THE EMPLOYMENT TRIBUNALS

Claimant **Mr J Stubbs**

Respondent **The Chief Constable of North Yorkshire Police**

Heard at **Newcastle upon Tyne (by CVP)**
On **27-30 September 2021 & 17 November 2021 (in Chambers)**

Before **Employment Judge Langridge**

Representation:

Claimant **Ms C Brooke-Ward (Counsel)**
Respondent **Ms B Clayton (Counsel)**

JUDGMENT

1. The claimant's dismissal was by reason of redundancy within the meaning of section 139(1)(b) Employment Rights Act 1996 ('the Act').

2. The reason for the claimant's dismissal was not because he made a protected disclosure in contravention of sections 103A or 105 of the Act.

3. The claimant's dismissal was fair and reasonable under section 98(4) of the Act.

4. All claims are dismissed.

REASONS

Introduction

1. This claim revolved around a restructuring of the respondent's training team in 2019 which led to the claimant being dismissed with effect from 1 April 2020. In his application to the tribunal the claimant alleged that the reasons relied on by

the respondent, redundancy or some other substantial reason, were not genuine. He alleged that his selection for redundancy and the decisions made about the pool of employees and the criteria to be applied were unfair, and that there was a lack of consultation in the later stages of the process. As well as challenging the reason for dismissal and the fairness of the redundancy, the claimant alleged that he had made public interest disclosures in accordance with section 43B Employment Rights Act 1996 ('the Act'). He relied on the fact that he had raised concerns about the restructuring, relating to data being accessed by untrained officers and staff. The claimant relied primarily on section 103A of the Act, and section 105 in the alternative. His claim relied on the fact that he and his colleague – the only other person carrying out the same work as him and also involved in making the public interest disclosures – were the only ones made redundant.

2. In its response the respondent said it had commissioned an external review of the training department by PWC, that Unison were involved on behalf of the claimant and others, and that the initial proposals were reviewed and revised by the then acting head of HR. The respondent asserted that it embarked on a fair redundancy process which included unsuccessful attempts at redeployment. Furthermore, the claimant's dismissal for redundancy took effect on 1 April 2020 because he requested that his termination date be brought forward. Alternatively, it was a dismissal for some other substantial reason arising from the restructuring exercise.

3. The respondent took issue with the allegation that the reason or principal reason for dismissal was linked to any protected disclosure, pointing out that its Change Proposal document dated 9 October 2019 predated the disclosures made on 18 October, 31 October and 4 November 2019. The respondent further raised an issue about alleged gross misconduct on the claimant's part. During the restructuring exercise he was suspended for posting information on social media about the process, in breach of an instruction to maintain confidentiality. The respondent relied on Polkey v AE Dayton Services to assert that the claimant would have been dismissed for gross misconduct in any event, had the redundancy not taken place.

4. The case was heard over four days by CVP video platform. Evidence was given by the claimant on his own behalf and by two witnesses for the respondent: Ms Leanne Consett, People Operations Manager, and acting Head of HR at the relevant time; and Mr John Mackfall, an employee of the respondent and elected Unison branch secretary for over 20 years. An electronic bundle was provided extending to over 800 pages, which unhelpfully did not match the page references in the index due to additional documents being inserted. It was nevertheless possible to complete the evidence and submissions in the time allowed.

Issues and relevant law

5. The bundle produced for the hearing included an agreed list of issues in draft. It then transpired that this had been superseded by a provisional list of issues annexed to the case management orders of EJ Aspden dated 4 August 2021.

That document was not in the bundle. The issues as identified in that document are reproduced here:

Whether the claimant made a protected disclosure as alleged

(1) Did the claimant disclose information to the respondent? The respondent accepts that the claimant disclosed information to it on those dates.

(2) At the time of the disclosure, did the claimant believe that the information that he disclosed tended to show that the respondent failed, was failing or was likely to fail to comply with a legal obligation to which they were subject?

(3) Was that belief reasonable?

(4) At the time of the disclosure, did the claimant believe that the disclosure was in the public interest?

(5) Was that belief reasonable?

Whether there was a redundancy situation

(6) Had the requirements of the respondent's business for employees to carry out work of a particular kind ceased or diminished or were they expected to cease or diminish (whether generally or in the place where the employee was employed)?

The reason for dismissal

(7) What was the reason (or if more than one, the main reason) for the dismissal, ie what were the facts known or beliefs held that caused the respondent to dismiss the claimant?

(a) Was it that the claimant made a protected disclosure as alleged? If so the claim succeeds.

(b) Was it that the claimant was redundant, ie wholly or mainly attributable to the fact that the requirements of the respondent's business for employees to carry out work for a particular kind had ceased or diminished or were expected to cease or diminish (whether generally or in the place where the employee was employed)? If so, the tribunal will consider whether this was an automatically unfair redundancy:

(i) Did the circumstances constituting the redundancy apply equally to one or more other employees in the same undertaking who held positions similar to that held by the claimant and who have not been dismissed by the respondent?

(ii) If so, was the reason (or the main reason) the claimant was selected for dismissal that he made a protected disclosure as alleged? If so the claim succeeds.

(iii) If this was not an automatically unfair redundancy the tribunal will consider the reasonableness of the dismissal.

(c) Was it some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held, namely a reorganisation? If so, the tribunal will consider the reasonableness of the dismissal.

Reasonableness of the dismissal

(8) Did the respondent act reasonably or unreasonably in treating that reason as sufficient reason for dismissing the claimant, taking into account all the circumstances, including the size and administrative resources of the respondent? Relevant considerations may include:

(a) whether the employer acted reasonably in identifying the pool of candidates for redundancy and the criteria for selecting from that pool;

(b) whether selection criteria were fairly applied;

(c) whether employees were warned and consulted about redundancies;

(d) whether any alternative work was available and considered;

(e) whether the claimant was able to appeal.

6. The following are the key sections of the Act relevant to this case:

43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection

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

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

43C 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

139 Redundancy

(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—

(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 of 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.

103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

105 Redundancy

(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 other employees in the same undertaking 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.

(6A) 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.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(c) is that the employee was redundant

(4) Where the employer has fulfilled the requirements of subsection (1), 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.

7. The Tribunal also had regard to key authorities including Fecitt v NHS Manchester [2011] EWCA Civ 1190 in which the Court of Appeal discussed the burden of proof in dismissal cases under section 103A (as distinct from detriment claims). The approach was also dealt with in the earlier case of Kuzel v Roche Products Ltd [2008] EWCA Civ 380. In summary, in a dismissal case the burden of identifying the reason for dismissal under section 98 of the Act falls on the respondent. If, as applies here, the claimant wishes to argue that the reason was an improper one such as to make the dismissal automatically unfair under section 103A, then he bears an evidential burden to produce some evidence supporting that argument. The Tribunal must then consider the evidence as a whole and may make its decision based on the direct evidence of the parties and from drawing permissible inferences as to the true reason. If the making of protected disclosures was not the sole or principal reason for dismissal, then the claim fails.

8. The case of Chesterton Global v Nurmohamed [2017] EWCA Civ 979 addressed the question of belief and motivation. The Tribunal should ask whether the worker believed, at the time of making the disclosure, that it was in the public interest, and whether that belief was reasonable. The fact that a worker may also have a personal interest in the concern raised does not deprive him of protection, if the character of the interest served by its disclosure is also in the public interest.

Findings of fact

9. The claimant first began working for the respondent as a police constable, joining the force in October 1992. He retired from his role as a police officer in August 2017 and from 9 October began a new civilian role as an IT trainer. As a police officer the claimant had acted as a Police Federation representative and was experienced in that role, which included awareness of HR policies and procedures. In his role as a trainer the claimant was employed in the Learning and Development team which formed part of the HR department. Before the respondent embarked on a restructure, he and his colleague Joanna Collins were

the only two members of the IT training team. The other training teams were Officer Safety Training (OST) and Corporate.

10. In 2018 PWC were commissioned to carry out a review into the respondent's enabling services, the non-operational services supporting the front line. The purpose of the review was to transform and improve efficiency and effectiveness. A change programme followed from that review, and phase 1 (which did not affect any staff in L&D) was implemented by July 2019. It was phase 2 of the proposals which had an impact on the claimant's role as well as others in the HR department. A Change Proposal document was prepared on 9 October 2019. One of its proposals was that staff trainers in all departments would be removed under a restructuring, and so all trainers including the claimant were to be put at risk of redundancy. The objective of the proposals was to reduce the number of trainers by seven (later modified to five), but the intention for the new roles (known as L&D Officers) was that trainers needed to be 'omnicompetent' rather than specialising in IT, OST and Corporate training.

11. On 15 October a staff briefing took place when the claimant and his colleagues were made aware of the proposals. This was followed by a letter dated 16 October confirming the information and including an offer of individual consultation meetings if requested. The claimant did not take up that offer then or at any later date.

12. The claimant was concerned about the proposals and the impact they would have both on the service generally and on his own personal position. On 18 October 2019 he emailed the respondent's Compliance Manager & Data Protection Officer, Susan Haider, on behalf of himself and Ms Collins and asked her to consider two particular points of concern which would form part of the wider submission they were preparing. He put these under the heading 'Corporate Risk' and pointed out that:

    a. Training in the respondent's Niche RMS system had not been scheduled as part of officers' induction, such that an unknown number of individuals had access to data via that system without having undergone any formal training.

    b. Users of the ViSOR database (Violent and Sex Offender Register) were required to be adequately trained before being given access to the system, and he (the claimant) was the only remaining IT trainer accredited by the College of Policing to deliver that training. Pending training scheduled for April 2020, an unknown number of staff were accessing ViSOR without formal training.

13. This email was later treated as the first formal disclosure relied on by the claimant for the purpose of these claims. Ms Haider replied on 23 October expressing the view that "whatever structure and training resource is afforded to the organisation post-consultation, we must ensure that an adequate level of training is provided to equip the workforce to perform their role and to understand how they must use systems and data within systems". She referred to the need to be able to provide

evidence that adequate training and instruction had been put in place to support users, whatever form that may take in the future.

14. The second formal disclosure was made shortly afterwards, on 31 October, when Ms Collins emailed the dedicated Change Programme consultation address attaching a detailed response to the phase 2 consultation on behalf of herself and the claimant. This document extended to 29 pages of representations and appendices. It included background information about the recent reduction in size of the IT training team and what was felt to be an absence of resilience across the full range of IT subjects. The key submission was that there was no basis for disestablishing the role of IT trainer. In the section on 'Corporate Risk' the submission referred to two areas where the IT trainers had had difficulty meeting demand "and where corporate practise may be placing the organisation at risk". The cause of these difficulties was attributed mainly to the move away from formal induction programmes for police staff, and by turnover in officer and staff roles requiring access to the ViSOR database. In respect of the Niche RMS the document stated that:

> "… it has become corporate practise across the organisation to grant such individuals access to the full Niche system without them having undergone any formal training whatsoever."
>
> and highlighted that:
>
> "There are an unknown number of North Yorkshire police officers and police staff accessing the Niche system without ever having received any training."

15. A similar concern was raised in relation to the ViSOR database:

> "It has become corporate practise to grant individuals, moving into roles which require them to utilise ViSOR, access to the system, without them having undergone any formal training. There is a degree of peer training but that may well be from individuals who themselves have never been trained."

16. Ms Haider's email of 23 October was quoted from in this part of the document. In the following section the submission expressed concern about the selection criteria set out in the redundancy 'at risk' letter, specifically relating to some practical difficulties in carrying out performance review ratings.

17. On 14 November a consultation meeting took place, attended by the claimant and colleagues, when the training team was advised of the L&D review that was to be carried out by the then acting head of HR, Leanne Consett. Ms Consett had taken on that role with effect from 1 August 2019, shortly before these events. Her review was carried out in response to feedback from affected members of staff, including the claimant and Ms Collins, which led Ms Consett to be concerned about whether the demand for the training services had been accurately assessed and whether the proposed digitalisation of IT training was feasible. As a result of the review being proposed, the redundancy process was paused on 14 November and staff were made aware of this at the meeting.

18. Later that same day the detailed feedback document was re-sent by the claimant to the dedicated Change Consultation email address on behalf of himself and Ms Collins. This added some supplementary data, and it became treated as the third disclosure relied on by the claimant in this claim.

19. A further consultation meeting took place on 28 November, again attended by the claimant, when Ms Consett's review was confirmed.

20. In January 2020 Ms Consett reported on the review she had carried out. This included reviewing the comments submitted by the claimant and Ms Collins, and feedback from other members of affected staff. She presented two options to the Change Board, which accepted her recommendation to make the IT trainers redundant. This was on the basis that their workload could be carried out by other trainers, whereas neither the claimant nor Ms Collins were in a position to absorb the specialist work of the trainers in corporate and OST. Ms Consett had assessed their work as equating to less than one full-time equivalent (FTE) member of staff and believed the work could be absorbed by others in the L&D team.

21. Ms Consett held a further consultation meeting on 29 January with the claimant and Ms Collins, both accompanied by the Unison Branch Secretary, John Mackfall. He had been made aware of the content of Ms Consett's review report shortly before the meeting. Ms Collins was not a member of Unison but Mr Mackfall invited her to join the meeting as she was directly affected. She and the claimant were made aware of the proposed redundancy of their posts and had an opportunity to comment on the proposals. They were also aware of the proposed outcomes for other members of the team, who were not to be made redundant at that time. Ms Consett instructed the claimant to keep that information confidential pending discussion with his colleagues about what was happening and the impact on their roles, which at that time they still understood to be at risk of redundancy. The review report was later provided to Mr Mackfall by email. A copy was not provided directly to the claimant, nor did he ever request this.

22. By the time of these proceedings Ms Consett had become aware that she had incorrectly stated the number of IT training days in her review. Whereas she had identified 157 days of IT training, the true figure should have been 265. On that basis the respondent required 1.45 FTE IT trainers. She did not consider that being aware of this oversight at the time would have altered her recommendation. She remained of the view that a dedicated IT training resource was not needed and could be absorbed into a team comprising 20 FTE trainers at that time. Possible further redundancies in that team were still due to be considered at a later date.

23. Ms Consett drew a distinction in her assessment between the role profile of the IT trainers as compared to the specialist nature of the trainers working in Corporate and particularly in Officer Safety Training. Although the claimant had previously been qualified to deliver courses on behalf of the College of Policing and key courses such as ViSOR, the proposed redundancy of his post did not prevent the respondent from relying on other trainers who had the qualifications or experience to undertake these roles.

24. Later in the evening of the 29 January meeting, the claimant posted information about the redundancies of the IT trainers on social media, in contravention of the instruction given to him. His Facebook post began by asking readers not to comment or like the post, but to message him directly, as he did not want others to get into trouble for interacting publicly. His post protested at the redundancies being implemented by an organisation:

> "… which does not train its police staff in how to access Niche, a system which holds personal data on victims, detainees, witnesses and intelligence. It also allows access to ViSOR […] to untrained officers and staff, in breach of the College of Policing instructions."

25. As a result the claimant was suspended on 31 January pending s disciplinary investigation. This overlapped with a period of sickness after he submitted a fit note covering 30 January to 26 February.

26. Ms Consett wrote to the claimant on 1 February giving three months' notice of his redundancy to take effect on 1 May 2020, subject to possible redeployment in the interim. The claimant was offered a right of appeal which he did not pursue. The letter asked him to direct any appeal in writing to Ms Consett, addressing the letter to the Chief Constable. Although he did not raise this with either Mr Mackfall or the respondent at the time, in his evidence to the Tribunal the claimant said his reason for not appealing was that the letter required him to write to the same person.

27. Following this, on 11 February the claimant emailed the Deputy Chief Constable through Mr Mackfall who forwarded the message on his behalf. The email attached the submission document dated 31 October which the claimant said he had sent to the Office of the Information Commissioner, the College of Policing "and other appropriate statutory bodies, for their consideration". The claimant drew attention to what he described as "protected disclosures" relating to the corporate risks identified in the submission, and explicitly asserted the claimant's "protections as a whistleblower" deriving from the submission document. The claimant stated that the respondent's only action in response to these concerns was to make the two IT trainers – "the only two individuals who were seeking to address the situation" – redundant. The claimant's letter went on to address his concerns about his personal position, stating:

> "It is my intention to keep my correspondence with the Office of the Information Commissioner and other bodies private, and allow them to address matters as they see fit.
>
> That is conditional on North Yorkshire Police agreeing to and implementing the following actions by 5:00 PM on Wednesday 19th February 2020."

28. The conditions included that the respondent should cease all disciplinary action, release the claimant from attending work during notice and make payment of his remaining notice pay and redundancy pay by 25 February. In addition, the claimant sought:

> "A settlement, to be agreed, in respect of the victimisation I have suffered arising from making reference to the protected disclosures.

29. The claimant undertook not to comment publicly on the data protection issues or the way he had been treated, if the respondent agreed to terminate his employment on the terms put forward. His letter did not request any redress or measures in respect of the subject-matter of his disclosures.

30. The respondent did not reply to this email and continued with its efforts to redeploy the claimant. He completed a redeployment form on 18 February though did not identify any particular roles for which he might be suitable. Notwithstanding that, the respondent did give consideration as to whether the claimant could be redeployed as an Intelligence Analyst but came to the view that this was not a suitable role for him.

31. On 6 March conversations took place between the claimant and Mr Mackfall about arrangements for an investigatory interview to take place in the context of the disciplinary allegation. On 11 March the respondent wrote to the claimant inviting him to the investigation meeting on 20 March. This was later put back to 3 April. On 18 March Mr Mackfall spoke to the claimant about the options and agreed that the union would request an early departure date so that the claimant could avoid attending any meetings in the disciplinary process. Mr Mackfall telephoned Ms Consett to make that request. Ms Consett recorded that conversation, and a follow up on 19 March, in a file note stating:

> "18/3 Why rather than progress discipline (interview 3/4) don't we let him go on redundancy. […] Agreed in principle."
>
> 19/3 JM contacted me to agreed by Mike, letter to be prepared."

32. On the evening of 18 March the claimant emailed a member of the respondent's HR team saying that he had spoken with Mr Mackfall who had "had discussions with Ms Consett" and adding that: "Apparently the plan is that I will leave on 1st April on redundancy", such that he would not be employed on the date of the proposed 3 April interview.

33. As requested on the claimant's behalf, the respondent wrote on 20 March confirming his new termination date of 1 April, which was fixed in order to avoid the investigatory meeting taking place on 3 April. Ms Consett also confirmed that in light of the claimant's request they would no longer pursue their redeployment efforts. Accordingly, the claimant's employment came to an end on 1 April and his financial entitlements were paid.

34. By this time there had been changes to the respondent's plans such that Ms Collins was redeployed into a new role as L&D Officer Digital. This came about following a discussion with Ms Collins on 3 April, after the claimant's termination date, about the potential for her to stay to help cover a backlog of courses cancelled as a result of the Covid-19 pandemic. Ms Collins had appropriate experience in e-learning and was suitable to fill that unexpected vacancy.

Submissions

35. Both representatives gave detailed oral submissions, the content of which is not reproduced here except in summary form.

For the claimant

36. Ms Brooke-Ward referred to the first disclosure in the claimant's email dated 18 October 2019 and said that Ms Haider's reply shows an obligation to the ICO for the respondent to certify and provide evidence of the training that is given. The claimant's communications with Ms Haider as the Compliance Manager & Data Protection Officer demonstrated that he had a reasonable belief in the respondent's data protection obligations. The second disclosure related to the section in the feedback document on Corporate Risk. The disclosures tend to show a breach of legal obligations under the Data Protection Act. That was and is the claimant's subjective belief and he provided enough specificity for the respondent to understand the information being disclosed. He identified email requests for training because people were using the system without any formal training. The claimant also asked attendees at courses about this and had first hand knowledge of them having access without training.

37. In any event, a protected disclosure is not invalidated if it turns out not to be true. It can still be a qualifying disclosure. The question of it being in the public interest was also not challenged. It is data belonging to the public. The claimant did not hide the fact that he also had a personal motive for making the disclosure, because he was trying to save his job. That only made his concerns greater. The question of good faith goes only to compensation. Therefore it is a qualifying protected disclosure. The claimant says he was selected for redundancy and/or dismissed as a result of making it.

38. During the initial consultation about the restructuring, the seven trainers at risk of redundancy were in the same pool, and acceptable objective selection criteria were set out. It was a reasonable consultation up until the protected disclosure was made. The process was paused in response to the consultation and no change was made to the pool at that time. A further consultation meeting took place on 28 November, at which time the affected staff were still in the same pool and all were at risk.

39. Ms Brooke-Ward accepted that the feedback to the consultation was carefully considered, but challenged the lack of updates and new timetable. Instead, the respondent arranged the meeting of 29 January when the claimant and Ms Collins were the only ones to be given notice. She submitted that the claimant's social media posts – which although not disclosures in their own right did refer to the same subject-matter – caused the respondent's attitude and demeanour to change. In other words, the respondent reacted badly to the claimant making the data protection concerns public as had happened after the protected disclosures were made.

40. The Change Board made its decision based on Ms Consett's recommendation. This allowed incorrect data to justify the dismissal and this in turn was because of

the protected disclosures. Ms Brooke-Ward submitted that this was engineered by a senior trainer who knew the data was wrong. The respondent did not even call him as a witness even though the claimant's witness statement alleged that he acted without honesty and integrity. Either Ms Consett was aware of the data being incorrect, or she did not care because the objective was to remove the claimant and Ms Collins from the organisation.

41. Ms Brooke-Ward also challenged that there was any reduction in the work of the two IT trainers. If this work could be done by others, there must have been capacity in the Corporate team to absorb it. Therefore that is where the diminution of work lay and where the redundancies arose. The only logical explanation for this is that the respondent wanted to remove the whistle-blowers. Alternatively, this approach fell way outside the band of reasonable responses.

42. Although Ms Collins was later redeployed, the respondent did give her notice of redundancy. The fact that there was a change of heart does not mean that the protected disclosure did not play a part. Only Ms Collins did not make the protected disclosure public. The conversation which led to her redeployment was on 3 April, two days after the claimant's termination date. This was a manipulation. Lockdown began on 27 March and the respondent therefore knew before the claimant's last day that it would need to retain someone, yet did not make him aware of this. The claimant's dismissal was automatically unfair under section 105 because of the way he was selected.

43. Turning to the social media issue, the claimant accepted that he was angered by his redundancy. He felt singled out because of the disclosures. Ms Brooke-Ward conceded that the claimant was told to keep the information to himself. She said it was a regurgitation of the subject-matter of the protected disclosures. The respondent said it suspended the claimant because the other twelve trainers had not yet been told about their position, but they were keeping their jobs. The claimant made no reference to them in his posts. The suspension was a guise and the real issue was the repetition of the protected disclosures.

44. On the question of fairness under section 98(4) of the Act, Ms Brooke-Ward submitted in broad terms that there was 'error after error after error' in the handling of the redundancy and no explanation for those errors, except the respondent's agenda to remove the claimant from his post. She accepted that the evidence was unclear about whether it was the claimant's or the respondent's instigation to leave early.

45. Another reason for the dismissal being unfair was that this was in effect a case of 'bumping'. At least 1.5 employees were needed in IT training but they were made redundant to make room for the Corporate trainers. It was unfair selection because Ms Consett didn't even consider this at the time.

46. Ms Brooke-Ward submitted that the consultation issue was the greatest difficulty for the respondent. No one was notified of the change in the proposals, so the respondent could not rely on the previous consultation after that. She said there was no consultation at all on the decision to make the IT trainers redundant and no opportunity to respond before the claimant was given notice. The meeting of

29 January was rushed and the claimant was not given Ms Consett's review document to read beforehand. Although he could have asked for consultation, in law the obligation is the respondent's.

47. No deduction should be made on Polkey principles. If the claimant had not been unfairly dismissed for redundancy, there is no evidence that he would have made public posts on social media. In any event, it was very unlikely that the disciplinary procedure would have concluded before the termination date. There is no evidence that the claimant would still have been selected for redundancy even if a proper selection exercise had been carried out.

For the respondent

48. Ms Clayton provided both oral and written submissions, the key points of which are summarised below. She accepted that the claimant did make disclosures of information on 18 October, 31 October and 14 November 2019, but disputed that they were qualifying disclosures. While the respondent now accepted that the claimant had a genuine belief, it did take issue with whether that belief was a reasonable one. Ms Consett's evidence in respect of ViSOR training was that only 100 out of a total of 1400 people required access. The claimant said he had previously raised his concerns with the respondent in 2017, but there was no evidence that the respondent was concerned about his doing so. The claimant relied on anecdotal evidence but accepted that he had no knowledge of informal training provided by line management.

49. As for public interest, the claimant did not raise the issues because he was concerned for the public. On previous occasions in 2017 and 2018 he took no further action, but only did so in 2019 in response to his role being disestablished.

50. Ms Clayton challenged the assertion that the claimant repeating the subject-matter of the disclosures in social media posts also led to his being treated differently, pointing out that this was not the claimant's case and was not pleaded.

51. Turning to the redundancy situation as defined by section 139 of the Act, there was evidence about the reduction in the need for trainers and a new blended approach. This would include e-learning alongside some classroom training, continuing informal training by line managers, and the production of 'off the shelf' training packages to reduce preparation time. The claimant himself accepted that it was difficult to put forward a training diary for the remaining part of the year. The best he could do was to say that they should take six months' data and double it, but that was not a satisfactory way of projecting the future.

52. The reason for dismissal was not a protected disclosure but redundancy. Alternatively, the respondent relied on the restructuring of the department to make it more efficient and effective as some other substantial reason for a fair dismissal. The work was redistributed by virtue of disestablishing the posts.

53. Ms Clayton submitted that causation was not made out on the disclosures being the reason for dismissal. Consultation documents were presented to the whole department on 9 October 2019, before the first disclosure on 18 October, with a

proposal that all roles should become omni-competent, and all 14 trainers were affected. She said that Ms Consett's evidence was very persuasive on the circumstances of Ms Collins' redeployment, and there was nothing to support the claimant's suspicion. It could not be said that the respondent was in a position to understand the impact of the lockdown in just a few days. If the respondent had been annoyed about the joint disclosures, it would not have attempted to redeploy Ms Collins. The claimant would also have been considered for redeployment if he had not requested to leave early. The claimant's evidence was that Mr Mackfall negotiated his early release without authority, but as a very experienced union representative he would have acted with integrity. In fact, during cross-examination the claimant eventually accepted that he had no objection to this course and was happy to leave when he did. His earlier letter to the Deputy Chief Constable supported this, because the claimant was threatening action if not released by the end of February. The claims under sections 103A and 105 of the Act were not therefore supported by the evidence.

54. Dealing with general principles of fairness under section 98(4), Ms Clayton referred to the several consultation meetings which took place in October and November 2019, which provided information about the proposed restructuring, the timetable and updates regarding the internal review. She submitted it was obvious that there would not be further consultation after the review. The review document was given to Mr Mackfall at the meeting on 29 January. If the claimant wanted to see it, he only had to ask his union representative. Mr Mackfall's evidence was that he would expect to let the respondent proceed with the redundancy, and if any real issues arose an appeal would be launched. After 29 January the claimant failed to take up any opportunity to request further consultation or an appeal.

55. The consultation was genuine and the respondent listened to what was said when staff provided feedback to the original PWC proposals. Ms Consett carried out her own review and made changes to those proposals. The revised position on pooling was that the two IT trainer posts would be disestablished. It was easier to upskill a few people in the Corporate team on Niche and ViSOR training rather than the other way around. Evidence was given about management and leadership training as well as other courses being delivered by Corporate which the claimant and his colleague could not do. There was therefore a proper rationale behind this decision, including the fact that it would mean deleting only two posts and therefore providing certainty for the rest of the department. The respondent was entitled to weigh up the effect on the whole department in pursuance of its aims. Unless that was an irrational decision or fell outside the band of reasonable responses, the tribunal should not interfere.

56. Even with the revised data of 1.45 FTE trainers being required in IT, that would have made no difference to the recommendation to the Change Board because others could absorb that work. The claimant's own estimate of 300 days' training a year was only 35 days more than the respondent's figure, and was more than the figure that Ms Collins was contending for.

57. The respondent took steps to consider alternative work, even though the claimant did not identify any other jobs on the redeployment form and said he only wanted to be an IT trainer. The respondent nevertheless spent time and resource

considering the claimant's suitability for another role, which shows that it was genuine.

58. On the Polkey question arising from the disciplinary allegation, the claimant was clear that he had been "requested" not to disclose information about the redundancy. He did so in contravention of a reasonable management instruction. The claimant showed no remorse in his evidence for making the information public. He knew it was wrong because he asked in the Facebook post for people not to publicly like or respond to it. He admitted being angry and upset at the time. Even when asked by Mr Mackfall, he did not take down the post until later.

59. It is therefore likely that the claimant would have been dismissed in any event for gross misconduct. Ms Clayton said the respondent could not contend for a 100% reduction but submitted there was a 70-80% chance that this would have been the outcome.

Conclusions

60. The fundamental difference between the parties in this case was the reason for the claimant's dismissal and whether it was principally for reasons linked to his making protected disclosures. Much of the evidence about the chronology of events was not in dispute, though the interpretation of the actions taken by the respondent was undoubtedly in contention. Where it was necessary to do so, I preferred the evidence of the respondent's witnesses over the claimant's evidence. A number of factors affected the credibility of the claimant's assertions. Firstly, he insisted throughout these proceedings that he did not request to bring forward his termination date and gave Mr Mackfall no such instruction on 18 March 2020. This was not credible at all. Mr Mackfall, whose evidence relied heavily on memory and not documents, was compelling on the point, which is that the claimant wished to leave before having to attend the investigation interview on 3 April. This was corroborated by Ms Consett's contemporaneous file note and even by the claimant's own email to HR confirming that he would no longer be an employee by that date. The claimant's earlier letter to the Deputy Chief Constable dated 11 February also made clear that his priority was to be released early with all his financial entitlements plus additional compensation.

61. This letter to the DCC was a further consideration I took into account when assessing the case. Although the claimant was entitled to make the DCC aware of his concerns and to ask for an early release, his letter also contained threats to make his data protection concerns public. The offer to keep those concerns private so long as unless his terms were agreed undermined the claimant's credibility generally and damaged his assertions about risks to the public interest. There was nothing to stop him seeking assurances that the respondent would take steps to look into and address the corporate risks identified.

62. Overall, it was striking that in his witness statement the claimant made a number of very serious allegations against officers or staff employed by the respondent. For example, the statement opens with allegations that the respondent:

- Sought to suppress the protected disclosures;
- Provided false information at the meeting on 29 January;

- Engineered his early departure;
- Deliberately concealed IT training as an activity in a new job description.

63. Having reviewed the evidence relied on by the claimant in making these and other assertions, I was satisfied that they lacked any substance but were rather in the nature of the claimant's interpretation of events and documents. The same can be said of the allegation that a senior trainer “acted without honesty or integrity”, a most serious allegation to raise unless there is clear and unambiguous evidence supporting it.

64. Turning now to the issues of law in this case, the first question was whether the claimant made a protected disclosure as defined by section 43A of the Act. It was not in dispute that he disclosed information to his employer on 18 and 31 October and on 14 November 2019.

65. The core concern contained in the information disclosed was that the respondent had a practice of allowing people access to the Niche and ViSOR systems without formal training, meaning in a classroom setting. The fact that the claimant and his colleague in the IT training team were put at risk of redundancy led them to raise this concern in their joint response to the consultation. They had no specific information or evidence about breaches of data protection laws, and the concerns did not take into account the extent to which any relevant training was being carried out informally, for example by line managers. The prospect of the IT trainer posts being made redundant meant that the claimant and Ms Collins were unsure that the respondent would have the resources to comply with their training obligations in the future.

66. The point of contention here was whether they were qualifying disclosures under section 43B. I am satisfied that the information disclosed did tend to show that the respondent was likely to fail to comply with its obligations under data protection law – if the claimant’s concerns were well-founded. Whether the information was actually correct is not the point, so long as the claimant had a reasonable belief that the information tended to show a likely or actual failure. The other element of section 43B is whether the claimant held a reasonable belief that the disclosure was in the public interest. On balance I conclude that he did hold that belief and that it was objectively reasonable for him to do so. The fact that the disclosure was undoubtedly also in the claimant's personal interests does not alter the character of the information, following Chesterton Global. It is not necessary for me to draw any conclusion on the accuracy or merits of the claimant's concerns, though I note that they were based on very limited anecdotal evidence relating to formal classroom-based training, and did not take account of the other, less formal ways in which the respondent was addressing the question of access to its IT systems. Ms Haider’s response to the initial disclosure reinforced the view that the respondent must be able to evidence its compliance, while also acknowledging that training may take different forms.

67. I therefore conclude that the disclosures made were qualifying and protected disclosures under the Act.

68. The next question was whether there was a redundancy situation as defined by section 139 of the Act. In other words, whether the requirements of the respondent's business for employees to carry out work of a particular kind had ceased or diminished, or were expected to cease or diminish. If the claimant's dismissal was wholly or mainly attributable to that fact, then it could amount to a potentially fair reason under section 98(2)(c) of the Act.

69. This question was not seriously challenged by the claimant, whose case relied more on the question why he and Ms Collins were selected for redundancy as compared to trainers in the other teams, or why Ms Collins was ultimately retained, unlike him.

70. The evidence in support of there being a redundancy situation was ample, and fully demonstrated by the initial PWC commission followed by Ms Consett's internal review. The respondent clearly had a rationale for going forward with its plan to change the training provision and this involved restructuring the roles in such as way as to remove the need for a discrete team of IT trainers. That work was to be absorbed into the other training teams in Corporate and OST, and the evidence was that this was achievable as part of the creation of the new omni-competent roles of L&D Officers. I found Ms Consett's witness evidence on the redundancy question and the rationale for the restructuring clear and compelling.

71. That said, the existence of a redundancy situation within the statutory meaning does not dispose of the need to examine the respondent's actual reasons for dismissing the claimant. His primary argument under section 103A of the Act was that the respondent had an agenda to remove him and Ms Collins from the organisation because they had blown the whistle on data protection risks. Acknowledging that Ms Collins' proposed redundancy was later avoided through redeployment, the claimant argued in the alternative that his selection over her was an unlawful breach of section 105.

72. On the causation point I accepted the respondent's submission that the timeline did not support the claimant's case. The initiative for change was well under way before the first disclosure on 18 October 2019, and indeed that email was prompted by the publication of the redundancy proposals affecting the trainers, not the other way around. It is nevertheless possible that the respondent's later decision to remove the posts of the two IT trainers and absorb their work into the remaining teams was influenced by the protected disclosures. Having considered this, I could see no evidence whatsoever that this was the case. The claimant's case was simply not supported by evidence, only suspicions.

73. The first person to respond to the concerns raised by the claimant and Ms Collins was the respondent's Compliance & Data Protection Officer. Her email of 23 October was measured and acknowledged the legitimacy of the risks identified. She clearly had no difficulty with the points made, and knew they would be submitted in the feedback to the consultation.

74. Ms Consett had come into her role in the recent past and had no reason to adopt any bias in her approach to her review. The fact that she modified the suggestions put forward by PWC demonstrated that she and the respondent were willing to

listen and adapt. She accepted, once she later became aware of this, that her data about the IT training workload was incorrect, but gave convincing evidence as to why this would not have proved material to her recommendation to the Change Board. Ms Consett had no animus towards the claimant or his colleague but carried out her professional duties as asked. She provided a clear and objective rationale for differentiating between the IT trainers and those in the Corporate and OST teams, and this approach was consistent with the redundancy situation and restructuring context.

75. I found no evidence at all that Ms Consett or any other person involved in the redundancy process reacted badly to the disclosures being made. They were explicitly raised jointly by Ms Collins, and the respondent ultimately retained her for future work. I am satisfied that this was because the respondent had no difficulty with the making of the disclosures and had no 'agenda' to remove the whistle-blowers. The timing of Ms Collins' redeployment is easily explained by the urgent need to react to the unforeseen impact of a global pandemic. That this happened close to the date when the claimant's employment ended is of no significance, not least because that outcome was set in motion by the claimant himself weeks earlier.

76. It was only in his letter to the DCC in February 2020 that the claimant explicitly asserted his rights as a whistleblower. That letter was ignored and nothing in the evidence suggests that this was a turning point when anyone in the respondent organisation began to view or treat the claimant differently. In fact, the respondent took steps even after this to consider redeployment and only brought that to an end in late March as a result of the agreement to let the claimant leave early.

77. For all these reasons, I accept the respondent's evidence that it took the redundancy decisions for reasons wholly related to the need to remove the posts of IT trainer as part of its restructure. These decisions were not made for any reason connected to the making of protected disclosures, and the claims under sections 103A and 105 both fail.

78. Having accepted that the reason for the claimant's dismissal was redundancy under section 98(2) of the Act, this leaves the question of whether the respondent acted fairly or unfairly in dismissing for that reason. Whether a dismissal is fair or unfair is partly about the statutory language of section 98(4) of the Act, by reference to the circumstances of the case, and the respondent's size and resources. It is also well-established through case law that certain considerations are relevant to the question of fairness in redundancy dismissals, namely:

    (a) whether the employer acted reasonably in identifying the pool of candidates for redundancy and the criteria for selecting from that pool;

    (b) whether selection criteria were fairly applied;

    (c) whether employees were warned and consulted about redundancies;

    (d) whether any alternative work was available and considered;

(e) whether the claimant was able to appeal.

79. In this case there is no doubt that employees were warned about possible redundancies as soon as the findings of the PWC report were available. This included not only the claimant and Ms Collins but also other trainers in the L&D team. This led to a number of consultation meetings taking place in October and November 2019, along with the provision of written information about the proposed changes. Rightly, the claimant made no complaint at this hearing about the adequacy of the consultation in this period. The respondent invited him and other affected staff members to request one to one meetings if required, but the claimant felt no need to do that. He understood well what was being suggested and indeed was able with his colleague to compile a very detailed response to it.

80. The consultation in the autumn of 2019 was manifestly meaningful, as it led the respondent to take on board some of the employees' concerns and the outcome was an internal review by Ms Consett and a revised proposal approved by the Change Board in January 2020. The claimant complains about the lack of further consultation at this point, before the meeting of 29 January when he was given notice of termination. By this time the position had changed somewhat, in that the respondent had accepted and authorised Ms Consett's recommendation to disestablish the posts of the two IT trainers. However, I do not accept this criticism as it was clearly the respondent's intention to allow ongoing discussion after notice was given, a point specifically made in evidence by Mr Mackfall, an experienced union representative who well understood that notice may be affected by subsequent events. Redeployment is one of them, as is an appeal.

81. Any points still outstanding for discussion after the giving of notice could easily have been raised by the claimant or his union. Instead, the claimant sought no further information nor made any protest, instead choosing to request an early termination date with payment of compensation.

82. By late January the claimant and his colleague remained at risk of redundancy, though their colleagues in the other training teams were no longer at risk. On the face of it, this could have changed the pool of employees placed at risk, and the claimant contends that he was selected either for improper reasons relating to protected disclosures, or as submitted on his behalf at the end of the hearing, due to 'bumping'. The claimant had no problem with the selection criteria previously identified, as applying to all trainers, except in relation to how his performance could be assessed following changes in the IT training team. Once the pool was limited to the IT trainers, no selection criteria were applied.

83. I have considered the respondent's decision to redefine the pool of employees to the IT trainers. Only if that approach fell outside the band of reasonable responses could the claimant succeed in arguing that it rendered his dismissal unfair. However, my conclusion is that the respondent was entitled to identify the 'at risk' pool as comprising those who delivered IT training. Their skills were deemed to be transferrable to other trainers in the department but the same could not be said in reverse. There is nothing irrational or unreasonable about that approach.

84. No complaint was made about the steps taken (or not taken) by the respondent in respect of redeployment. The claimant was encouraged early on to identify vacancies for which he might be suitable. He did not identify any particular jobs that might interest him, but even so the respondent proactively considered him for an intelligence role, albeit this was not suitable. Once the claimant made it known that he would like to bring forward his termination date (as requested in his letter to the Deputy Chief Constable), the respondent reasonably stopped taking further steps on redeployment. It was obvious to the respondent, and indeed to Mr Mackfall, whose evidence on this point was convincing, that the claimant had no interest in staying in employment with the respondent. This was also clear from the claimant's letter to the DCC offering to negotiate terms. These terms were all concerned with his own personal position and not with any public interest issue. He made no request for any remedial measures to be put in place to protect data belonging to members of the public.

85. Finally, the respondent offered the claimant a right of appeal, but the claimant did not take this up. His assertion in evidence that this was because it would be dealt with by the same person was wholly implausible. The claimant was an experienced Police Federation representative and familiar with the respondent's HR policies. He also had access to advice from Mr Mackfall. Had he genuinely believed that the appeal would not be dealt with by an independent decision-maker, he would have raised this. In fact, he had no interest in appealing as he had already made the decision to leave. All of these factors are consistent with the events of 18 March taking place as described by Mr Mackfall and Ms Consett.

86. For the reasons set out above, the claimant's claims fail. Had I not found that he was fairly dismissed for genuine redundancy reasons, I would have concluded that the disciplinary issue was sufficiently serious to warrant the claimant's summary dismissal for gross misconduct. I do not accept the submission that but for the unfair redundancy selection he would not have posted information on social media in anger. His doing so was in deliberate contravention of a management instruction which was manifestly reasonable. It was for the employer, not the claimant, to decide how and when staff would be notified about the effect on their posts of a restructuring. Had the claimant not requested an early departure in order to avoid the disciplinary consequences, his dismissal is very likely to have taken place. This process would either have been concluded before his original termination date of 1 May, or by 30 June at the latest. In that event, he would have lost his right to notice pay and a redundancy payment, both of which he received in full by virtue of bringing forward his departure.

EMPLOYMENT JUDGE LANGRIDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
4 January 2022

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