EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
DR SMITHERS	**V**	**THE SMART VETERINARY CLINIC LIMITED**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: **CARDIFF BY VIDEO** **ON:** **1ST & 2ND JUNE 2021**

BEFORE: **EMPLOYMENT JUDGE HOWDEN-EVANS**

REPRESENTATION:
FOR THE CLAIMANT: **IN PERSON**

FOR THE RESPONDENT: **MS BOORER (COUNSEL)**

RESERVED JUDGMENT

The Employment Judge's decision is that:

1. The complaint of unfair dismissal is well founded. This means the Respondent unfairly dismissed the Claimant contrary to section 94 Employment Rights Act 1996.

2. The Claimant's complaint that she had been automatically unfairly dismissal for a health and safety reason (per 100(1)(e) Employment Rights Act 1996) is also well founded.

3. The Claimant's complaint that she had been automatically unfairly dismissal for making a protected disclosure (s103A Employment Rights Act 1996) is also well founded.

4. The Claimant's complaint that she had been automatically unfairly dismissal for a health and safety reason (per section 100(1)(c) Employment Rights Act 1996) is not well founded and is dismissed.

Reasons

1. References to the hearing bundle appear in square brackets throughout this Judgment.

Background

2. The Claimant was employed by the Respondent, a specialist veterinary practice, as a vet, from 28th August 2018 until 6th October 2020. Early conciliation started on 18th August 2020 and ended on 18th September 2020. The claim form was presented on 29th September 2020.

3. The claim is about the Claimant's dismissal.

    3.1. The Respondent asserts the Claimant's dismissal was on grounds of redundancy and that the Claimant was fairly selected for redundancy following a fair redundancy process.

    3.2. The Claimant asserts she was unfairly selected for redundancy and has been unfairly dismissed

    3.3. Alternatively, the Claimant asserts the principal reason she was selected for redundancy was that she had taken steps to protect herself from what she reasonably believed was a serious and imminent danger, namely the risk to her of catching Covid as an asthmatic (and someone that had been hospitalised with aspiration pneumonia in the last 12 months).

    3.4. Alternatively, the Claimant asserts the principal reason she was selected for redundancy was that she had raised concerns about health and safety.

    3.5. Alternatively, the Claimant asserts the principal reason she was selected for redundancy was that she had made protected disclosures.

4. The case was originally listed to be determined at a hearing on 16th February 2021 with a time estimate of one day. There had been no preliminary hearing for case management and at first sight, the Claim Form appeared to allege only an unfair dismissal (unfair selection for redundancy) claim. This resulted in standard directions being automatically issued, without a judge considering the file.

5. At the hearing on 16th February 2021, the employment judge identified that the Claimant was alleging automatically unfair dismissal (ie that the principal reason for her dismissal / selection for redundancy, was that she had made a protected disclosure and / or that she had raised health and safety concerns and / or had taken appropriate steps to protect herself in what she reasonably believed were circumstances of serious and imminent danger). Whilst these allegations were included in the claim

form itself, as the Claimant is a litigant in person, these claims had not been precisely labelled.

6. Whilst the Grounds of Resistance had partly anticipated an automatically unfair dismissal claim, in the absence of the claims being precisely labelled, the Respondent was in difficulty defending the claims on 16th February 2021 – for instance, the Respondent needed to call an additional witness, Dr Davies, as one of the alleged protected disclosures was made orally to Dr Davies.

7. At the hearing on 16th February 2021 parties agreed the fairest course of action, was for the employment judge to precisely label the claims, identify the issues and make case management directions, and for the final hearing to be relisted with a 2-day time estimate.

The Final Hearing on 1st & 2nd June 2021

8. At the start of the hearing, there was a query as to whether this case ought to be heard by a tribunal of three rather than an employment judge sitting alone. (*A claim for detrimental treatment following protected disclosures should be heard by a tribunal of three rather than a judge sitting alone).* This claim did not include a claim for detrimental treatment – the claim was solely about the decision to dismiss the claimant and as such I was satisfied, and parties agreed, it could be determined by a judge sitting alone.

9. The final hearing was conducted wholly remotely by video on 1st and 2nd June 2021. During these 2 days we were able to hear all the witnesses' evidence and closing submissions from both parties.

10. At the final hearing, the Claimant presented her own case. Ms Boorer, Counsel, represented the Respondent.

11. At the outset of the hearing we discussed the timetable and order of witness evidence. I took the first 90 minutes of the hearing to finish reading all the witness statements and the bundle of documents (of 353 pages).

    11.1. On Day 1 the Claimant gave evidence;

    11.2. On Day 2 we heard:

- Lowri Davies, Director of the Respondent and Veterinary Surgeon, who jointly conducted the scoring in the redundancy process;
- Sian Baker, the Respondent's Practice Manager, who jointly conducted the scoring in the redundancy process; and
- Tara Rowberry Duignan, an external HR Consultant that considered the Claimant's Appeal against the decision to dismiss her.

12. All witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: I had already read each witness's statement, there was opportunity for supplemental questions (or in the Claimant's case, for the Claimant to address matters raised in the Respondent's witnesses' statements) before questions from the other side, questions from the judge and any re-examination (or in the Claimant's case, opportunity for the Claimant to clarify anything she felt she had not been able to explain fully in answering questions).

13. Having completed the witness evidence, I heard oral closing submissions from both parties. Ms Boorer supplemented her oral submissions with written submissions, that she had shared in advance. As we did not finish closing submissions until late on the second day, I reserved my decision. I apologise to the parties and witnesses, for the delay in providing this reserved judgment, caused by my heavy workload.

The Issues to be determined

14. The Claimant is making the following complaints:

    14.1. Unfair dismissal;

    14.2. Automatically unfair dismissal for a health and safety reason, per section 100(1)(c) and per section 100(1)(e) Employment Rights Act 1996; and

    14.3. Automatically unfair dismissal for making protected disclosure(s), per s103A Employment Rights Act 1996

15. Parties agreed to adopt the List of Issues set out in the Order of 16th February 2021. This provides the issues / matters I needed to determine are as follows:

    Unfair dismissal

    15.1. It is agreed the Claimant was dismissed.

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

    15.3. 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 Employment Judge will usually decide, in particular, whether:

        15.3.1. The Respondent adequately warned and consulted the Claimant;
        15.3.2. The Respondent adopted a reasonable selection decision, including its approach to a selection pool;
        15.3.3. The Respondent took reasonable steps to find the Claimant suitable alternative employment;

15.3.4. Dismissal was within the range of reasonable responses.

15.4. Was the reason or principal reason for dismissal or selection for redundancy that the Claimant had taken, or proposed to take, appropriate steps to protect herself (and/or others) from a danger which she reasonably believed to be serious and imminent, namely the risk to her of catching Covid as an asthmatic (and someone that had been hospitalised with aspiration pneumonia in the last 12 months) – the steps she relies upon was that on 18th March 2020, she proposed that her clients remain in their car(s) and only the (animal) patients were brought into the surgery –If so the Claimant will be regarded as unfairly dismissed.

15.5. Was the reason or principal reason for dismissal or selection for redundancy that the Claimant had brought to her employer's attention, by reasonable means, circumstances with her work which she reasonably believed were harmful or potentially harmful to health or safety and either there was no safety committee or safety representative, or it was not reasonably practicable for the claimant to raise the matter via the safety committee or safety representative? If so the Claimant will be regarded as unfairly dismissed.

15.6. Was the reason or principal reason for dismissal or selection for redundancy that the Claimant made a protected disclosure? If so the Claimant will be regarded as unfairly dismissed.

Protected disclosure

15.7. Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Employment Judge will decide:

15.7.1. What did the Claimant say or write? When? To whom? The Claimant says she made disclosures on these occasions:

15.7.1.1. During a conversation with Dr Davies on 18th March 2020. The Claimant says she tried to explain to Dr Davies that she was concerned about the clients coming into the building and the risks it posed to her (the claimant) and others.

The Claimant explained that the context in which she was reporting matters was that she had been sending emails to Ms Baker and was worried as during the evening of 17th March 2020 "the government had told us to stay 2 m

away from anyone and you must follow that advice if you are at risk" and the claimant identified herself as being "at risk" and the clinic rooms were not big enough to stay 2 m away from people inside the building. The Claimant explained she didn't get to explain her concerns in this amount of detail as Dr Davies said "If you are not willing to see any patients you need to leave".

15.7.1.2. Emails / letter – pages 32, 33, 37, 38 and 41 & 42 in bundle

15.7.2. Did the claimant disclose information?

15.7.3. Did she believe the disclosure of information was made in the public interest?

15.7.4. Was that belief reasonable?

15.7.5. Did she believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered;

15.7.6. Was that belief reasonable?

15.8. If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the Claimant's employer.

Findings of Fact

16. I make the following findings of fact in this case, by applying the balance of probabilities. It is not necessary for me to resolve every factual dispute, only those necessary for me to determine the issues before me.

17. The Respondent offers specialist veterinary services, including pain management and sports medicine rehabilitation, at clinics in Swansea and Cardiff. As a specialist practice, the Respondent receives referrals from other veterinary practices. The Claimant commenced part time employment as a veterinary surgeon with the Respondent on 28th August 2018. The Claimant supplemented her income by working for other veterinary practices alongside her work for the Respondent.

18. At all material times, Ms Baker, the Respondent's Practice Manager, has also been the Health and Safety Representative for the Respondent and the Claimant has been aware that she should contact Ms Baker in respect of health and safety concerns.

19. In March 2019, like most employers, the Respondent was struggling to operate in and respond to the ever-changing circumstances and risks caused by the Covid 19 pandemic. The Respondent's usual practice was

that clients (the humans accompanying their pets) would be allowed to enter the clinic when a vet was examining or treating a patient.

20. The Respondent was placed in a difficult situation: on the one hand, as more was learnt about Covid 19, they were endeavouring to update risk assessments and change procedures to ensure staff and clients remained safe; on the other hand, as much of their work was non-emergency work, they were conscious there was likely to be big decline in work (and income) and so they were anxious to undertake as many appointments as possible and didn't want to deter clients from using their services.

21. On 16th March 2020, Ms Baker sent staff (including the Claimant) a written risk assessment and invited staff to contact her with any queries or concerns. Her risk assessment put in place the following control measures:

    21.1. Clients and staff were asked to notify the clinic before attending the clinic if they were showing symptoms of COVID-19 or had been exposed to anyone infected with the virus.

    21.2. Staff were to disinfect all surfaces and door handles after each appointment, including the handles on the entry/exit door to each clinic and each toilet door.

    21.3. Staff and clients were to avoid any close/unnecessary contact e.g handshakes, hugs etc with any other individuals in the clinic.

    21.4. Clients were offered the option of not accompanying their pet to the appointment.

        21.4.1. A member of staff would meet these clients in the car park, the client would take their pet out of the car for the staff member to put a slip lead on the pet, with the client then taking the collar and lead back to the car to wait whilst treatment was provided.

        21.4.2. If the patient was feline, their owner could leave the patient in their own cat basket in the cat consulting room and then leave the clinic.

    21.5. If clients wanted to remain with their pet for the duration of their appointment they were allowed to do so provided,

        21.5.1. On entering/exiting the building they thoroughly washed their hands;

        21.5.2. Additional hand washing was carried out whenever needed e.g. after coughing, sneezing etc;

        21.5.3. Blue paper towel was used for drying hands and disposed of in the bins provided; and

21.5.4. They were mindful of avoiding any close/unnecessary contact e.g handshakes, hugs etc with any other individuals in the clinic

21.6. In addition, staff were instructed not to offer clients beverages during appointments.

22. On 16th March 2020, Ms Baker ensured hand towels were removed and sufficient handwash and paper towels were provided. She also publicised the risk assessment on the Respondent's Facebook page and website to draw it to the attention of clients. She also circulated guidance on how to handwash effectively and the latest guidance on the signs and symptoms of Covid 19:

"The following symptoms may develop in the 14 days after exposure to someone who has COVID-19 infection:

cough
difficulty in breathing
fever

Generally, these infections can cause more severe symptoms in people with weakened immune systems, older people, and those with long-term conditions like diabetes, cancer and chronic lung disease."

23. On 17th March 2020 Ms Baker and Dr Davies held an emergency staff meeting at the Swansea Clinic to discuss the Respondent's response to the Covid pandemic; they held a similar emergency staff meeting at the Cardiff clinic at 8am on the morning of 18th March 2020.

24. The Claimant attended the emergency staff meeting on 17th March 2020. The Claimant is asthmatic and had been hospitalised with aspiration pneumonia during 2019. During the emergency staff meeting, the Claimant suggested reception staff should phone clients ahead of appointments to check whether they had a cough or had travelled abroad recently.

25. During the meeting, Ms Baker and Dr Davies discussed the risk assessment and confirmed that:

25.1. provided clients felt well, the Respondent was happy for one individual client to accompany their pet to appointments in the clinic if the client wanted to; and
25.2. the clinic <u>would not</u> adopt a practice of phoning clients ahead of appointments to ask whether the client was feeling well. Dr Davies was anxious to avoid causing panic and didn't want to lose potential work.

26. Late on the evening of 17th March 2020 (after the emergency staff meeting), the UK government provided updated guidance which listed categories of people that were more at risk of adverse effects from Covid ("at-risk" people) – these included adults with asthma. As she was within one of the categories of at-risk people, the Claimant noted the government's advice to be extremely careful to avoid contracting Covid. At that point in time, the government advised people to remain 2m apart from other individuals. The Claimant was anxious about this advice, as she explained it is difficult to stay 2m away from a client when they are holding a pet that you are examining or treating in a consultation room. Some days later the government's advice changed and the Claimant and other at-risk people were advised to "shield" (ie stay at home) to avoid contracting Covid, but as at the 17th / 18th March 2020 the advice was that the Claimant and other at-risk individuals should be extremely careful to avoid contracting Covid and should remain 2m apart from other individuals.

27. On the morning of 18th March 2020, the Claimant travelled to work and was hoping to discuss the previous evening's changes in government guidance. At 7.45am she tried to phone Ms Baker, but Ms Baker and Dr Davies were travelling (separately) to attend the emergency staff meeting in the Cardiff clinic, so Ms Baker did not receive the call.

28. As the Claimant arrived at the clinic and "clocked in", there were a couple of staff in the treadmill room. The Claimant told some of the support staff that she was happy to see patients but, if possible, she would prefer the clients to wait outside. The lady that was working on reception on 18th March had not received this instruction, so when the Claimant's first patient "Maude" (a dog) arrived, the receptionist started to show Maude and her owner into a consultation room at which point the Claimant asked the receptionist to take Maude off her owner as the Claimant was not seeing clients because she was an at-risk person. The receptionist took Maude off the client, explained the Claimant was an at-risk person and asked the client to wait outside. Maude's owner was a friend of the Claimant's and had no objection to this request. The Claimant treated Maude.

Alleged protected disclosure 1 – the conversation with Dr Davies on 18th March 2020

29. There had been an accident on the motorway which prevented Dr Davies from getting to Cardiff, so she drove back to the Swansea clinic to attend the Cardiff emergency staff meeting by phone. She arrived at the Swansea clinic just after 8.30am and was told by the receptionist that the Claimant had just refused to see a patient accompanied by a client and that the conversation had taken place in front of the client.

30. As soon as the Claimant was free, Dr Davies spoke to her. There is a dispute as to whether the Claimant was "given the opportunity" to go home or was told to go home. Given the contemporaneous documents and particularly the Claimant's comments in her email at 11.52am on that day

(to Ms Baker), I accept the Claimant's account, that as she tried to explain her concerns, she was cut short by Dr Davies and was told *"If you will not see clients you have to go home"*. Dr Davies did not give the Claimant chance to discuss her concerns regarding the changed government guidance or her proposals for how she could continue to see and treat patients safely. To put this in context, Dr Davies was working under immense pressure at that point in time, worried about the clinic's declining work and trying to adapt to ever changing guidance from the government; however, the Claimant was trying to raise a genuine and serious health and safety concern and Dr Davies did not give her time to discuss this then (or later).

31. At the point of being sent home, there had been no discussion about whether the Claimant would be paid whilst at home.

32. The Claimant tried to phone Ms Baker but was unable to speak to her. Ms Baker returned her call, but by this time the Claimant was driving home.

Alleged protected disclosure 2 – email to Ms Baker on 18th March 2020 [32 & 33]

33. At 11.52am on 18th March 2020, the Claimant emailed Ms Baker:

"I am terribly sorry I couldn't take your call just now as I was driving. I had tried to call you on multiple times this morning and before I left work (at [Dr Davies]'s request).

I had planned to ring today to ask if the safety procedures you have put in place, as part of the clinic risk assessment to safeguard the clients, could be extended to the staff. Especially given the new advice to the 'at risk' individuals last night; which I had not had access to prior to our staff meeting, due to the time of the speech.

To be able to follow the guidelines I had planned to request the dogs be dropped off/ removed from owners if they were happy with this, if they were seeing me. I am more than happy to continue working but plan on stringently following the government guidelines, so as not to be putting myself at undue risk and then potentially not be able to receive appropriate medical care.

I have included the link to define the 'at risk' population which given I am asthmatic and have been hospitalised with aspiration pneumonia in the last 12 months I am unfortunately within:
https://www.gov.uk/government/publications/covid-19-guidance-on-social-distancing-and-for-vulnerable-people/guidance-on-social-distancing-for-everyone-in-the-uk-and-protecting-older-people- and-vulnerable-adults

I should like to point out this request also follows the RCVS guidelines (which I sent over on Monday) of not putting yourself or any clients at unnecessary risk.

I do expect to be paid for today given I left work at [Dr Davies]'s request not of my own doing; and I had not at any point said I was unhappy to see our animal patients.

I think it is sad at best that staff safety is not a concern to the clinic and negligent at worst. I would also like to point out I had made other suggestions previous to this to try and safeguard staff safety also.
I understand this is a terribly difficult time and I do hope that things start to improve.

I will update you as frequently as you deem necessary (I imagine more government guidance on self-isolation for the at-risk is to follow on, given the speech last night also).”

34. At 2.08pm that afternoon, Ms Baker sent an email to all staff (including the Claimant) [31l and 31m], summarising the matters that had been discussed during the emergency staff meetings. This included the following,

“Points were raised by staff in relation to concern regarding the potential need for 'screening' of clients and the need to call all clients before attendance to appointments. This could actually cause undue panic and have a detrimental effect on the number of appointments we see being cancelled. I have amended the attached Risk Assessment to highlight the need for clients to notify us of any concerns and if these concerns are voiced we are requesting staff to make clients aware of the additional measures (ie leaving their pets for treatment with us and remaining in their vehicles) we can take to allow their appointment to go ahead….

…-Self-isolation- current guidelines advise that unless you are exhibiting symptoms of the virus, or are living in the same household as someone else who is exhibiting symptoms, there is no need to self- isolate.

35. At 2.35 pm that afternoon, Ms Baker replied to the Claimant’s email

“I have heard back from Bob and [Dr Davies] and they fully except the comments and concerns raised in your email. Their priority is to keep you safe.
They have asked me to clarify with you as to whether you are now intending to self-isolate or not? If you can get back to me as soon as possible I would greatly appreciate it.”

Alleged protected disclosure 3 – Second email to Ms Baker on 18th March 2020 [38]

36. At 5.40pm that afternoon the Claimant replied

“Thanks for this. I plan on following the government advice which is currently to stringently follow the social distancing plan (remain 2m away from anyone at any given time and not to put yourself at unnecessary risk), which although the clinic is offering to provide for the clients you and [Dr

Davies]/Bob had decided you will not offer to meet this government guideline for staff.

Obviously if the guidelines change and require me to self-isolate I will do so immediately on receiving that information and let you know straight away from an SSP point of view.
Thanks again"

37. During the evening of 18th March 2020, Ms Baker updated the risk assessment so the control measures emphasised,

"Appointments: We are currently open as normal, and all our staff in clinic are currently healthy, and collectively want to minimise the disruption to our patient's appointments as much as possible.
WE WOULD HOWEVER ASK CLIENTS TO NOTIFY THE CLINIC BEFORE THEIR APPOINTMENT IF THEY ARE CONCERNED THAT THEY ARE SHOWING ANY SYMPTOMS RELATING TO COVID-19 (see Appendix 1) OR HAVE BEEN EXPOSED TO ANYONE INFECTED WITH THE VIRUS. Staff have also been asked to do the same."

38. There was no change to the policy of permitting clients to attend appointments in clinic with their pet, if they wished.

39. The next morning (19th March 2020), at 10.39am Ms Baker wrote to the Claimant

"Thanks for getting back to me. I am more than happy to update our risk assessment to include more prominently the social distancing recommendations, these are currently included in the risk assessment, in the document found at HTTPS://PHW.NHS.WALES/CORONAVIRUS/ and as the first paragraph of our risk assessment clearly states,

> *Summary: This risk assessment aims to document the measures the SMART Veterinary Clinic Ltd will implement to reduce the risks associated with the current outbreak of the COVID-19 virus, for our staff and clients, and to mitigate the impact to our current services and patient care.*

- the issue we have, is due to the nature of our working environment I cannot absolutely guarantee that this will happen with every staff member and every client and therefore your safety as a high-risk person. We would therefore have to advise that you do not return to work and that self-isolation may be warranted. As we understand the position now, you are not currently in self isolation and we will consider you to be on unpaid leave for the time being, however please do keep us updated on this and let us know if there is any other help we can offer."

Alleged protected disclosure 4 – email to Ms Baker on 20th March 2020 [37]

40. The Claimant had a prearranged day of annual leave on 19th March 2020.

41. On 20th March 2020, the Claimant replied to Ms Baker,

"Thank you for this update.
I do think it is interesting if this is your stance on the matter that you have not sent any other at-risk members of staff home. It is also worth mentioning that employment law is such that "Where an employee is willing and able to perform work in accordance with their contract of employment there is an obligation on the employer to pay wages, unless there is a contractual right not to." Acas advice for the current situation is as follows; 'The Acas advice recommends that, in the first instance, an employer should listen to any concerns that colleagues may have. Employers should try to resolve any genuine concerns. This could be particularly useful for colleagues who have weakened immune systems."
The request I made is in line with the RCVS, government and new amended BVA guidelines which now recommends minimal client contact for all individuals (not even those at risk such as myself and others with underlying conditions etc in the clinic) and this appears to not even have been considered.

I reiterate that I would prefer to be working and I am more than happy to do so if you implant the recommended safety measures as per RCVS/BVA/Government advice.
Thanks again,"

42. On 22nd March 2020, Dr Davies and the Respondent's other director wrote a joint letter that was sent by email to the Claimant, which stated

Firstly, as I am sure you appreciate these are difficult and unprecedented times and we are all doing the very best we can under circumstances none of us could have envisaged even 1 week ago to deal with Covid 19 and its impact on all our lives. Circumstances that are changing daily and require us to similarly adapt on a daily basis. With this in mind, firstly we think it would be useful to review the current position….

….Once the meeting in Cardiff was concluded [Dr Davies] was immediately made aware of the incident by a support staff member who relayed the message that you had stated that you were at a high risk of contracting Covid 19 due to your asthmatic condition and that you were unwilling to have direct contact with clients. As we had been unaware of your high-risk status until this point [Dr Davies] suggested that in the circumstances you may wish to go home, and that you should consider self-isolation, as per the guidance in force at the time for high risk groups. Her sole reason for doing this was to protect you and not place you in a position that you did not feel comfortable with within the clinic. You did in fact leave work on the 18/03 but subsequently informed us by e mail that you were not in self-isolation but that also you had been hospitalised within the last 12 months with aspiration pneumonia, a fact that hitherto we were completely unaware. We all have copies of the e mail conversation that has taken place since the 18/03.

Subsequent to the 18th of March there has been a number of email communications between yourself and the clinic. These emails indicate some confusion as to our position, so for clarity let us reassure you that we as a company have at all times done our utmost to follow current guidance regarding Covid 19 and how to maintain a safe working environment for all our staff and for our clients in a fast-changing situation. You have been continually encouraged to raise any concerns in a professional manner and to work with management, colleagues, and clients to ensure the safety and wellbeing of all concerned.

Following our daily-updated risk assessment, we have protocols in place which we believe are compliant with current guidance and that are ensuring the safety of staff and clients whilst still allowing us to continue to offer a much-needed service to our patients. Staff and clients have been regularly appraised of our current protocols and where necessary, protocols have been adapted and changed. As previously stated, the situation is changing daily which means that whilst we are doing all that we can inevitably we have to be reactive as the situation changes. To date, all other members of staff and the clients we are seeing are happy with our current protocols and as previously stated we are keeping both risk assessment and protocols constantly under review. If you feel, given your high-risk status, that you are able to work and offer treatments to our patients using the measures in place then we are happy for you to work your normal working hours adhering to protocols and safety measures just like all other members of staff. If on the other hand you feel that your high-risk status means that you are unable to work, then our understanding is that you are not self-isolating and are on unpaid leave for the time being.

Please be assured that at all times we have the best interest of our staff, clients and patients at the very heart of all that we do and that we are in no way treating you differently to any other member of our team, however you must understand that at this very difficult time we can only do the best we can with the information we have to hand.

We would be grateful if you could respond to the above, stating clearly your current position regarding your employment with SMART Veterinary Clinic Ltd and whether you intend to remain on unpaid leave, are going into self-isolation or will be returning to work for your next scheduled shift, as we need to know how to plan operations for the coming days."

Alleged protected disclosure 5 – letter to Ms Baker, Dr Davies and the other director (attached to email of 23rd March 2020 [41 & 42]

43. On 23rd March 2020, the Claimant replied to the Respondent's letter of 22nd March 2020,

Thank you for your letter of 22nd March. Obviously, the situation is changing daily; I have been doing my utmost to comply with the advice from all relevant agencies; Government/NHS/RCVS and BVA.

At the meeting on 17th March, I suggested some additional measures that the clinic could follow given the latest (at that time) advice from Government and RCVS. The response was that the clients would not be happy with this, and it was important to the business that as many clients as possible should be accommodated prior to an inevitable downturn at some point. I did point out that every other practice at which I had been working was stringently following these guidelines, without any adverse reaction from their clients.

On returning home from the above meeting I became aware that at-risk individuals need to be extremely stringent and listed in the list on PHE/PHW websites in these categories are asthmatics, however by the time of reading this, after the commute home it was passed 10pm (the cut off for clinic contact in our protocols, unless an emergency). The following day, I asked that my first animal client be collected from the owner. I had tried to contact Ms Baker (as the lead in Covid-a9 protocol) but as you mentioned she was in a meeting. Complete discharge instructions were written (as they have been for at-risk clients dropping dogs off) and the owner had no problem with this. After this consultation had ended I was called into a consult room with [Dr Davies], where I was told that if I wasn't prepared to meet the owners I should go home (there was not mention of self-isolating as you wrote earlier). There is clear, available, legal advice which I have previously sent to [Ms Baker] regarding listening to, and discussion of, staff members concerns regarding Covid-19 (not just those at-risk). Which given the following appointments had cancelled could have occurred then or been discussed at a later stage; given the concerning circumstances for everyone involved, but it was not even considered. Therefore you point regarding encouraging us to raise concerns seems a little over stated.

….I did though return home, as per your instruction; it was clearly not a suggestion. Self isolation was not the Government guidance at that time; social distancing and protective measures were the advice, so I have been following this and had advised by email that I would be happy to return to work if appropriate measures were in place.

Whilst I would be happy to continue to see animal clients, with the safety measures now adopted by yourselves on 23/3/20 sadly, the situation and government advice has been significantly updated such that those in higher risk groups (such as myself) must now 'shield'. No doubt further information will become available and I will obviously update you on this situation as soon as possible and hope to be back very shortly."

44. The Claimant would have been due to work on 24th March 2020, but on the evening of 23rd March 2020 a national lockdown was announced which meant the clinic was closed to all but emergency cases. Also by 23rd March 2020, at-risk individuals such as the Claimant had been advised to shield at home.

The decision to furlough the Claimant and others

45. On 25th March 2020 Dr Davies phoned every member of staff to explain they were being "stood down" due to circumstances beyond her control. As the Claimant's phone went to answer machine, she left a message and the Claimant returned her call. Dr Davies apologised for having to close the clinic and said she was looking forward to being able to welcome the Claimant back to work as soon as possible although she had no idea when that would be.

46. On 27th March 2020 Mr Gledhill (Director of the Respondent) wrote to the Claimant and most staff to advise they were being furloughed under the government's job retention scheme. This letter necessarily included a warning that the Claimant's post has been identified as one that might be at risk of redundancy or being laid off and to avoid this, the Respondent was accessing the job retention scheme.

47. The Claimant has suggested that this letter might have been prompted by her alleged protected disclosures. I am satisfied that this letter was one of many letters written to many of the Respondent's employees and was prompted by the Respondent's urgent need to furlough staff to access the government's job retention scheme funds, to be able to pay staff wages notwithstanding the dramatic drop in work and income the business was experiencing.

The Redundancy Situation

48. In oral evidence, in light of the documents disclosed during these proceedings, the Claimant confirmed she accepts there was a redundancy situation, in that the Respondent needed less hours of veterinary work to be undertaken.

49. Ms Baker confirmed there were constant concerns about the viability of the business and in April 2020 she first considered redundancy processes with Citrus HR. In oral evidence Ms Rowberry-Duignan confirmed that Citrus HR provided telephone support and HR software. Ms Rowberry-Duignan didn't provide "onsite support" until the point of considering the Claimant's appeal against the decision to select her for redundancy.

50. As the furlough scheme was initially only going to provide a few months' support, in June 2020, the Respondent concluded it was going to be necessary to make redundancies. The Respondent was experiencing a drop in work and income and anticipated this would continue for the near future

Redundancy Warning and Consultation

51. On 26th June 2020, the Respondent wrote to all five veterinary surgeons that it employed (including the Claimant) indicating their post was at risk of redundancy and that all five veterinary surgeons were in the pool of employees at risk of redundancy [48].

52. On 29th June 2020, the Respondent wrote a further letter to the Claimant inviting the Claimant to an individual redundancy consultation meeting. This letter confirmed the Claimant was entitled to be accompanied by a colleague or trade union representative.

53. On 3rd July 2020, the Claimant attended her initial redundancy consultation meeting, which was conducted by Zoom conference and was with Ms Baker, Practice Manager. Ms Baker confirmed this was her first redundancy situation and that she used Citrus HR template documents to conduct this meeting.

54. At the meeting, Ms Baker explained the Respondent was proposing to reduce the veterinary surgeons' combined hours by 50 hours. Ms Baker also told the Claimant the selection criteria would be:

    54.1. Attendance;
    54.2. Adaptability;
    54.3. Capability;
    54.4. Extra/Additional Skills;
    54.5. Team Leadership ability; and
    54.6. Disciplinary actions taken against the individual.

55. The Claimant enquired whether it was possible to achieve the savings needed by staff agreeing a reduction in their hours. Ms Baker told the Claimant it was a confidential matter and it was not possible for the affected employees to have a group meeting to discuss this.

56. Ms Baker confirmed there were no suitable alternative roles available.

57. When she learnt that the Respondent was looking to reduce veterinary surgeons' hours by 50 hours, the Claimant felt it was obvious the Respondent was looking to make her (and one other particular veterinary surgeon) redundant as their combined hours added up to 51 hours; losing other staff would not result in a reduction of 50 hours – had two full time staff been made redundant this would amount to a reduction of 80 hours.

58. In addition, by July 2020, the two vets whose hours added up to 51 hours (and that were subsequently made redundant) were the only two vets that had not been requested to return to work from furlough.

59. On 5th July 2020, having received the notes from the 3rd July 2020 meeting, the Claimant emailed Ms Baker making the following submissions:

    59.1. In recent weeks (June/July 2020), the number of weekly appointments were steadily increasing and a rush to reduce staff might be premature;
    59.2. 50 hours per week was the equivalent of the two part time vets' posts and selection based on part time status would be unfair;

59.3. The two part time vets were the only vets that hadn't been brought back into work from furlough suggesting they were being pre-selected for redundancy;

59.4. Commonly used selection criteria such as performance; experience; flexibility in shift patterns; extra qualifications were not being used – why were attributes that the claimant held, such as being more experienced and holding additional qualifications not being considered?;

59.5. The instruction that affected employees were not allowed to discuss this matter with other affected employees was wrong as it denied staff from supporting each other and prevented employees from sharing ideas to produce suggestions to avoid redundancies.

60. At this point in the redundancy process, the Claimant indicated she would be prepared to take voluntary redundancy, provided the Respondent released her from the restrictive covenants in her employment contract, to enable her to find alternative work and enhanced the standard redundancy package (by paying 24 weeks' wages in total for notice and redundancy pay). The Claimant did not have a response to this offer, save that she was advised everything would be discussed at the second consultation meeting (but at the second consultation meeting she was actually made redundant).

The Redundancy Scoring Criteria and its application

61. The following criteria were applied to the 5 veterinary surgeons in the Claimant's redundancy pool:

62. **Attendance** – the Respondent considered attendance during the period 25th March 2019 to 20th March 2020.

62.1. Scoring was a combination of sickness days measured using the Bradford Factor and number of times late for a shift start, expressed as a percentage of the total number of shifts worked. The Respondent only counted a late start if the employee was 3 minutes or more late.

62.2. The maximum score available for sickness was 5 points and for lateness it was also 5 points.

63. **Adaptability** – this score was awarded according to how *"flexible each individual is and adaptable to change"*. This was said to be *"vital at the moment with the continued uncertainty and unpredictability of the business structure."*

63.1. Again the maximum mark was 5 marks which was to be awarded if the employee was *"very adaptable";* 3 marks if *"reasonably adaptable"* and 0 if "*inflexible"*.

64. **Capability** – this score was to *"take in to account the capability of each individual within the post and their general performance, over the preceding 12 month period."*

64.1. Up to 5 marks was awarded. A descriptor was provided for each of the 5 possible marks. For instance, to attain 5 an employee *"Consistently produces work well above the required standard, actively displays the potential to learn and develop within the business, actively works with the whole team to improve our services and promote a positive working environment, responds well to critique and pushes to develop own skills and knowledge within job role"*

65. **Extra Skills**- One point was awarded for each additional skill. Additional skills were identified as *"specific skills, other than skills and abilities within their normal working role, which are over and above their basic job specification".*

66. **Disciplinary Action** – up to 6 points were deducted for active disciplinary warnings and 2 points were added for a clean disciplinary record.

67. **Team Leadership** – this score was to reflect *"each individual's specific capability to take charge of the clinical day, their personal responsibility for the efficient running of the clinical day and their individual case management, alongside working with the team to ensure this can be achieved"*. Up to 5 points were awarded with a detailed descriptor being provided for each of the 5 possible marks. For instance, to attain 5 an employee is *"Consistently able to organise the day efficiently and delegate appropriate tasks within the team and communicate these effectively, to ensure this can be achieved. Always takes personal responsibility of cases and ensures case management and communication are up to date, regularly outside of own personal working remit."*

68. The Claimant asserts the Respondent has devised the selection criteria and it's application in bad faith, deliberately to remove the Claimant from her position.

69. The Claimant contends that experience in the particular field of veterinary practice would have been a fair and objective selection criteria; she submits there was no danger of indirect age discrimination as all the veterinary surgeons were of a similar age group. She explained that years of experience within the clinic or within another specialist clinic, is included in the clinics "Tier system" implemented for veterinary surgeons and is something that is routinely fairly considered at interview.

70. The Claimant also suggests that turnover per vet for each working day would have been a fair and objective criteria.

71. She also suggests that length of service could have been one of the criteria.

72. She asserts that in each of these alternative criteria she would have scored higher than others in the pool as they were relatively inexperienced compared to the Claimant.

73. Mr Gledhill input the scores for Attendance. The Respondent's witnesses accept that the remaining scoring required a subjective assessment of the individuals and as such was undertaken by Dr Davies (Director and Veterinary Surgeon) and Ms Baker (Practice Manager) separately considering each employee and awarding marks against each of the selection criteria. Ms Davies and Ms Baker's marks were then combined so each employee had an average mark awarded for each of the selection criteria.

74. The Claimant points to the application of the criteria to a person ("X") that was on probation and had only worked for the Respondent since 10th February 2020 (ie for 6 weeks before the national lockdown). X had scored higher than the Claimant and other colleagues and had avoided being made redundant. In particular, the Claimant objected:

    74.1. As the attendance period being considered was 25th March 2019 to 20th March 2020, X had only worked for the Respondent for 30 days in this period so scored the full 10 marks for attendance and lateness as they had not had a day's absence or been late in their first 30 days of employment. This compared to the Claimant who scored 2 marks for attendance and lateness as she had scored 0 for attendance (in part as she had been ill during the 12 month period with asthma and hospitalised with aspiration pneumonia (neither Dr Davies nor Ms Baker was able to confirm that this absence had been disregarded). The Claimant objected that the Attendance period had been deliberately selected to capture a period of her sick leave and pointed out that if the assessment had looked at the 12 months up to the date of assessment, her Attendance score would have been much higher than others in the pool.

    74.2. X had been awarded the full 5 marks for adaptability and an almost perfect score of 4.5 for capability despite still being on probation and not being able to undertake the same level of procedures the Claimant could undertake – the Claimant was awarded 3 for adaptability and 4 for capability. The Claimant objected the score of 3 (*"reasonably adaptable")* was not a fair reflection given that she had worked 19 days overtime (cover days) and had routinely changed her days in the clinic to be able to accommodate the Respondent's requests. In addition, on behalf of the Respondent, the Claimant had attended Olympia to check dogs were fit to compete (a sport science role rather than a pain management role) which the Claimant relied on as evidence of her adaptability and capability.

    74.3. X was awarded the full 5 marks for team leadership despite being on probation and still working under observation rather than leading. Ms Davies awarded the Claimant only 2 out of 5 for team leadership *("2-Rarely able to organise the day efficiently and often requires support to delegate appropriate tasks with the team and to*

communicate these effectively, to ensure this can be achieved. Inconsistently takes personal responsibility of cases and ensures case management and communication are up to date, rarely outside of own personal working remit."). The Claimant objected this was a wholly unfair assessment of her team leadership skills particularly as nothing had been raised with her previously (or in her 2019 appraisal) and she had been praised for her efforts in the Cardiff clinic. She asserted that if this was a true reflection of her skills she would not have been trusted to represent the clinic at a national event in London in 2019 and she would not have been trusted to attend other practices to make presentations.

74.4. The Claimant was only awarded 1 for "extra skills" despite having 2 additional qualifications each of which was formally recognised by the Royal College of Veterinary Surgeons – one of which, her Advanced Certificate in Veterinary Practice had taken 4 years' work to attain. In oral evidence, Ms Baker had confirmed she had not understood the additional qualifications the Claimant had, so she had thought they counted as one qualification. None of the others in the pool had additional qualifications with the Royal College of Veterinary Surgeons, so the Claimant questioned why another person in the pool had received marks for extra skills.

75. As originally marked, despite still being on probation X was awarded 26.5 out of a possible 27 marks (excluding marks for 'additional skills'). The remaining vets scored 23, 12.5, 9 and the Claimant scored 8.5 out of a possible 27 marks (excluding the 'additional skills' marks). Taking into account the 1 mark awarded for additional skills for her two additional RCVS qualifications, the Claimant scored 9.5.

The Decision to Dismiss the Claimant

76. By letter of 9th July 2020 the Claimant was advised that following the scoring exercise she had been placed at risk of redundancy and she was invited to attend a second individual consultation meeting. By email of 10th July 2020 Ms Baker confirmed the points the Claimant had raised in previous correspondence (as set out in paragraph 59 of this judgment) would be discussed at the second meeting.

77. On 14th July 2020, Ms Jacob, an external HR Consultant attended the Claimant's second individual redundancy consultation meeting (as did Ms Baker and Mr Gledhill (taking notes for the Respondent). Ms Jacob did not attend any other employee's individual redundancy meeting. The Respondent asserts this was to be able to answer the Claimant's questions. The Claimant was aware that the HR Consultant was only attending her consultation meeting (and none of the other employees) and felt intimidated by the HR Consultant attending only her meeting.

78. At that meeting, Ms Baker confirmed there would be no changes to the selection criteria. She told the Claimant the marks she had been awarded:

78.1.	Attendance	2
78.2.	Adaptability	3
78.3.	Capability	4
78.4.	Extra skills	1
78.5.	Disciplinary action	-3
78.6.	Team leadership	2.5
	Total **9.5**	

79. During the meeting the Claimant repeatedly asked questions about the marks she had been awarded against the more subjective criteria – Ms Baker (the practice manager who was not a veterinary surgeon) could only discuss the marks she had awarded the Claimant and in reality, was not able to give specific examples for her own scores. More importantly, Dr Davies (who had jointly marked the Claimant and as a veterinary surgeon had specialist knowledge of the Claimant's performance) did not attend this meeting and has not, prior to this tribunal hearing met the Claimant or attempted to justify or discuss the marks she provided the Claimant. Dr Davies did not (during the redundancy exercise or during this hearing) provide objective specific examples explaining why she awarded the scores she did.

80. During the meeting on 14th July 2020, the Claimant objected that the Attendance period had been deliberately selected to capture a period of her own sick leave and pointed out that if the assessment had been looking at the 12 months up to the date of assessment, her Attendance score would have been much higher. Mr Gledhill stated using the 12 months immediately up to the date of assessment would have given those on furlough an unfair advantage.

81. The Claimant objected she was being penalised twice for her sick leave – once under the heading "Attendance" and again under the heading "Disciplinary Action" as this related to an attendance warning following that sick leave.

82. The Claimant objected she had been very adaptable and had provided additional cover for the Respondent on 19 days since September 2019 and had changed her shift pattern to accommodate the Respondent's needs.

83. In relation to "extra skills" the Claimant asked whether the Respondent had considered that the Claimant had:

    83.1. given demonstrations in other practices for the Respondent;
    83.2. attended Olympia performing a sports science role for the Respondent; as well as
    83.3. looked at business development for the Respondent.

    Ms Baker confirmed these had been reflected in "capability'.

84. Ms Baker was also asked to explain the score for Team Leadership and was only able to say she thought it was a fair reflection, without giving more specific feedback.

85. At the end of the meeting the Zoom call was paused for the Respondent to consider the matters the Claimant had raised. After three minutes, the Zoom call resumed and the Claimant was advised she was being made redundant. This decision was confirmed in the Respondent's letter of 14th July 2020 [81].

The Claimant Appeal

86. By letter of 15th July 2020 the Claimant appealed this decision [88]. In her letter of appeal she stated:

    86.1. The real reason for her selection was that she had raised health and safety concerns / made protected disclosures at the beginning of the pandemic;
    86.2. The decision amounted to part time workers discrimination;
    86.3. The selection criteria were not objective and measurable.
    86.4. The Respondent had deliberately excluded more objective criteria as the Claimant would have scored higher than others in the pool – the Respondent had deliberately and unfairly disadvantaged the Claimant – for instance the Respondent had chosen not to consider years of experience within the clinic or within another specialist clinic, which is included in the clinics "Tier system" implemented for veterinary surgeons and which would be considered at interview.
    86.5. Under 'Capability' the Claimant had only scored 4 out of 5 despite no performance issues ever having been raised, never having missed deadlines or targets and being the only member of the pool involved in business development, presenting at referring practices, representing the clinic at Olympia and/or developing CPD for other practices.
    86.6. Under 'Team Leadership" only scoring 2.5 out of 5 despite being thanked by Dr Davies for the improvement in business at the Cardiff clinic and never having received any complaints about her ability to organise the day efficiently.
    86.7. "Extra skills" awarded only 1 additional point for 4 years of additional study to attain a Certificate in Advanced Veterinary Practice, compared to having 5 points deducted for 4 days' absence with ill health 16 months earlier.
    86.8. Under Disciplinary Action 3 points were deducted for the same absence, in effect penalising the Claimant twice.

87. The Respondent appointed Ms Rowberry-Duignan of Citrus HR Consulting to consider the Claimant's appeal. It was agreed Ms Rowberry-Duignan would conduct the appeal in writing.

88. By email of 10th August 2020, Ms Rowberry-Duignan requested further information about the Claimant's appeal. This was provided by the Claimant.

89. Ms Rowberry-Duignan spoke to Ms Baker to understand the process that had been adopted and the scores applied. She accepted the Respondent had chosen criteria to meet their needs. She did not consider that having a HR consultant attend the Claimant's meeting (and only the Claimant's meeting) had caused any detriment to the process. She felt the Claimant's appeal was not substantiated.

90. As part of her investigation, Ms Rowberry-Duignan considered the scores provided to those in the pool and undertook tests to see if the outcome would be affected. She removed the disciplinary penalty for all in the pool as she accepted there was a double penalty related to attendance.

91. In oral evidence, Ms Rowberry-Duignan accepted that if a score was amended in isolation, there would be no change to the outcome, but if a couple of the scores for particular criteria had changed, to reflect the entirety of the Claimant's comments, the Claimant would not have been selected for redundancy.

92. In oral evidence, Ms Rowberry-Duignan accepted that comparing an employee's absence across a 30-day period with a different employee's absence across a year did cause her concern, as the employee with only 30 days' service would be at an advantage.

Support to find alternative employment

93. The Respondent's redundancy policy [31B] provides at paragraph 4.6

"Where we are unable to offer alternative employment we will support employees to look for work with other employers. Specifically, any employees with over two years' continuous service will be granted reasonable time off to look for alternative work with another employer. This will also include reasonable time off to attend interviews or to make arrangements for training for future employment, and appropriate time off should be arranged with the employee's line manager."

94. The Claimant was made redundant on 14th July 2020. Despite requests from the Claimant, the Respondent did not (until February 2021) release the Claimant from the restrictive covenants in her employment contract. These clauses prevent the Claimant from working for a similar business, within 50 miles of any business address of the Respondents, for a 12-month period from the end of her employment with the Respondent. As the Respondent has clinics in Cardiff and Swansea, in effect the restrictive covenants prevent the Claimant from working in an area that had a 150 mile diameter. At the preliminary hearing in February 2021, I suggested the Respondent might need to agree to amend these restrictive covenants to assist the Claimant to find alternative employment to mitigate her loss. Shortly after that hearing, the Respondent agreed to release the Claimant from these covenants.

Relevant law

"Ordinary" Unfair Dismissal

95. Section 94 Employment Rights Act 1996 ("ERA") provides an employee has the right not to be unfairly dismissed by their employer.

96. Here it is agreed the Claimant has been dismissed by the Respondent. Section 98(1) ERA provides:

> *(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.*

97. In this case, the Respondent is asserting the reason for dismissal was on grounds of redundancy. Redundancy is a potentially fair reason for dismissal (see Section 98(2)(c) ERA).

98. Section 139 ERA provides:

> *(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
>
> *a. the fact that his employer has ceased or intends to cease –*
>
> *i. to carry on the business for the purposes of which the employee was employed by him; or*
>
> *ii. to carry on that business in the place where the employee was so employed, or*
>
> *b. the fact that the requirements of that business –*
>
> *i. for employees to carry out work of a particular kind, or*
>
> *ii. for employees to carry out work a particular kind in the place where the employee was employed by the employer,*
>
> *have ceased or diminished or are expected to cease or diminish.*

99. In *Safeway Stores v Burrell* [1997] EAT, Judge Peter Clarke identified a 3 stage test for determining whether the reason for dismissal is redundancy:

1. Was the employee dismissed?, if so
2. Had requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished or were they expected to cease or diminish? If so
3. Was the dismissal of the employee caused wholly or mainly by that state of affairs?

100. Having considered the Respondent's evidence in relation to the drop in work and income (as a result of the pandemic), the Claimant accepts that a redundancy situation existed in that there were less hours of work available for veterinary surgeons. However, she asserted the Respondent could have continued to use the furlough scheme or could have explored a reduction in hours by all vets.

101. The employment judge is not at liberty to investigate in depth the commercial and economic reasons behind a decision to make redundancies rather than to furlough staff. I am only entitled to ask whether the decision to make redundancies was a genuine one; a good commercial reason is enough to justify the decision to make redundancies rather than furlough staff.

102. If I am satisfied the reason for the Claimant's dismissal was redundancy, Section 98(4) ERA provides:

"… the determination of the question whether the dismissal is 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."

103. When determining the question of reasonableness under Section 98(4) ERA there is no burden of proof on either party; the issue of whether the dismissal was reasonable is a neutral one for the employment judge to decided.

104. The ACAS Code of Practice does not apply to redundancy dismissals.

105. When considering whether the dismissal was procedurally fair, in *Polkey v AE Dayton Services Ltd* 1988 ICR 42, the House of Lords indicated in a redundancy dismissal, an employer will not normally have acted reasonably unless he:

105.1. warns and consults any employees affected or their representatives

105.2. adopts a fair basis on which to select for redundancy i.e. uses objective criteria and applies those criteria fairly

105.3. takes such steps as may be reasonable to avoid or minimize redundancy by redeployment within his own organization"

106. In *Williams and others v Compair Maxim Limited* 1982 ICR 156, the Employment Appeal Tribunal provided guidelines that a reasonable employer might be expected to consider in making redundancy dismissals:

106.1. Whether selection criteria was objectively chosen & fairly applied;
106.2. Whether employees were warned and consulted about the redundancy;
106.3. Whether, if there was a union, the union's view was sought, and
106.4. Whether any alternative work was available

107. The Compair Maxim guidelines are just that; they are not principles of law but they can assist me in considering the reasonableness test under Section 98(4) ERA. The overriding test is whether the employer's actions fell within the range of reasonable responses of a reasonable employer.

108. I should not impose my own view as to the reasonableness of the selection criteria or the interpretation of the selection criteria; the correct question is whether the selection was one that a reasonable employer acting reasonably could make (*Drake Systems v O Hare [2003] EAT)*

Automatically Unfair Redundancy – selection for Health and Safety reasons

109. Section 105 ERA provides:

"(1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if –

(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,
(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaken who held positions similar to that held by the employee and who have not been dismissed by the employer, and
(c) it is shown that any of subsections (2A) to (7N) applies."

110. Section 105 (3) ERA provides:

"This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in subsection (1) of section 100 (read with subsections (2) and (3) of that section)"

111. Section 100 (1) ERA provides:

"(1) 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 –

(c) being an employee at a place where -

(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger"

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or if more than one, the principle reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them."

Automatically Unfair Redundancy – selection for having made a protected disclosure

112. Returning to Section 105 ERA (see previous page of this judgment) Subsection (6A) of Section 105 ERA provides:

"This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103A".

113. Section 103A ERA provides:

"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 principle reason) for the dismissal is that the employee made a protected disclosure."

114. Section 43A ERA explains a worker makes a "protected disclosure" when they make a "qualifying disclosure" in one of the ways set out in Sections 43C to 43H.

115. To be a protected disclosure it must first be a "qualifying disclosure", ie it must meet the requirements of Section 43B which provides:

"(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 –

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

116. Section 43C provides:

"Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure
(a) to his employer…."

117. This means there are a number of requirements before a disclosure is a "qualifying disclosure" -

117.1. First, the disclosure must be of "information" capable of tending to show the wrongdoing - it has to have sufficient factual content and specificity (see *Kilraine v London Borough of Wandsworth* [2018] ICR 185). This is a matter of judgment by the tribunal/ employment judge considering all the facts of the case. The question is whether, taking into account the evidence as to context, the information is capable of satisfying the other requirements of the section i.e. could a worker reasonably believe that it tended to show one of the specified matters.

117.2. Second, the worker must believe the disclosure tends to show one or more of the listed wrongdoings.

117.3. Third, if the worker does hold this belief, it must be reasonably held. Here the worker does not have to show that the information did in fact disclose the wrongdoing, it's enough if the worker reasonably believes that the information tends to show this to be the case. A belief can be reasonable even if it's ultimately wrong.

"If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief." (per *Kilraine*).

117.4. Fourth, the worker must believe that the disclosure is made in the public interest.

117.5. Fifth, if the worker does hold this belief, it must be reasonably held. I should consider whether the worker believes the disclosure is in the public interest (not the reasons why the worker believes that to be so). The worker must have a genuine and reasonable belief that the disclosure is in the public interest, but that does not have to be the worker's predominant motive for making the disclosures. (see *Chesterton Global Ltd v Nuromhammed* 2018 ICR 731)

117.6. In *Chesterton* when considering the meaning of *"in the public interest"* it was said that there was an essential distinction between disclosures which serve the private or personal interest of the worker and those that serve a wider interest. The tribunal should consider of all the circumstances of the particular case, but relevant factors may include:

117.6.1. the numbers in the group whose interests the disclosure served;
117.6.2. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
117.6.3. the nature of the wrongdoing disclosed; and
117.6.4. the identity of the alleged wrongdoer.

117.7. It was also said that the broad intention behind the legislation is that workers making disclosures in the context of private workplace disputes should not attract the statutory protection that is afforded to whistle-blowers. However, there may be cases where the disclosure relates to an interest that is personal in character but there are features of the case that make it reasonable to regard the disclosures as being in the public interest as well as in the personal interest of the worker.

118. In a protected disclosure dismissal case, the protected disclosure must be the primary motivation for a dismissal (it must be the "principal reason" for dismissal).

Conclusions

Protected disclosure

119. I started by considering whether the Claimant had made a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996?

Alleged protected disclosure 1 – the conversation with Dr Davies on 18th March 2020

120. Whilst the Claimant might have been trying to raise a genuine concern about health and safety, Dr Davies cut short this conversation and directed *"If you will not see clients you have to go home"*. This meant the Claimant did not have chance to impart any "information" which is an

essential component of a qualified disclosure. The Claimant did not have chance to say any words that had specific factual content before this meeting was cut short. As such I found the Claimant did not make a qualified disclosure (as defined in Section 43B(1) ERA) on this occasion.

Alleged protected disclosure 2 – email to Ms Baker on 18th March 2020 [32 & 33]

121. I started by considering whether information was being imparted; whether there was sufficient factual content and specificity to be capable of tending to show health and safety is being endangered. The Claimant's words in this email do convey that the clinic's risk assessments do not currently safeguard staff and that this relates to the procedures surrounding when dogs will be dropped off / removed from owners. This is more than a mere assertion - there is sufficient factual content and specificity to be 'information capable of tending to show the health or safety of any individual is being or is likely to be endangered"

122. I am satisfied that the Claimant believed the information she disclosed in this email tended to show the health or safety of individuals (namely staff) was being or was likely to be endangered. The Claimant was trying to alert Ms Baker of her genuine concern that the Respondent had not adequately considered the risk to staff and was endangering members of staff's health and safety (and particularly those that were "at risk"), by continuing to allow clients to attend appointments in clinic with their pets during the Covid pandemic.

123. Was it reasonable for the Claimant to hold this belief? In the context of the Claimant,

    123.1. having raised concerns at the emergency staff meeting the previous afternoon and been told that the Respondent would not be changing this practice;
    123.2. the email containing references to the government's updated Covid guidance; and
    123.3. the email referring to RCVS guidance which the Claimant was implying was not being adhered to,

    I am satisfied that it was reasonable for the Claimant to believe her email tended to show the health or safety of individuals (namely staff) was being or was likely to be endangered in that the Respondent had not adequately considered the risk to staff.

124. Did the Claimant have a genuine belief this disclosure of information was made in the public interest? I was satisfied she did – she was trying to keep abreast of RCVS and government guidance and encourage the Respondent to change their practice of allowing clients to decide whether to accompany their pets to appointments. The Claimant was genuinely concerned that it was not possible for staff to stay 2m away from a client when that client was holding a pet during treatment. The

Claimant was concerned about the risk to colleagues' health and safety as well as her own.

125. Was it reasonable for the Claimant to belief this disclosure of information was made in the public interest? The claimant was referring to the risk to staff and particularly those in the at-risk group. The number in the group whose interests the disclosure served would be at least 10 people. The nature of the interests affected – whilst the disclosure served the Claimant's personal interest (in that she was in the at-risk group and was particularly vulnerable if there were any failings in the Respondent's risk assessments for staff), this disclosure also served a wider interest, namely others that were at-risk and indeed staff that weren't at risk – if the policy of allowing clients to continue to attend appointments in clinic (when it might not be possible to maintain 2m distancing) was unnecessarily risking the Claimant's health and safety it was also risking the health and safety of other staff and clients. The nature of the wrongdoing disclosed - endangering health and safety by failing to adequately assess the risks involved in maintaining a practice during a pandemic could have fatal consequences, particularly for an at-risk person, as there were limited means of treating Covid in March 2020. I am satisfied that it was reasonable for the Claimant to belief this disclosure was made in the public interest.

126. The Claimant's email to Ms Baker on 18th March 2020 [32 & 33] was a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996 – as it was made to her employer it was also a protected disclosure (see Section 43C ERA).

Alleged protected disclosure 3 – Second email to Ms Baker on 18th March 2020 [38]

127. Was there "information" - sufficient factual content and specificity to be capable of tending to show health and safety is being endangered. Against the backdrop of the global pandemic, in which governments around the world had emphasised "social distancing" and "remaining 2m away from others" as being a key health and safety message, I am satisfied that this email does convey information of sufficient factual content and specificity to be capable of tending to show health and safety is being endangered - The Claimant's words in this email do convey that [Ms Baker, Dr Davies] and Bob were not enabling staff to comply with the 2m rule and avoid unnecessary risk to their health.

128. I am satisfied that the Claimant believed the information she disclosed in this email tended to show the health or safety of individuals (namely staff) was being or was likely to be endangered. The Claimant was again trying to alert Ms Baker of her genuine concern that the Respondent had not adequately considered the need for staff to be able to maintain 2m social distancing at any given time.

129. Was it reasonable for the Claimant to hold this belief? In the context of the email containing references to the government's Covid guidance I

am satisfied that it was reasonable for the Claimant to believe her email tended to show the health or safety of individuals (namely staff) was being or was likely to be endangered in that the Respondent were not enabling staff to comply with the 2m rule and avoid unnecessary risk to their health.

130. Did the Claimant have a genuine belief this disclosure of information was made in the public interest? I was satisfied she did – she was trying to encourage the Respondent to prioritise the 2m social distancing rule to safeguard the health and safety of staff.

131. Was it reasonable for the Claimant to belief this disclosure of information was made in the public interest? The claimant was referring to the risk to staff. The number in the group whose interests the disclosure served would be at least 10 people. The nature of the interests affected – whilst the disclosure served the Claimant's personal interest (in that as she was in the at-risk group, so it was particularly important for her to be able to always maintain 2m social distancing), this disclosure also served a wider interest, namely the health and safety of other staff. The nature of the wrongdoing disclosed - endangering health and safety by failing to enable staff to maintain 2m social distancing during a pandemic could have fatal consequences, as previously discussed. I am satisfied that it was reasonable for the Claimant to belief this disclosure was made in the public interest.

132. The Claimant's second email to Ms Baker on 18th March 2020 [38] was a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996 and as it was made to her employer it was also a protected disclosure.

Alleged protected disclosure 4 – email to Ms Baker on 20th March 2020 [37]

133. Was there "information" - sufficient factual content and specificity to be capable of tending to show health and safety is being endangered. Having carefully considered the words in this particular email, I am satisfied this email does not convey information of sufficient factual content and specificity to be capable of tending to show health and safety is being endangered.

134. This email was not a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996, and so could not be a protected disclosure.

Alleged protected disclosure 5 – letter to Ms Baker, Dr Davies and the other director (attached to email of 23rd March 2020 [41 & 42]

135. Was there "information" - sufficient factual content and specificity to be capable of tending to show health and safety is being endangered. Having carefully considered the words in this particular email, I am satisfied this email does not convey information of sufficient factual

content and specificity to be capable of tending to show health and safety is being endangered.

136. This email was not a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996, and so could not be a protected disclosure.

137. Having found the Claimant had made protected disclosures I will consider whether the fact she had made protected disclosures was the principal reason for her dismissal / selection for redundancy later in this judgment

Health and Safety Concerns under s100(e) Employment Rights Act 1996

138. Had the Claimant taken, or proposed to take, appropriate steps to protect herself (and/or others) from a danger which she reasonably believed to be serious and imminent?

    138.1. On 18th March 2020, given she was an asthmatic who had been hospitalised with aspiration pneumonia in the last 12 months, and had just been identified as being in the "at-risk" group (people that were more at risk of adverse effects from Covid) I'm satisfied that the Claimant believed the risk of her catching Covid from a client that was accompanying a patient in the clinic, was a serious and imminent danger.

    138.2. It was reasonable for her to believe this situation presented a serious and imminent danger to her. When she was treating patients, if the client chose to attend the appointment, the client was likely to be within 2 metres of the Claimant whilst she was treating the patient. The Respondent was refusing to make preliminary phone calls to check whether that client had a cough or had travelled.

    138.3. Whilst this situation had existed previously, on the evening of 17th March 2020 the Claimant learnt the government were escalating their response to the pandemic and new guidance aimed at 'at-risk' people like the Claimant now advised she should be extremely careful to avoid contracting Covid and to maintain 2 metre social distancing. She was understandably very anxious and was repeatedly checking guidance from the government and RICS to try to keep herself safe.

    138.4. Given all the circumstances, her knowledge, the facilities, and advice available to her at the time, I am satisfied that she took appropriate steps to protect herself. She tried to phone the Respondent's Health and Safety Representative, Ms Baker but when she wasn't available, she reduced her risk of potential exposure to Covid by asking the receptionist to take the patient off the client and asking the client to wait outside.

139. Having found the Claimant had taken appropriate steps to protect herself from a danger which she reasonably believed to be serious and imminent, I will consider whether this was the principal reason for her dismissal / selection for redundancy later in this judgment

Health and Safety Concerns under s100(c) Employment Rights Act 1996

140. As the Respondent had a Health and Safety Representative, Ms Davies and the Claimant was aware of this, s100(1)(c)(i) ERA did not apply to the Claimant's situation *(see paragraph 111 in this judgment for the definition contained in s100(1)(c)(i) ERA).*

141. Turning to consider whether s100(1)(c)(ii) ERA applied, the occasions the Claimant relies upon as her raising health and safety concerns are the same occasions that are relied upon as being protected disclosures. Examining each of these,

    141.1. The conversation with Dr Davies on 18th March 2020

        Whilst the Claimant might have been trying to bring health and safety concerns to Dr Davies's attention, Dr Davies cut short the conversation so the Claimant didn't have chance to raise particular circumstances in this conversation.

    141.2. Email to Ms Baker on 18th March 2020 [32 & 33]; second email to Ms Baker on 18th March 2020 [38]; email to Ms Baker on 20th March 2020 [37] and letter to Ms Baker, Dr Davies and the other director (attached to email of 23rd March 2020 [41 & 42]

        Each of these communications was to Ms Baker, the Respondent's health and safety representative, so it cannot be said that that it was not reasonably practicable to raise the matter with the Health and Safety Representative, which is an essential element of this type of claim

142. The Claimant's claim under s100(c) Employment Rights Act 1996 is not well founded and is dismissed.

Principal Reason for Dismissal and the Claimant's Selection for Redundancy

143. Having considered the Respondent's circumstances, I am satisfied that that a redundancy situation existed.

144. However, it is still an automatically unfair dismissal, if the <u>principal reason</u> the Claimant was selected for redundancy is because she had made a protected disclosure or because she had taken appropriate steps to protect herself from a danger which she reasonably believed to be serious and imminent (per s100(e) ERA).

145. When considering *"what was the principal reason for the Claimant's dismissal / selection for redundancy?"* and the conscious and subconscious matters that Dr Davies and Ms Baker had in mind, I note

145.1. There was a genuine need to reduce the hours of veterinary surgeons.

145.2. This was Ms Baker's first redundancy process, so it was understandable that small errors crept into the procedure.

145.3. Both Dr Davies and Ms Baker were working under incredible pressure trying to keep the practice open, financially viable and keep colleagues and clients safe.

145.4. This meant that, on 18th March 2020, when the Claimant raised and acted upon genuine concerns about her health and safety and the very serious risk that she was working under, rather than listen to these concerns, Dr Davies snapped and sent the Claimant home.

145.5. From this point onwards Dr Davies and Ms Baker, at the very least subconsciously and perhaps consciously, had little sympathy for the Claimant and her circumstances – this was evidenced in

145.5.1. There being no attempt to speak to the Claimant about her genuine concerns (since the event on 18th March 2020) to try to look for solutions;

145.5.2. The communications indicating she would be unpaid whilst at home;

145.5.3. The stance that as *"all other members of staff and the clients we are seeing are happy with our current protocols"* the claimant should either adhere to these protocols (and accept the risk) or accept unpaid leave, despite there having been no discussion with the Claimant about her genuine concerns that the protocols were not complying with RCVS, BVA and government guidance.

145.5.4. The claimant sometimes not receiving emails / letters that had been sent to other veterinary surgeons at the same time that other staff received them.

145.5.5. Only the claimant and the other vet that was selected for redundancy remaining on furlough, without any attempt to discuss or advise the Claimant why some staff were returning to work and she (a more experienced vet) was being left on furlough.

145.6. Thus it was unfortunate that the selection criteria to be adopted and a candidates' scoring in relation to it, required a subjective assessment by Dr Davies and Ms Baker. A bias against the Claimant was evident in the redundancy decision making:

145.6.1. Dr Davies did not engage with the Claimant at all during this process – she made no attempt to explain (in person or in writing) to the Claimant how she had reached the scores she did or the objective examples she had in mind.

145.6.2. There was no meaningful consideration of the Claimant's suggestions of alternatives to compulsory redundancy, such as

145.6.2.1. affected staff being free to talk to each other to explore the possibility of reducing hours or

145.6.2.2. her being freed from her restrictive covenants and taking voluntary redundancy.

145.6.3. There was no meaningful consideration and response to her suggestions of alternative more objective selection criteria

145.6.4. The Claimant was not offered any support in finding alternative employment and indeed was hampered by the Respondent not releasing her from the restrictive covenants.

145.6.5. The Claimant, an experienced veterinary surgeon with two additional RCVS qualifications was awarded 9.5 - against a new employee who was on probation and still working under observation and had no additional external qualifications scoring 27 out of a possible 28.

145.6.6. Any independent and fair-minded person would regard this scoring as being perverse. If Dr Davies and Ms Baker were approaching this exercise in an objective manner it would have given them cause for concern and to revisit and check their assessments and scores. They did not.

146. Whilst the redundancy situation was genuine, I accept the Claimant had been selected for redundancy from the outset. This was evident in:

146.1. the total lack of communication and contact from Dr Davies towards the Claimant;

146.2. the announcement that the employer was looking to reduce veterinary work by 50 hours;

146.3. the choice of selection criteria; the period that was chosen for consideration and the interpretation of the selection criteria all being the least helpful for the Claimant;

146.4. the Claimant and the other person that was selected for redundancy being the only vets that remained on furlough

146.5. the lack of genuine consultation

146.6. the independent HR consultant attending only the Claimant's meeting (and not attending any of the meetings with others in the selection pool).

146.7. the decision to confirm the Claimant's selection being announced after 3 minutes' discussion.

147. I am satisfied that the principal reason the Claimant was selected for redundancy and dismissed was that she had taken appropriate steps to protect herself from a danger which she reasonably believed to be serious and imminent, namely that on 18th March 2020 when she wasn't able to speak to the Respondent's Health and Safety Representative, she had reduced her risk of potential exposure to Covid by asking the receptionist to take the patient off the client and asking the client to wait outside. The Respondent was not willing to alter its practice of allowing the client to decide whether to accompany a patient during an appointment, so the Claimant's decision to depart from this practice upset Dr Davies on the day and permanently damaged the employer employee relationship.

148. Further and in the alternative, I am satisfied that the principal reason the Claimant was selected for redundancy and dismissed was that she had made protected disclosures in her email to Ms Baker on 18th March 2020 [32 & 33] and her second email to Ms Baker on 18th March 2020 [38], that the clinic's risks assessments did not currently safeguard staff and that Ms Baker, Dr Davies and Bob were not enabling staff to comply with the 2m rule and avoid unnecessary risk to their health. The Respondent has had an unsympathetic approach towards the Claimant since 18th March 2020 which, consciously or subconsciously motivated them to select the Claimant for redundancy– if this bias was not caused by the steps she took to protect herself from danger, I am satisfied it was caused by the protected disclosures she made on the same day.

149. Further and in the alternative, I am satisfied that the claimant has been unfairly dismissed. I remind myself that when considering the fairness (or not) of an employer's decision to dismiss an employee I must not substitute my decision for that of the employer – I simply ask whether the employer's actions fell within the range of reasonable responses of a reasonable employer.

150. Here I have found the Claimant's selection for redundancy was pre-determined – this does not fall within the range of responses of a reasonable employer.

151. Further and in the alternative, I was satisfied that the selection criteria had not been fairly and objectively applied to the candidates and that Dr Davies and Ms Baker's decision making was influenced by their negative feelings towards the Claimant since her protected disclosures and actions to protect her health and safety on 18th March 2020. For instance, Dr Davies has not been able to give any specific examples to support her score of 2 out of 5 for the Claimant's Team Leadership against X's score of 5 out of 5 for Team Leadership when X was on probation and still working under supervision. Applying selection criteria in bad faith, or in an unfair manner, is beyond the range of responses of a reasonable employer.

152. The employment judge will set out directions to prepare the case for a remedy hearing in a separate Order.

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Employment Judge L Howden-Evans

Dated: 25th August 2021

JUDGMENT SENT TO THE PARTIES ON 27 August 2021

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FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS Mr N Roche