recorded that she spoke to L Bowen, J Petrie-Rout, E McDonnell, PW and AL all of whom had been identified in the "Safecall" report as potentially having information about VC's alleged behaviours – though the reference to AL was not in connection with any alleged form of sexual harassment: (3rd Respondent's memo of 7th November 2018 doc 1069).

49. Although L Bowen says that she was not in fact spoken to by the Third Respondent at this stage, what is recorded as having been her response is nonetheless confirmed in her oral evidence as being true. That is, that she had once in the past objected to VC touching her on or about the upper arm but that this "tactile" approach was not confined to women, and she expressly did not consider this to have been sexual.

50. J Petrie-Rout does recall being spoken to at the time by the Third Respondent about a "Safecall" report. She did not report any concerns that had come from her team arising out of the away day on 5th September. Nor did she wish to make any complaint on her own behalf but did confirm in her evidence that she had felt sufficiently confident to address the issue directly when VC had touched her on the arm.

51. The assertion in the ET1 that the Third Respondent told the Claimant on Wednesday 12th September 2018 that "she had sat on this report for weeks" and had taken no action is therefore demonstrably false. She had at this time only known about the report for two days and had already taken steps in connection with it.

52. On the direction of A Carr, the Third Respondent did however then, on 12th September 2018, approach the Claimant to invite her to carry out focus groups with members of the HR function, so as to provide a confidential environment where any concerns about VC which might substantiate further investigation into the "Safecall" allegations could be identified. The Claimant's own oral evidence as to how this was put to her was that she was asked to "flush out if there were any issues regarding VC."

53. The Claimant was not, however, shown the report, and nor did the Third Respondent have a copy in front of her at the time. The Claimant was therefore ignorant of the actual substance of the report and remained so until disclosure took place in these proceedings.

54. It is accepted, however, that the Claimant was at least informed that the report contained allegations of sexual harassment against VC and there was also an allegation that there had been some sort of "cover up".

55. It is common ground that the Claimant expressed an opinion that there ought to be formal investigation. The best and most plausible account of what she actually said comes from the evidence in cross-examination of the Third Respondent, and which is accepted by the Claimant in closing submissions as accurate. She said that the Claimant's words were "<u>if</u> there's an allegation like that, you really need to undertake a formal investigation" (emphasis added).

56. We accept the evidence of the Third Respondent that she was perfectly aware of the obligations on the First Respondent to seek to eliminate discrimination or harassment, and that this would necessitate the carrying out of a formal investigation where there was sufficient evidence.

57. In the Claimant's oral evidence, it was clear that she expressed this opinion only after the invitation to conduct focus groups had already been voiced. The Third Respondent's evidence was, however, that it was said before a discussion of A Carr's advice as to how a preliminary investigation might in fact be carried out.

58. Because the Claimant did not know what was actually contained in the report she cannot have expressed, and did not express, any informed opinion as to the format of any alternative "formal investigation", either as to how it should have been conducted or who should have been interviewed.

59. It was not until the Claimant's revised list of issues was submitted on 13th May 2021 that it was alleged that the Claimant had been subjected to a detriment by reason of the fact that "instead of undertaking a formal investigation, Ms Roberts attempted to pressure the Claimant into being part of an ill-conceived covert investigation and caused or contributed to acute anxiety and distress".

60. It was only in cross-examination that the Claimant first stated that she had disclosed that the so-called covert investigation was, as she understood the ACAS Code of Practice on Disciplinary Procedures, a breach of VC's alleged right to be informed of the charge against him at this stage. This is, of course, an erroneous understanding of the code, which is not concerned with the preliminary investigation to establish the facts but only where it is then decided that there is a potential disciplinary case to answer.

61. It was agreed that the Claimant would conduct a series of "Respect and Inclusion Focus Groups" or individual interviews with members of the HR function. The Claimant and the Third Respondent spoke further about this on Monday 17th September 2018.

62. On the night of Thursday 13th September 2018, the Claimant called an ambulance and was taken to A&E with what the doctor, however, recorded on the admission form as "non-concerning chest pains" for which she was "reassured": (doc 839). The Claimant did not inform A Rankin of this hospital admission when she spoke to him the next day.

63. On Friday 14th September 2018 T Houghton caused a further message to be placed on the "Safecall" system inviting the person who had submitted the initial concern to contact himself, A Carr or the Third Respondent. No response to this request was ever received: (doc 838)

64. On 17th September 2018 the Third Respondent's father died. She was then continuously absent from Sellafield until 15th October 2018, because she was on compassionate leave (up to 21st September), was working remotely so as to be closer to her family, or was on holiday (from 8th October).

65. The Claimant drafted the terms of reference for her focus groups and sent a draft to the Third Respondent for approval on 21st September 2018: (doc 866).

66. The email to the HR team inviting them to participate in the Claimant's "Facilitated Feedback Sessions" was then sent out in the name of the Third Respondent on 24th September 2018: (doc 868).

67. The email invitation, as drafted by the Claimant, was not inconsistent with the Third Respondent's understanding that this would afford an opportunity for any concerns about VC to be raised.

68. On 25th September 2018 the Claimant sent a further email to the Third Respondent setting out a number of further questions which, in addition to obtaining anecdotal evidence in oral discussion, she also now proposed to put in writing to the participants in her enquiry. These questions did in part focus attention directly upon levels of satisfaction with the HR lead team and The Third Respondent in particular and asked, for instance, whether the responder respected the HR Director, somewhat respected her, somewhat disrespected her or disrespected her. Other questions similarly required an answer on a four-point-scale: (doc 880). The Third Respondent did not reply but did not therefore dissent from that revised proposal.

69. The focus groups took place on 27th and 28th September 2018. Individual interviews with the members of the HR lead team, either by telephone or in person, were also scheduled for 1st and 2nd October 2018, though that with A Thompson had to be put back to 11th October 2018.

70. The focus groups/interviews did in fact afford an opportunity for participants to have reported any express concerns about VC. E McDonnell was specifically asked whether she had "ever <u>not</u> felt respected by VC" and confirmed that had she herself had any issues about his behaviour this is where she would have raised them (emphasis added).

71. After the first focus group sessions on 27th September 2018 the Claimant reported orally to the Third Respondent that one participant, SP, had spoken of historic concerns regarding VC. The notes of the focus groups/interviews are clearly material and ought to have been disclosed. They have not, however, been retained and the Claimant does not say what has actually happened to them.

72. At the second set of focus group sessions on 28th September 2018 we accept the evidence of one of the participants, F Shand, that the Claimant initiated a private conversation with him. At the focus group which he had attended he recalls a number of comments suggesting that others in the group were aware of people having felt uncomfortable as a result of something which VC had done: F Shand characterised this in his oral evidence as being like "gossip". He, however, explained to the Claimant that, whilst he would be prepared to speak to the Third Respondent, he did not have any direct experience of VC behaving in a "sexist manner" and nor had he personally been made to feel uncomfortable, although he had experienced what he described as "ribbing" about his hair colour or his quiet nature. He said that he was not 100 per cent sure at the time that the matter would in fact then be referred to the Third Respondent.

73. On Thursday 4th October 2018 T Houghton requested an update from A Carr on the "Safecall" report, either upon any progress made by the Claimant – who is

referred to, not strictly accurately, as our "NDA facilitator" – or upon any reply to the post on 14th September: (doc 926). The reply from A Carr's legal secretary was that "Heather is progressing with Alison and will update us when she is back from leave but nothing further to investigate at this point."

74. On Monday 8th October 2018 an anonymous letter, ostensibly written by a number of members of the HR department, was sent to senior members of management at both the First and Second Respondents including D Vineall and P Vallance: (doc 932). Although not herself a named recipient the Claimant says that she also received a copy at her home address. The letter was highly critical of the Third Respondent.

75. That anonymous letter alleged, inter alia, that: "Serious problems re sexual harassment are being ignored. Someone has recently raised an issue re sexual harassment regarding one of the HR leaders and Heather has taken no action." Whilst this does not specifically refer to the "Safecall" report, anyone who was in fact aware of that matter would obviously have connected the two.

76. On Friday 12th October 2018 T Houghton, clearly in connection with the anonymous letter, contacted A Carr again to inform him that: "I started "tactful discussions" with trusted individuals but it is rapidly becoming apparent that Heather and Alison have done rather more than I was aware of": (doc 947). When she returned to Sellafield on Monday 15th October 2018 the Third Respondent was informed by the First Respondent's Chief Executive about the anonymous letter but was not actually given a copy.

77. Upon her return the Third Respondent prioritised her dealing with the outcome of the Claimant's focus group/interviews. On speaking to the Claimant on 15th October the Third Respondent asked about any information that had been obtained and which related to the "Safecall" report and was informed that it was only F Shand who had expressed any concerns regarding VC. The Third Respondent then queried the situation regarding SP which had already been reported to her on 27th September 2018, and the Claimant told her that she would check her notes.

78. The draft report was written up by the Claimant on Tuesday 16th September 2018 and was emailed to the Third Respondent at 9.28 pm that day: (doc 959).

79. Within that accompanying email the Claimant expressly recorded that "I have not included the issue re VC". She also notes that "And obviously not appropriate to record the comments [F Shand] made as they were made under the strict condition of confidentiality and I didn't want to put anything in writing".

80. On Thursday 18th October 2018 D Vineall spoke to the Third Respondent about the anonymous letter and the investigation into sexual harassment. Although the Third Respondent refers to this in her personal "timeline" dated 16th November

2018 as being about the "Safecall" that would obviously be because she herself would have made the connection, and does not necessarily indicate that it was D Vineall who also referred to it in that way. She informed D Vineall that she was, on advice from A Carr, using the Claimant to undertake focus groups. At this point the Third Respondent had not yet shared the content of the draft report with the HR lead team, and we accept her evidence that she was therefore still contemplating further potential input from the Claimant in relation to VC. In particular, she had not by this stage received any additional information about what SP had reported and had not yet spoken to F Shand.

81. On Friday 19th October 2018 the Third Respondent requested a new copy from T Houghton of the "Safecall" submission: (doc 1001).

82. On Monday 22nd October D Vineall met with the Chief Executive of the First Respondent, again clearly in the context of having received the anonymous letter, and was once more assured that the sexual harassment case was being addressed: (doc 1008).

83. On Wednesday 24th October 2018 the Third Respondent met with F Shand: (doc 1069).

84. On Thursday 1st November the Third Respondent, together with the First Respondent's former HR Director, spoke to VC regarding the allegations against him and her report to T Houghton was dated 7th November 2018: (doc 1069).

85. On 16th November the Second Respondent's Chief Compliance Officer recorded that he did not agree with the reasons for closing out the investigation and indicated that he intended to commission a further investigation into whether or not the complaint into the alleged ignoring of problems regarding sexual harassment as set out in the anonymous letter of 8th October should be reopened: (doc 1080). This is understood to have concerned a potential new witness, who was on secondment between the First and Second Respondents so that the matter potentially fell within the remit of the NDA.

86. Apart from such matters as may have come to light in the course of her focus groups/interviews the Claimant remained ignorant as to the nature of any further allegations against VC or the steps being taken to address those concerns.

87. Although out of the time frame with which we are concerned an executive director of the First Respondent carried out nineteen fact finding interviews and concluded on 21st December 2018 that there was no case to answer in relation to the "Safecall" allegations: (doc 1120).

<u>Disclosure 2.</u>

88. On 24th September 2018 the letter from the Third Respondent inviting participation in the "Facilitated Feedback Sessions" was received by SG, a former member of the HR department.

89. She responded by email timed at 3.54 pm on the same date stating that she would not be able to make the proposed dates for a meeting but set out a number of concerns in her email reply, which she also copied the Claimant into: (doc 874).

90. This was not in fact, as the Claimant has alleged in the pleadings, a grievance under the First Respondent's procedure and was clearly never regarded as such by SG herself.

91. The email alleged that SG had been treated with disrespect by one of the HR lead team, but that she "did not actually feel bullied". That person was not named, but there is no dispute that it refers to L Bowen.

92. The email makes no reference whatsoever to any potential complaint of discrimination under the Equality Act 2010. It is now conceded that this cannot therefore provide a context in which anything the Claimant said about this might constitute the doing of a protected act for the purposes of any victimisation complaint.

93. The Third Respondent responded immediately at 4.20 pm acknowledging the email and asking SG to meet with the Claimant to discuss the matters in confidence. Alternatively, The Third Respondent offered to speak with SG herself, though a meeting in person would not have been possible until after 15th October. The Claimant was copied into that email reply: (doc 873).

94. The Claimant and the Third Respondent spoke on the telephone at some stage on 24th September and the Claimant agreed that she would speak to SG.

95. At its highest the alleged disclosure in that telephone conversation is now said by the Claimant in oral evidence to have been that although she would speak to SG she would not be positioned to conduct any actual investigation into "bullying" by a member of the lead team. Although the Claimant says that she made this comment specifically with reference to L Bowen, she would not in fact have known for certain at this stage against whom the complaint of disrespectful treatment was brought.

96. The Claimant emailed SG at 8.58 am the following morning, 25th September 2018, to confirm that: "As Heather suggests we need to meet and I would like to understand in more detail exactly what happened (and) any wider observations you may have": (doc 873).

97. SG replied at 9.13 am (copying in the Third Respondent) and confirmed that she would be happy to speak one-to-one, but not in a focus group, and said that her

complaint was against the person "championing EDI" – which although still not actually naming her no doubt served to identify L Bowen: (doc 872).

98. We note that L Bowen strenuously denies any inappropriate behaviour during the incident in question, and it is no part of the Tribunal's function to make any finding on this matter.

99. The Claimant and SG did then subsequently speak by telephone for about an hour. There are, of course, no notes of that conversation and the Claimant has given no evidence as to what specifically was discussed. At the end of that conversation however the Claimant told SG that the Third Respondent would want to speak to her directly: (doc 1044)

100. When the Claimant submitted her draft report on 16th October the covering email states that it "does not include the email SG sent" but erroneously, and somewhat inexplicably, states that "SG didn't contact me": (doc 959). The Claimant therefore never briefed the Third Respondent on the content of her discussion with SG.

101. At 9.03 am on 25th October 2018 SG however – because she had been led to understand from the Claimant that this was the intention – emailed the Third Respondent to arrange a meeting to speak to her directly about the "survey recently conducted and my feedback". The Claimant, who was however on holiday at that time, was copied into that email: (doc 1010).

102. The Third Respondent replied promptly at 11.08 am the same day to say that she would indeed value a private meeting, but the Claimant was not copied into that reply: (doc 1010).

103. Upon her return from holiday on 29th October 2018, unaware that the Third Respondent had already replied, the Claimant emailed SG and repeated the incorrect assertion that they had not in fact spoken. She again suggested that SG speak to the Third Respondent and offered to facilitate this with no suggestion, as is now made in her evidence, that the Third Respondent had agreed to do this earlier or that she was at fault for not having already done so: (doc 1045). The Claimant did say to SG at this stage that it was a matter which was "possibly outside the scope of my work" (emphasis added), but the Third Respondent was not copied into this correspondence.

104. SG apprised the Claimant of her error and told her that arrangements were already in hand for her to set up a meeting with the Third Respondent, but that she had not yet done so: (doc 1044).

105. The next day 30th October 2018, also the day after notice was given to terminate the contract with IDL, the Claimant spoke to SG, apparently to ask for a copy of the earlier Employee Engagement Survey, even though the Claimant had already received a copy of this on request from A Thompson on 11th October 2018: (doc 945). She went on to ask SG a number of questions, in particular about the Third

Respondent, which she, SG, considered to be "fishing" so that she contacted T Houghton to express her concern: (doc 1039/40).

106. The Third Respondent and SG did meet on 7th November 2018.

Disclosure 3

107. On 28th September 2018 A Rankin invited the Claimant to attend a meeting with two members of a young professionals' group, RS and JN. This was because he was concerned that they had information, particularly about homophobic abuse on site, of which the Claimant ought to have been aware to set the context for any future work in the field of EDI, and where she may have been able to offer further support to the individuals concerned.

108. The Claimant took three pages of notes recording what she was told by RS and JN: (doc 852-4). Although the sources of these comments are unattributed, and they are not connected to any particular place or time, they are highly offensive and concerning.

109. The Claimant accepts that both she and A Rankin sought to persuade RS and JN either to make a formal complaint themselves or to encourage others involved to do so, but that they were adamant that they did not wish to do so. Absent such a complaint the Claimant accepted in oral evidence that a formal investigation would not have been possible.

110. The highest that the Claimant now puts her alleged disclosure to L Bowen, A Rankin's line manager, is that she informed her of the situation so that she too might seek to persuade RS or JN to take the matter further.

111. The Claimant has always maintained that this conversation with L Bowen took place on the same date that she had spoken to RS and JN, 28th September 2018. L Bowen was however on annual leave that day.

112. It is only in her oral evidence that the Claimant has, for the first time, alleged that she spoke to L Bowen on this day by telephone. Although the original claim form and the Claimant's witness statement do not expressly state that this alleged disclosure was made in person, that is the implication. Had the Claimant, who was on site that day, sought out L Bowen to speak to her but had had to contact her by telephone because she was on holiday, we would have expected that detail to have been remembered.

113. It is clear that the Claimant cannot have and did not, in the course of making any alleged disclosure, provide L Bowen with a copy of the notes she had taken in her discussion with RS and JN.

114. It is also accepted that the Claimant did not ever in fact provide a copy of her notes to L Bowen or to anybody else at the Respondents. Nor did she have any further communication with L Bowen, or anyone, about this matter: this included the fact that she did not ever go back to speak to RS or JN.

115. L Bowen has no recollection whatsoever of any such conversation having taken place, and on balance we therefore prefer her evidence that it did not in fact happen.

116. Necessarily, therefore, no conversation on this topic as between L Bowen and the Claimant was ever reported to the Third Respondent.

Disclosure 4

117. CL was an employee of the First Respondent who had been on long term sick leave since 23rd May 2018 with mental health issues, and who had had previous lengthy absences because of physical ailments.

118. He would almost certainly meet the definition of somebody with a disability.

119. The Claimant accepts that she was wholly ignorant of the steps which the First Respondent had or had not taken to support CL throughout his absence.

120. In actual fact the First Respondent has adduced what appears to be good evidence of extensive attempts to assist CL whilst managing his absence, including active involvement on the part of the Third Respondent. Although it is understood that CL is bringing his own Tribunal claim, presumably for some form of disability discrimination, the details of that complaint are not known and are not material to the case before us, so that we do not, of course, make any determination.

121. At one of the focus groups facilitated by the Claimant on 28th September 2018 FW, a colleague of CL's and with whom he had been in contact in the form of distressing text messages, expressed her concerns for his state of mind and for his well-being. There is, of course, no note by the Claimant of what was said by FW in that focus group.

122. The Claimant has alleged that she urged L Bowen "to take prompt and meaningful action to investigate how the HR team had allowed the situation to develop." In her oral evidence she now puts the case no higher than that she urged L Bowen to "explore" whether all that could be done to assist CL was being done.

123. L Bowen was not CL's line manager and so was not directly responsible for managing his absence, that would have been CB. The Claimant said that she nonetheless approached L Bowen about the issue because she was the person with whom she had an existing relationship, not CB. She acknowledged that she believed L Bowen did care about CL, and that she believed her when she said she was aware of the problem already and that she would look into it.

124. The Claimant has originally maintained that she spoke to L Bowen on 2nd October 2018. She has now amended that account to say that it was raised in the course of the one-to-one that she conducted with L Bowen on 1st October 2018, as part of the "Facilitated Feedback Sessions". There is again, of course, no note of that discussion and it is somewhat implausible that the Claimant should have used that time for an entirely different purpose to that for which the meeting was scheduled.

125. On balance we prefer the recollection of L Bowen, as now expressed in the course of her oral evidence, that there was a very brief encounter in the corridor where the Claimant mentioned the situation with CL.

126. L Bowen was indeed aware of the situation, had discussed it with CB, and had also independently already had a conversation with FW about her concerns for CL.

127. Independently of any conversation with L Bowen, the Claimant was at this same time also discussing CL in emails with A Rankin: (doc 904-7).

128. This exchange was prompted by an email sent by A Rankin to a number of people at 3.40 pm on 2nd October 2018, where he is pessimistic about the prospects of now being in a position to launch the First Respondent's new Bullying and Harassment Campaign on schedule.

129. This is followed up by a private exchange with the Claimant when at 6.57 pm he explains why he is having a "glass half empty day". He informs the Claimant of an employee suicide that day and of "more stories of employees receiving very poor treatment".

130. The Claimant replied, again in a private exchange at 7.12pm. She said "**Oh Alan, I am sorry to hear that.** That is just awful re the employee suicide. I don't want to add to your woes, but the HR feedback is indicating how worried some are about CL too."

131. A Rankin replied further at 7.20 pm: "CL is also a big issue. He largely blames me for his current very poor health and whilst his views are entirely incorrect and out of proportion **my personal concern about his condition and prognosis/outcome are keeping me awake a lot.** We all should examine how we could have helped more."

132. The final email in this chain is from the Claimant at 7.36 pm where she says: "Me again. Re CL I don't know any of the detail but I do think it is important that the team and you feel that everything that can be done is being done for him and for you. **I am now concerned about you too -you need support so that you are not carrying this."**

133. In the entirety of this exchange with A Rankin the Claimant makes no mention whatsoever of her ever having raised the issue with L Bowen, either the day before or at any other time.

134. The Claimant confirms in her last email to A Rankin that as at 7.36 on 2nd October 2018 she still did not know any of the detail about CL's case. We are satisfied therefore that she cannot have, and did not have any discussion with L Bowen that went beyond a similar general expression of employees having recorded their concerns about CL.

135. The Claimant is also ignorant as to any measures taken by the First Respondent with respect to CL after 1st October 2018. In actual fact the Third Respondent already had a pre-arranged further meeting with CL on that same day, 1st October 2018, which was attended in her stead by the Second Respondent's executive mental health sponsor. The Claimant therefore provides no basis whatsoever for her stated belief in evidence that "I think L Bowen would have been upset that I asked her to "explore".

136. The Third Respondent was never made aware at the time of any conversation on this issue as between the Claimant and L Bowen.

<u>Disclosure 5</u>

137. It is now rightly conceded that the email of 15th October 2018 to R Weston was in fact neither a protected qualifying disclosure nor the doing of a protected act.

138. The email reads "Sorry to bother you. Alan has just made me aware that Heather has mentioned the Safecall issue to him. I am not sure why": (doc 951).

139. This email on its face could never have been properly construed as a disclosure that the Third Respondent had "breached the confidentiality requirements of the "Safecall" procedure".

140. It was only in cross-examination that the Claimant for the first time said that in her ET1 the person whose confidentiality she was referring to as having been broken was L Bowen.

<u>Disclosure 6</u>

141. Following the HR away day on 5th September 2018 the Claimant expressed to A Rankin, J Petrie-Rout and L Bowen and CB her criticism of A Thompson. She also expressed the view that the Third Respondent was not up to the role of HR Director.

142. On that evening, or the next day, the Claimant repeated to the Third Respondent her opinion that she should "get rid of" A Thompson and said the same about VC.

143. The Claimant accepts that she had indeed by this stage formed the view that the Third Respondent should not remain in post. That opinion she says was based upon two earlier interactions which she had had with the Third Respondent in about June

and August 2018. She now alleges that these demonstrated a lack of commitment to EDI on the part of the Third Respondent, particularly in respect to race or sexual equality in the workplace. We do not need to determine this issue, although we prefer the evidence of the Third Respondent as to what actually happened on these occasions over that of the Claimant. The significant point for our purposes is the Claimant admits that she had already arrived at this adverse conclusion about the Third Respondent.

144. In the course of conducting her “Facilitated Feedback Sessions” the Claimant spoke to 37 people in the HR department. As there were in fact more than 90 in the team, that is, however, less than half the total.

145. In the course of those sessions the Claimant in addition to the questions directly about VC also, according to J Petrie-Rout, specifically asked questions inviting potential negative feedback in relation to A Thompson, whom she had already decided should be “got rid of”.

146. According to L Bowen, and J Petrie-Rout the Claimant also appeared to be inappropriately directing her questioning towards securing adverse criticism of the Third Respondent.

147. The Claimant, we repeat, has produced no notes of what was said at any of the sessions she conducted.

148. Prior to its completion, the Claimant did contact both L Bowen and R Weston to suggest that she believed the Third Respondent would respond badly to the adverse criticism that she was intending to present in her report.

149. On her return to Sellafield on Monday 15th October 2018 the Third Respondent contacted the Claimant to ask for a progress report on the outcome of the Facilitated Discussions and was informed for the first time that it was “not good”. The Third Respondent had on that same day been informed by the CEO of the receipt of the anonymous letter, but was not shown a copy. The Claimant informed the Third Respondent that she did have a copy of the letter. It appears that she also communicated to the Third Respondent that the letter mentioned her father and was a personal attack on her, as a result of which the Third Respondent confided in the Claimant by text on 16th October 2018 that she was “not in a good place at the moment”: (doc 984).

150. The Third Respondent discussed the receipt of the anonymous letter with the HR lead team on 16th October 2018 and informed them that the Claimant’s Draft report was anticipated shortly.

151. The Draft Report was written up by the Claimant in the course of Tuesday 16th October 2018.

152. Also on 16th October 2018 the Claimant had arranged to speak to P Vallance of the Second Respondent about something but emailed his assistant at 2.09 pm to say that she no longer needed to do so because she had managed to sort things out without further help": (doc 982).

153. The Draft Report was emailed to the Third Respondent at 9.28pm: (doc 959). The Claimant in referring to her preliminary recommendations stated, "nothing that is rocket science and all very logical based on the feedback" and she signs off the email "Speak soon and happy reading!"

154. The Claimant also initiated a series of text messages with the Third Respondent commencing at 9.25 pm that night: (doc 983). The Third Respondent replied that she had a cold, was at home and would not read the report that night and so did not want to discuss it yet: (doc 984).

155. Because the Third Respondent had not indicated that she needed to speak to her, the Claimant left Cumbria early on Wednesday 17th October 2018 to drive back to Yorkshire. She was going on holiday on Thursday 18th October 2018.

156. The Claimant texted the Third Respondent again at 12.08 pm on Wednesday 17th October 2018 to ask if she was okay: (doc 985). The Third Respondent replied that she was "in back-to-back meetings but obey (sic) -?*"a bit"?* - disappointed however if you ask you have to be prepared for the answer".

157. The Claimant must however have been in contact with P Vallance on 17th October 2018 because at 3.07 pm he texted her to say that in respect of something which she had raised the Group CEO of the Second Respondent was going to speak to the chairman of the First Respondent: (doc 990).

158. At 3.53 pm the Claimant texted the Third Respondent again and said about the Draft Report: "I think there are some simple things that could be done to really demonstrate to people you (plural) have heard the issues": (doc 986). The Third respondent replied to thank the Claimant, wish her a good holiday and to inform her that she was to share the Draft Report with the lead team on the next day, Thursday 18th October 2018, and that "we will look at a plan of 2-3 things to do immediately and the option of a dept wide brief": (doc 987).

159. At 5.03pm on 17th October 2018 the Claimant texted the Third Respondent to say that she hoped it went well tomorrow and then again at 6.49 pm on Thursday 18th October 2018 to ask if she had got all she needed from her session: (doc 988).

160. The format of the Draft Report (doc 961) is firstly a half-page setting out the methodology, then 12 pages of selected but unattributed verbatim comments, from the participants with no indication as to how many of the 37 responders are in fact quoted at all, or which of them is the author of multiple quotations. There is also an executive summary at the start by the Claimant together with a further summary introducing each of the eight areas covered.

161. There are then 6 pages recording the responses to the six written questions, with pie charts although the sample is so small as to render the conversion to percentages largely superfluous. 16 responders said they respected the lead team to some degree as opposed to 21 who did not, but 22 people respected the Third Respondent as against only 15 who did not.

162. Finally, there is a half-page of 6 bullet point “Recommendations” which the Claimant accepts are “anodyne”. They contain no concrete proposals and are accurately described by the Third Respondent as “some generic recommendations which could have applied to any team”. This is padded out by two proverbs supposed to illustrate the value of “effective team working”.

163. Only one of the 108 quotations in the Draft Report has now been identified in closing submissions as something which is relied upon as being a protected act for the purpose of the victimisation claim. That is within the section on “trust”: “CL – actively disliked by the lead team and some of their comments are not appropriate. This massively reduces trust and safety. What if I got ill - would they speak about me like this?”

164. The Claimant in her preamble to this section on trust does not identify this comment as in anyway relating to CL’s disability.

165. Nor, notwithstanding that it is critical of the HR lead team and refers to low morale in the department, does the Claimant anywhere in the Draft Report identify any issues raised which she considered to disclose any breach of a legal obligation (whether a common law duty of care toward employees) or an endangerment to health or that there had been a failure to investigate any such specific matter.

166. The Third Respondent did share the contents of the Draft Report with the lead team on Thursday 18th October 2018, having redacted it to remove references to named individuals apart from those relating to herself.

167. The Third Respondent, accurately in our view, summarised the reactions as “I would say the team were shocked and horrified by the contents of the report. The team expressed concerns about the negative way in which the report had been written…Notwithstanding the concerns about some of the content of the report, it was clear that some action was warranted in light of the range of concerns which had been expressed. However, in order to avoid a knee-jerk reaction, everyone agreed that we should take some time to reflect.”

168. Following this meeting four members of the lead team, independently of each other, contacted the Third Respondent further to express their opinion that the Draft Report did not represent a balanced picture of the department because the quotations selected for inclusion were predominantly negative, did not reflect the fairly even split between those who expressed satisfaction with the lead team or the Third Respondent and those who did not, in particular that it did not record

positive things which they themselves had said in their interviews, and to express their concerns as to the way the Claimant had conducted the process. These were L Bowen, E McDonnell, A Thompson and T Morris.

169. Three of these people put their concerns in writing as follows. T Morris's email dated Thursday 18th October 2018: (doc 1004). A Thompson's letter dated Friday 19th October 2018: (doc 998). E McDonnell's email dated 22nd October 2018: (doc 1002). Although they had each spoken to the Third Respondent to some extent before delivering their written concerns, in each case the initial approach was unsolicited by her.

170. Although the Information Commissioner's Office has criticised the fact that these letters were produced outside of the First Respondent's computer or email system hard copies were properly delivered into the control of T Houghton on 30th October 2018.

171. These letters are not fabrications, as had previously been asserted by the Claimant but which allegation is sensibly not now maintained. They were prepared on the dates shown and represent the genuine views of the authors.

172. On or about Friday 19th October 2018 L Bowen updated the Third Respondent on the actual cost to date of the IDL contract, that it had exceeded the expected 2 days per week cost, even though contingencies were built in to the projections, and that there was risk of overspend.

173. The invoices submitted by IDL show that the cost of the Draft HR Report was at least £12,000 (exclusive of VAT) plus expenses. Given the admittedly anodyne nature of its recommendations, and irrespective of the concerns over the impartiality of its conclusions, this clearly in our view did not reflect value for money to the public purse no matter what the "going rate" may have been for consultants.

174. The Third Respondent asked L Bowen what the implications for EDI would be if the Claimant's services were no longer retained and she in turn posed the question to A Rankin. We accept the evidence of the Third Respondent that she was reassured and was confident that L Bowen and A Rankin had the necessary expertise to continue the work in this area and that the Claimant was not in fact bringing sufficient added value to justify the high cost of the IDL contract.

175. The Third Respondent took the decision to terminate the IDL contract on due notice, having discussed the matter in advance only with the CEO.

176. On Monday 29th October 2018 L Bowen, acting on the Third Respondent's instructions, telephoned the Claimant to inform her of the cancellation of the contract with IDL. The reason for termination was simply stated to be "funding constraints". The Claimant said that she needed time to think and that she would be in touch, it was she who ended the call: (doc 1098).

177. Unbeknownst to the Claimant A Rankin listened in to L Bowen's side of the conversation.

178. The Claimant did not in fact make any further contact, save to submit her final invoice on Tuesday 30th October 2018: (doc 1523). That is the context for A Rankin referring to "radio silence" from the Claimant as at 11.55 am on Tuesday 30th October and asking L Bowen if he should therefore drop the Claimant an email: (doc 1037). The response from L Bowen that he should not do so until she had spoken to the Third Respondent was in the context of confirming if further payment was in fact due: (doc 1036).

179. Although the contractual obligation to pay for work not done is by no means clear the final invoice was not disputed and L Bowen confirmed payment to be made on Monday 5th November 2018: (doc 1054). This email also confirmed that the reason for termination of the IDL contract was financial, and invited the Claimant to make contact if she wished to return to work. The Claimant did not reply, but nor did she seek to claim any further payment allegedly due during the notice period.

<u>Disclosures 7 and 8</u>

180. P Vallance and D Vineall were named recipients of the anonymous letter on 9th October 2018.

181. As we have noted the Claimant, after cancelling a call to P Vallance on 16th October 2018 did in fact speak to him on 17th October 2018.

182. P Vallance has, however, no specific recollection of that conversation. We accept his evidence that had it in fact raised any substantial concerns, of the type now alleged, as itemised in the Claimant's witness statement, which required investigation that would have acted as a "red flag" warning to him, but that it did not.

183. The disclosure as identified in the list of issues ("On 17th October 2018, the Claimant informed Mr Vallance (NDA Executive of EDI) of her concerns as to the functioning of the HR department and its ability to address systemic workplace issues "in its own yard" and beyond") reflects the content of an email from A Rankin to the Claimant on 2nd October 2018 , already referred to in the context of Disclosure 4, where he observes in respect of the proposed Bullying and Harassment initiative, "I agree we need to clean up our own HR backyard mess first": (doc 905).

184. Although the Claimant now also seeks to cast doubt on A Rankin's commitment to EDI because of his comment in the same email "did I also mention one of our autistic employees was called a "mong" by her team leader too…Welcome to 1976", her initial reply clearly acknowledged that she understood this as merely an indication of frustration with the slow progress of change, saying "it does get to you sometimes... Me too": (doc 904). The Claimant acknowledges that she has never

before her witness statement made any allegation of inappropriateness on the part of A Rankin as a result of this email. That would include an admission that she did not in fact raise this with P Vallance on 17th October 2018 as is implied in her witness statement.

185. Whilst D Vineall spoke to the Third Respondent on 18th October 2018 this was not in respect of anything which the Claimant had said to P Vallance the day before. Although the Third Respondent in her timeline references this as a discussion about the "Safecall" that does not mean that D Vineall identified the issue in this way. The note of this conversation in the Third Respondent's timeline reads: "HBR asked DV if she was to be investigated and he advised **"that will be a SL decision as the letter was addressed to Paul".** This is clearly a reference to the anonymous letter and the whole of the exchange is fully explicable in that context without any need to import an additional postulated report from P Vallance which specifically identified the "Safecall" alert as such.

186. D Vineall and the CEO of the First Respondent met on Monday 22nd October 2018. Again, that is perfectly explicable as discussion following on only from the anonymous letter. The Claimant was not mentioned at all, as is clearly shown by the fact that her name does not appear anywhere in the memo of that meeting prepared by D Vineall the next day, shortly before his going on holiday: (doc 1008).

187. At that meeting D Vineall proposed the secondment of M Barber from the Second Respondent to take over as head of HR pending finding a suitable replacement for the Third Respondent.

188. We accept the evidence of D Vineall as Group Chief People Officer for the Second Respondent that, although carrying great influence, the Second Respondent could not directly intervene in the affairs of the First Respondent.

189. The Services Agreement between the Second and the First Respondent expressly provides under clause 3.1 "Partnership and Agency" that "Nothing in this Services Agreement is intended, or shall be deemed, to establish any partnership or joint venture between NDA and SL (Sellafield). Nothing in this Services Agreement is intended, or shall be deemed to, authorise SL to make or enter into any commitments for or on behalf of NDA": (doc 151).

190. On Monday 29th October 2018 the Claimant firstly spoke to M Barber of the Second Respondent, where it is admitted that she merely informed him of the fact that IDL's contract had been terminated.

191. Subsequently on that same day the Claimant spoke to P Vallance and also informed him of the termination but, on this occasion, she alleges that she also advised him that he may wish to obtain a copy of her Draft Report and that she had a strong suspicion that she had been served notice of her contract in a bid to suppress wrongdoing. By "wrongdoing" the Claimant means those matters which

she had allegedly itemised in her earlier conversation with P Vallance on 17th October 2018.

192. By Wednesday 31st October 2018 The Third Respondent in her timeline records being told by T Houghton that someone at the Second Respondent was extremely nervous about terminating the IDL contract immediately after the report into inclusion and respect was received. It is clear therefore that the Claimant had informed somebody, presumably therefore P Vallance, that she had indeed submitted a report.

193. P Vallance however has no recollection of the substance of that conversation beyond being told of the fact of termination. Once more, however, we accept his evidence that had it in fact raised any substantial concerns that there had been any suppression of wrongdoing required investigation that would have acted as a “red flag” warning to him, but that it did not.

194. On Thursday 1st November 2018 M Barber texted the Claimant to say he was following things up: (doc1662).

195. On Friday 2nd November 2018 M Barber did then speak to the Third Respondent and was informed that there was no hard evidence to justify investigating the “Safecall” report and that the IDL contract had been terminated for financial reasons.

196. Shortly after Monday 5th November 2018 upon his return from holiday, D Vineall was informed by the CEO of the First Respondent that the reason for the termination of IDL’s contract was financial.

197. Also, at or about this time, D Vineall and the CEO of the First Respondent agreed as a collaborative measure that the First Respondent would cooperate with a diagnostic review of the HR function, to be paid for by the Second Respondent: (doc 1080). This led to the commissioning of a report from Price Waterhouse Cooper. As already noted in the context of Disclosure 1 the Second Respondent’s Compliance Office also intended to commission a third-party investigation into the “Safecall” report following the identification of the potential witness who was on secondment.

198. The Claimant instructed solicitors almost immediately. On Tuesday 6th November 2018, following a conversation the day before, M Barber offered the Claimant a meeting with the CEO of the Second Respondent; (doc1059). After talking again to her solicitor, the Claimant declined this opportunity pending further legal advice: (doc 1058).

199. On Thursday 8th November 2018 the Claimant emailed M Barber with a copy of the First Respondent’s whistleblowing policy and asserted that it had failed on most of the key points, but without any detail and without at that stage identifying herself as a whistle blower: (doc 1657).

200. Following a meeting with her solicitor and counsel the Claimant again contacted M Barber on Thursday 15th November: (doc 1081). At this point she identified that she was considered to be a worker under the whistleblowing provisions and that she felt she had been victimised and was seeking funding to bring a claim from the Equal Opportunities Commission.

201. On Friday 16th November 2018 the Claimant's solicitors wrote to the CEO of the Second Respondent requesting a meeting with the board of the Second Respondent and the chair of the First Respondent with her solicitor and counsel in attendance: (doc 1586).

202. On Thursday 22nd November 2018, having discussed the matter with the CEO, M Barber texted the Claimant asking to speak. She initially refused, but they did then in fact have a conversation on Friday 23rd November 2018 when she declined to have any meeting without her legal team also being in attendance: (docs 1664 and 1100).

203. The Claimant was offered re-engagement with the Second Respondent directly to work elsewhere across its estate but declined.

204. On Friday 23rd November 2018 the solicitors for the Second Respondent reiterated that a meeting could be held, but not with the full board and not with lawyers present: (doc 1558).

205. At no stage did the Claimant ever suggest that the Second Respondent could or should intervene to stop the IDL contract being terminated.

206. The Claimant's case now in her oral evidence is that the Second Respondent should somehow have affected the suspension of the notice taking effect until it had carried its own separate investigation into the reason for termination of the contract.

Conclusions

207. Establishing from the Claimant the facts of what was actually said in respect of any alleged oral disclosure has proved elusive. The Claimant has not provided any clear verbatim account of what was said close to the time. It is now, of course, nearly 3 years after the events in question and lapses in memory might be excused. Unfortunately, however, the more detailed accounts now given by the Claimant, particularly in her witness statement, bear all the hallmarks of being what she would like to think that she said in support of her claim as it has now been constructed, rather than what actually happened at the time.

208. We have come to our conclusions as to what was in fact said by taking into account not only the conflicting evidence of witnesses making allowance as appropriate for any potential inaccuracies in recollection, but also the documented surrounding

context so as to determine what is the most plausible finding in all the circumstances.

Disclosure 1

209. The "Safecall" report might have been dealt with differently. In hindsight it might indeed have ben preferable if it had been. It was, however, investigated.

210. The Claimant did not, of course, have any actual knowledge as to the substance of that report and could not therefore make any specific representations at the time as to how it ought to have been addressed.

211. Everybody who was made aware of the "Safecall" report, whether or not they were also aware of its specifics, understood that the Facilitated Feedback Sessions led by the Claimant were in fact intended to form the first stage of any investigation into the allegations against VC. That understanding extended to the Claimant.

212. Had it not been for the "Safecall" report the Claimant's experience in facilitating focus groups would not have been called upon. The initial purpose of such groups was clearly understood by her to be to "flush out if there were any issues regarding VC."

213. In the absence of any direct knowledge of the specific nature of the allegations, the Claimant's observation that "if there's an allegation like that, you really need to undertake a formal investigation" is no more than an expression of opinion.

214. It did not, therefore, disclose any information, which could properly be said to amount to a protected qualifying disclosure. Nor is it even an allegation such that in an appropriate context it might nonetheless qualify for protection.

215. Nor was the Claimant in any position to make any actual allegation of discrimination, whether express or implied, before the potential matters raised in in the anonymous "Safecall" report, the details of which she of course did not know, had been investigated. Nor, even though it need not refer to any specific statutory provision, does this expression of opinion amount to the doing of anything for the purposes of or in connection with the Equality Act, because the Claimant was not actually aware of any facts which she was reporting as deserving of investigation.

216. All the Claimant was saying was that if, conjecturally, there were in fact serious allegations they ought to be formally investigated. There is nothing to suggest that had substantiated allegations come to light they would not then indeed have been subject to a formal process.

217. The Claimant was not pressurised into setting up the Facilitated Feedback Sessions. She had almost complete autonomy as to their format and content.

218. In the event, although the Claimant was clearly aware of the importance attached to these sessions as a means of eliciting any information which corroborated the potential allegations of “sexual harassment” against VC she chose instead to focus upon negative criticism of the style of the lead team and in particular of the Third Respondent.

219. When the Draft Report was presented the Claimant then chose not to include, within or without the main body of the report, any information which would assist – one way or another - in evaluating whether the anonymous “Safecall” allegations had any substance. She did, however, expressly acknowledge that the issues regarding VC were still outstanding. The one potential line of further inquiry which she did report in connection with this matter, though without any detail, was then promptly followed up by the Third Respondent.

220. This does not mean that she was in any way from the outset pressurised into conducting the session in a manner which she had taken objection to. Rather it strongly suggests that she did indeed take the opportunity presented by the commission to “flush out if there were any issues regarding VC”, which she accepted, to then follow a parallel agenda dictated by her own preconceptions as to the inadequacy of the HR lead team generally.

221. We find, on balance, and in accordance with the Claimant’s own case that the expression of opinion came after she was invited to use her expertise to “flush out if there were any issues regarding VC.” The subjecting of her to this alleged detriment cannot therefore have been because she had made any disclosure.

222. In any event, whenever this opinion was expressed in the course of the conversation the decision to investigate the “Safecall” report in the way that it was in fact investigated clearly had nothing whatsoever to do with the Claimant saying, “if there’s an allegation like that, you really need to undertake a formal investigation”.

223. There was no failure to investigate or take action in respect of this alleged disclosure. The expression of opinion, expressed in the way that it was, was not of itself susceptible to any investigation.

224. There is no good evidence that the Claimant was in fact in any way stressed by the decision to hold the Facilitated Feedback Sessions rather than, hypothetically, to have conducted the investigation in some other way. She was fully prepared to conduct these sessions and she informed the Third Respondent of the information that then came to light in respect of VC, such as it was. The Claimant did not in fact know what did or did not then happen in respect of any further investigation into VC’s conduct once she had completed her Draft Report and passed F Shand’s details on to the Third Respondent. In reality, it appears that the sessions which she had conducted had disclosed no significant allegations against VC such as might have given rise to concerns or anxieties on the part of the Claimant herself as a result of her becoming aware of that information.

225. Nobody apart from the Third Respondent knew about what the Claimant had said in the course of this conversation, and there is no reason at all to suppose that the expression of opinion on 12th September 2018 had anything at all to do with her subsequent decision to terminate the contract with IDL.

Disclosure 2

226. The Claimant's case in respect to Disclosure 2 is a well-nigh total distortion of what actually happened.

227. The email from SG was dealt with promptly and appropriately in all the circumstances, except that the Claimant failed to record her discussion with SG or to relay that information back to the Third Respondent so that further action might be taken as appropriate, and indeed positively misled her as to what actions she had taken.

228. The Claimant did not ever state in "unequivocal terms" that she did not have the authority to conduct a formal investigation, as this would be wholly inconsistent with the manner in which she actually expressed any reservations when contacting SG on 29th October 2018.

229. What the Claimant in fact said about the inappropriateness of her investigating any grievance against L Bowen (or any other member of the lead team) is not the disclosure of any information. There was no formal grievance raised. All the Claimant was being asked to do was to speak to SG in the first instance to clarify the issues raised, which she was clearly perfectly willing to do, and not at any stage to carry out any form of investigatory hearing with L Bowen.

230. Failure to investigate this alleged protected qualifying disclosure is no longer separately pursued as an allegation of detriment. It was removed from the Claimant's revised list of issues when this was provided at the start of the hearing.

231. The Third Respondent certainly did not approach the SG email in the manner in which she did so as to subject the Claimant to a detriment because of anything that she had said to her in a telephone conversation on 24th September 2018. In all probability her initial response to SG was before she had spoken to the Claimant at all. Whenever it took place, in any event that discussion clearly led to a consensual decision that the Claimant would speak to SG. Had this in fact been a formal grievance the first stage in that process would, of course, to have been to arrange a meeting with the complainant. The substantive matter concerning SG was investigated, and so far as the alleged disclosure itself was concerned there was nothing to investigate.

232. In these circumstances, and given the concession, it is clear that this alleged disclosure cannot, in any event have had any material bearing upon the decision to

dismiss. By this time the Third Respondent had already herself agreed to meet with SG, so that anything which the Claimant may have said about the inappropriateness of her continuing to investigate this matter beyond her initial conversation with SG was completely immaterial.

Disclosure 3

233. We find that the Claimant has not proved that the alleged disclosure to L Bowen on 28th September 2018 happened at all.

234. In any event even on the Claimant's own case a mere exhortation to L Bowen to seek to persuade RS or JN formally to take the matter further is not the protected, qualifying disclosure of any information, nor is it a protected act for the purposes of victimisation.

235. Whilst the Claimant had her notes of the discussion with RS and JN, which certainly did identify allegations of homophobic abuse, she elected not to share that information with anybody until it was first quoted some 2 ½ months later in the particulars drafted in support of her claim for compensation.

236. Had the Claimant, as she initially alleged, indeed stated to L Bowen that "immediate action be taken, not least so as to avoid compounding the impression that systemic issues were ignored or mishandled", it is wholly implausible that she would not have also made available to her the material, namely her notes, which would have formed the starting point of any such investigation.

237. Even if such a brief conversation had taken place exhorting L Bowen to pursue the matter, where the Claimant herself and A Rankin had already failed to secure the necessary cooperation of RS and JN, and where she had no details provided to her, the Claimant was not subjected to any detriment because she has given such a general exhortation. There was nothing specific to investigate, where an alleged failure to do so could then amount any detriment to the Claimant. After 28th September 2018 the Claimant herself did nothing whatsoever to raise these issues until bringing the Tribunal claim.

Disclosure 4

238. The passing comment to L Bowen about CL, asking her to "explore" if everything appropriate was being done did not disclose information about what had actually been done as the Claimant admittedly did not know the situation.

239. Nor, even though CL was disabled, does it amount to the doing of a protected act. It does not allege any discrimination as the Claimant did not know of any, and it is

at most an exhortation to ensure that the sickness management procedures are being fully and properly followed.

240. This was evidently not a significant conversation that registered in the mind of L Bowen at the time.

241. That this comment was also not in fact particularly significant in the mind of the Claimant is clear from the fact that in the context of her exchanges with A Rankin at this time it is not mentioned at all.

242. In any event, in her own case, the Claimant suffered no detriment. She was reassured by L Bowen and had no reason to doubt that she would indeed look into it as she had said she would.

<u>Disclosure 6</u>

243. The Draft Report does in fact not contain protected qualifying disclosures. The Claimant is an experienced, human resources professional. If she had genuinely and reasonably believed that the quotations from interviewees actually disclosed any breach of a legal obligation or an endangerment to health or an attempt to conceal this information she would have said so.

244. If she had genuinely and reasonably believed this to have been the case, she would have made specific recommendations as to how these matters ought to be addressed and would not have presented the position to Third Respondent simply as one where the low morale in the team could easily be addressed.

245. The single allusion to CL in one of the many quotations is not properly construed as the doing of protected act just because CL is disabled. The allegedly inappropriate comments about CL are not particularised, and, in any event, they are not stated to be related to his disability but to the fact that he is apparently disliked. It is primarily a concern on the part of the interviewee that if they too were absent through illness comments might be made about them. It is a complaint about someone being spoken about behind his back, not anything obviously related to discrimination.

246. In any event the inclusion of that single reference to CL in the body of the report, absent any comment at all upon it by to Claimant, was not the reason why the Third Respondent acted as she did: it will have had no bearing whatsoever upon her thought processes.

247. The reason why the Third Respondent in fact decided to terminate the contract with IDL is identifiable from the reason why her position changed between the initial receipt of the Draft Report and its being shared with the lead team and the subsequent giving of notice.

248. The principal difference is the fact that Third Respondent was informed by four members of the lead team that they independently had serious doubts about the lack of balance in the report such that they no longer fully trusted the Claimant.

249. Those concerns were genuinely and reasonably held, and the representations made to the Third Respondent were therefore simply a record of observed doubts about the manner in which the feedback session had been conducted, not as a result of the Claimant having made any alleged disclosure. They certainly did not induce the termination of the IDL contract because the report contained a reference to CL.

250. Also, L Bowen had by then updated the Third Respondent for the first time as to the actual costs involved in the IDL contract.

251. We are satisfied therefore that the reason why the IDL contract was terminated was that the Third Respondent had received reliable information which cast doubt on the balance and impartiality shown by the Claimant in the preparation of the Draft Report, that the report itself lacked any meaningful analysis and that its recommendations were vague and entirely generic.

252. This questionable and insubstantial piece of work by the Claimant had, however, incurred a cost to date of in excess of £12,000.

253. The First Respondent was continuously operating under financial constraints. Where such a cost evidently does not represent good value for money it ought properly to be challenged by a publicly funded body.

254. Had the Claimant in fact done a protected act which could realistically be connected to the termination of the IDL contract, then the failure to inform her, or indeed anybody else who asked at that time, of the full underlying reason for "financial constraints" being invoked as a ground for terminating the contract would be sufficient to reverse the burden of proof on the victimisation complaint. That is not however he case here, and it cannot so operate.

255. We are further satisfied that the reference only to "financial constraints" was in order that the Claimant could indeed, had she wished, have left "with her head held high" and with no openly voiced criticism of her work.

256. The IDL contract was not terminated because of the subject matter in any alleged disclosure by the Claimant.

257. Nor was the decision to communicate that decision in a short, business-like telephone call taken because of any alleged disclosure. It was simply in the nature of the giving of notice to terminate a commercial contract, but where obviously the Claimant would be disappointed at losing that work and revenue source. It was the Claimant who in fact closed the call.

258. The Claimant did not know at the time that A Rankin was present with L Bowen. This is not a detriment to her, it did not place her at any disadvantage in "employment", that during the currency of the IDL contract. In any event the reason why A Rankin was asked to observe was so that there would, if necessary, be a witness to what L Bowen said, and not because of an alleged disclosure made by the Claimant.

259. The Claimant could have worked throughout IDL's notice period. She chose not to. Rather she immediately took steps to prepare for litigation and communicated directly only with the Second Respondent. As a result, there was no further direct contact with any employees of the First Respondent. Again, this is not properly construed as a disadvantage to her in the course of "employment" and is not because of an alleged disclosure made by the Claimant. The Claimant had of course only worked for the Respondent, through IDL, for a very short time. Her previous involvement at Sellafield had been when she was supplied by Capita to the Second Respondent and any work that she done had already been completed, and no doubt acknowledged, when the Capita contract had come to an end.

Disclosures 7 and 8 and the case against the Second Respondent

260. The alleged disclosure to P Vallance on 17th October 2018 was on a non-working day for the Claimant, when she was travelling home before her holiday, and appears to have been sometime in the early afternoon. At this point in that day, between the Third Respondent acknowledging that she was "disappointed but if you ask you have to be prepared for the answer" to her questions and the Claimant ostensibly expressing her full support for her in anticipation of the sharing of the Draft Report with the lead team on the following day, there is no obvious reason for the Claimant to have contacted P Vallance at all, and certainly not as she alleges in her witness statement to have itemised nearly all of her alleged disclosures to date (though not in relation to RS and JN) .

261. It is wholly implausible that the Claimant in fact informed P Vallance of the "Safecall" alert and the lack of formal action and the fact that she had been "asked to conduct an unfair and covert investigation", given the terms in which she had referenced this matter in the covering email when submitting her Draft Report the night before.

262. It is wholly implausible that the Claimant in fact informed P Vallance of the failure to address the wellbeing of CL or the stress that this was causing FW, when this matter raised only in a passing conversation had led to satisfactory assurances from L Bowen, where the Claimant had not taken the matter any further, and where she did not actually know what was happening in respect to CL's sickness absence.

263. It is wholly implausible that the Claimant in fact informed P Vallance of the further allegations against VC or the bullying allegations raised against L Bowen in the course of her research and the fact that these had not been acted upon, given the way in which her interactions with SG and F Shand had in fact been reported back to the Third Respondent just the night before.

264. It is however plausible that some mention was made of the anonymous letter, of which both the Claimant and P Vallance were aware. It is though unlikely that this included a genuine allegation that the CEO of the First Respondent or any other member of the executive team was not taking this seriously, since the Claimant well knew that any such inquiry was at a very early stage, the Third Respondent had only just arrived back from holiday and had not yet been given sight of the letter but was understandably upset when she had been told, presumably by the Claimant, that it referenced her father's death and was a personal attack on her. Also, in so far as the anonymous letter reproduced comments included in the Claimant's own Draft Report, these were matters which she had already therefore herself identified as capable of fairly simple resolution.

265. Whatever it was that the CEO of the Second Respondent was intending to discuss with the Chair of the First Respondent, it was on a purely informal level. This does not suggest that it was anything which required detailed investigation and corroborates P Vallance's evidence that had anything of that nature been raised with him he would have remembered it.

266. At its highest we conclude that all that the Claimant may have raised with P Vallance in this telephone call was along the lines set out in the lists of issues, that is sharing A Rankin's observation that "I agree we need to clear up our own back yard first".

267. There was nothing in what the Claimant actually said that required any further investigation.

268. There is absolutely no evidence that the Second Respondent induced the termination of the IDL contract, or any other alleged detriment. The Claimant relies only on the fact of the meeting on 22nd October 2018 but this does not in any way indicate that D Vineall on that occasion induced the termination of the contract, which was not even in contemplation at that stage, and was certainly not envisaged by himself.

269. So, even if there had been any basic contravention, the Second Respondent could not be liable under section 111 Equality Act 2010.

270. Nor did the Second Respondent knowingly aid or help the termination of the IDL contract to take effect upon expiry of the notice period by reason of anything that it did or failed to do after learning that that notice had been served.

271. The single allusion to the Claimant feeling that she had been victimised as at 16th November 2018 is not sufficient for the Second Respondent to have known that an act of victimisation was in contemplation, particularly when it could reasonably rely on the assurance that the decision was in fact taken on financial grounds.

272. Even if the Second Respondent would have had authority to suspend the taking effect of the period of notice had it wished to do so absent any actual request from the Claimant at the time, it had no sufficient information to found any investigation. The Claimant did not provide any particulars to substantiate her vague assertion that she felt she had been victimised. She did not ever identify the protected act relied upon, and certainly did not allege that it was only a single reference to CL in her Draft Report.

273. The Second Respondent did in fact seek to "take sides" with the Claimant and was prepared to challenge the First or Third Respondent as to why they had taken action. There was no "failure to investigate" which positively aided the notice coming into effect. There is nothing worthy of reproach in the actions of the Second Respondent after 29th October 2018.

274. So, even if there had been any basic contravention, the Second Respondent could not be liable under section 112 Equality Act 2010.

275. Nor would the Second Respondent be liable under section 109 Equality Act 2010.

276. Ministry of Defence v Kemeh [2014] ECA Civ 91 confirms that the common law principles as to agency apply in construing the relevant statutory provisions in respect to discrimination by an agent and for which the principal is therefore liable.

277. Even if the legal concept of agency does not necessarily involve an obligation to affect the legal relationship with third parties– and which is here expressly precluded by the terms of the Services Agreement – it is still necessary to show that "*that a person (the agent) is acting on behalf of another (the principal) and with that person's authority"* (see paragraph 39 of the judgement of Elias LJ).

278. The source of the First Respondent's authority to act with respect to the Claimant is clearly the fact that as a separate legal entity it had entered into a commercial contract with IDL. That is the source of its authority to make decisions regarding utilisation of the Claimant's services as commissioned by its HR department. Similarly to the position in Kemeh (see paragraph 41) the limited degree of control that the Second Respondent might in practice have been able to exert over the First Respondent by advising, challenging or supporting comes "*nowhere near constituting an authorisation…to allow the [First (or Third)] Respondent) to act on its behalf with respect to third parties."*

Decision

279. The Claimant has not, on the facts, established any alleged disclosure which is properly capable of amounting to a protected qualifying disclosure or the doing of a protected act, or that there is any causal link between what she actually said or wrote and the only proven detriment to which she has in reality been subjected, which is the lawful determination of the contract with IDL through whom she chose to provide her services.

EMPLOYMENT JU DGE LANCASTER

DATE 29th July 2021
JUDGMENT SENT TO THE PARTIES ON
30th July 2021
AND ENTERED IN THE REGISTER
30th July 2021

Olivia Vaughan
FOR SECRETARY OF THE TRIBUNALS

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