



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Mrs L Fry

v

Kingswood Learning & Leisure Group Ltd

**Heard:** In Midlands (East) region via CVP

**On:** 6,7,8 & 9 June 2022

**Before:** Employment Judge Ayre, sitting with members Mr C Pittman and Mr C Goldson

**Representatives:**

**Claimant:** In person

**Respondent:** Mr C McDevitt, counsel

## JUDGMENT

The unanimous decision of the Tribunal is that the claimant was dismissed by reason of redundancy. She was not dismissed because she made protected disclosures. Her complaint of automatic unfair dismissal under section 103A of the Employment Rights Act 1996 therefore fails and is dismissed.

## REASONS

### Background

1. On 2 December the claimant presented a claim of unfair dismissal to the Employment Tribunal, following a period of Early Conciliation that started on 30 October 2020 and ended on 30 November 2020. Her claim is that she was automatically unfairly dismissed because she made protected disclosures.
2. The respondent defends the claim. It says that the claimant was dismissed by reason of redundancy. Both parties agree that the claimant had less than two years' continuous employment with the

respondent, and that she therefore cannot pursue a complaint of ordinary unfair dismissal.

3. The case was listed for a Preliminary Hearing before Employment Judge Britton on 1 March 2021 at which the issues were discussed and Case Management Orders were made.
4. Following that hearing the respondent admitted, in an email sent to the claimant on 20 May 2021, that the claimant had made protected disclosures. Mr McDevitt confirmed that position at the start of the hearing.

### **The Proceedings**

5. There was before us a bundle of documents running to 228 pages. A number of documents had been added to the bundle at a very late stage, and the final version of the bundle was only produced on the first day of the hearing.
6. The claimant expressed concern that she did not have a hard copy of the final bundle. She was working to a hard copy of the bundle that had been sent to her by the respondent's representatives in April, and that copy was marked by her. It was explained to her that she could of course use the marked copy when questioning the respondent's witnesses, and during submissions.
7. The claimant understood that when giving evidence she needed to have a 'clean' and unmarked copy of the bundle in front of her. After some discussion, the claimant agreed to use an electronic copy of the bundle on a separate screen, when giving her evidence.
8. We heard evidence from the claimant and, on behalf of the respondent, from Mike Husband, Sales Director, and Stephen Watson, People Director.
9. The respondent also provided the Tribunal with extracts from the IDS Employment Law Handbook on Whistleblowing at Work, for which we are grateful.
10. The respondent had previously been referred to in these proceedings as 'Kingswood Learning & Leisure Group'. During the course of his evidence Stephen Watson told the Tribunal that the legal entity that employed the claimant was Kingswood Learning & Leisure Group Ltd, and Mr McDevitt subsequently confirmed the position.
11. The name of the respondent was therefore changed to Kingswood Learning & Leisure Group Ltd.

### **The Issues**

12. At the start of the hearing we discussed and agreed the issues that the Tribunal would have to determine. The respondent admits that the claimant made the following disclosures and that these disclosures are

protected disclosures falling within section 43B of the Employment Rights Act 1996 (“**the ERA**”):

- a. Orally to Sarah Farrell, Interim Sales and Marketing Director, in a meeting on 13<sup>th</sup> March 2020 when the claimant disclosed information tending to show that Mr Husband had touched a female colleague at a work event; and
- b. Orally to Andy Marsden, Programme Director, on 15<sup>th</sup> April 2020 when the claimant repeated the disclosure made on 13<sup>th</sup> March 2020 and also disclosed information tending to show that Mr Husband had made an inappropriate comment to a female colleague about attending a Zoom call in her dressing gown.

13. The claimant confirmed that these are the only protected disclosures that she relies upon.

14. The claimant told the Tribunal that the only complaint she is bringing is one of automatically unfair dismissal under section 103A of the ERA. The issue for the Tribunal to determine therefore is:

Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

15. If the Tribunal finds that the reason or principal reason for the dismissal was that the claimant made a protected disclosure, then the claim for automatic unfair dismissal succeeds. The Tribunal will then go on to consider questions of remedy.

### **Findings of Fact**

16. We make the following findings of fact unanimously.

17. The claimant was employed by the respondent from 5 November 2018 until 31 October 2020. She joined the respondent as Interim Head of Risk and Governance and was subsequently promoted. In January 2020 she became Head of Schools on a salary of £65,000.

18. As Head of Schools the claimant reported to Sarah Farrell until the end of May 2020, although Sarah Farrell was on furlough from 10 April 2020. On 1 June 2020 Mike Husband became the claimant’s line manager.

19. Whilst Head of Schools the claimant also took on some responsibility for managing the respondent’s contact centre in Norwich. She spent one or two days a week in Norwich, and the respondent would pay for overnight accommodation for her, as Norwich is 152 miles from the claimant’s home. The rest of the time the claimant worked from home as the Head of Schools role was field based.

20. On 4 March 2020 the claimant and others in the sales team attended a work event in Oxford. Mike Husband also attended the event. He was not yet employed by the respondent, but was due to join on 16 March,

and the event was considered to be a good opportunity for him to meet the team.

21. Susan Evans, International Business Development Manager, and a member of the claimant's team, was present at the meeting on 4 March. She later told the claimant that during the meeting on 4 March Mike Husband had slapped her on the back. The claimant told us that Susan Evans told her that Mike Husband had prodded, poked and slapped her.
22. We had some concerns that the claimant's recollection of events was not always accurate or consistent. For example, when questioning Stephen Watson, she was adamant that she had not spoken to him on 19<sup>th</sup> May 2020. He pointed out to her that she had referred to speaking to him on 19<sup>th</sup> May in her Claim Form, at which point she accepted that she had spoken to him. She also referred in her witness statement to a conversation with Stephen Watson on 19 May.
23. The version of events given to us by the claimant during evidence at the Tribunal was also not consistent with the documentary evidence or what she appears to have said at the time. For example, the claimant was complimentary about Mike Husband at the time she was made redundant, thanking him for the way in which he handled the situation, and contacting him on LinkedIn to connect with him. She told us in evidence that she had always had suspicions that the real reason for her dismissal was that she had made protected disclosures, but this was not consistent with her behaviour at the time. Not only did she choose not to appeal against her dismissal, but she thanked Mike Husband, made no complaint to Andy Marsden, another director who she trusted, and voluntarily contacted Mike Husband on LinkedIn asking him to stay in contact.
24. The claimant also presented in evidence notes of a conversation that she said she'd had with Stephen Watson on 28 May 2020. The note was dated 21 June 2020 but could not have been created on that date because it referred to her redundancy dismissal. The claimant was given notice of termination of her employment due to redundancy on 27 July, and the dismissal did not take effect until 31 October 2020. The claimant did not provide a satisfactory explanation for this discrepancy. In cross examination she suggested that the note had actually been written in 2021.
25. The claimant's evidence on the key questions of the alleged behaviour of Mike Husband towards Susan Evans and Jennifer Willows also differed significantly from their version of events. Both Susan Evans and Jennifer Willows provided statements for the respondent during the course of an internal investigation. Those statements were reproduced in the bundle of documents for the Tribunal hearing. Susan Evans described the events of 4 March as *"a couple of times Mike lightly slapped me on the back. I happened to mention this to Leigh over a glass of wine that evening, certainly not in a way that I was upset or requiring something to be done, just in a way of a passing comment. From that very moment she was "like a dog with a bone" and kept pushing me into raising this officially, by which stage it had*

*gone from a light slap on the back to poking, pushing and slapping on the back. I did think the whole situation was extremely exaggerated and just wanted to put the matter to rest. Leigh took the matter upon herself and as my line manager said that she had to raise this issue with her line manager, Sarah Farrell.”*

26. The claimant described the events of 4 March 2020 very differently. She said that in a 1-2-1 meeting on 11 March Susan told her that Mike Husband had been “*prodding and poking her and ‘man slapping’ her at the event*”.
27. Jennifer Willows was employed at the time as Head of Groups on a salary of £45,000. In her statement she described an occasion when, during a Microsoft Teams call, Mike Husband asked her for an early meeting one day, and she commented ‘wow that’s early’, “*Mike responded with ‘don’t worry Jen if you’re still in your dressing gown it doesn’t matter’ I didn’t think anything of the comment and we carried on with our call...It wasn’t until later when Leigh Fry called me and brought it up in conversation following this comment being communicated to her by another person on the call stating that it was inappropriate. My response was ‘yeah a bit of a strange thing to say’ but didn’t mention it again.... Leigh progressively brought the dressing gown comment up in a number of conversations and advised me to speak with HR, this was not something I was going to pursue as I didn’t feel it was necessary and didn’t take offence...*”
28. The claimant, in her witness statement, said that Susan Evans told her about the dressing gown comment on 14 April 2020, and that both Susan Evans and Jennifer Willows were “*horrified*” by it. The claimant’s version of events was therefore different to those of the ‘victims’ of the alleged behaviour, who had experienced it first hand, namely Jennifer Willows and Susan Evans.
29. On 13<sup>th</sup> March 2020 the claimant reported Mr Husband’s alleged behaviour on 4 March towards Susan Evans to Sarah Farrell. On 15<sup>th</sup> April the claimant telephoned Andy Marsden, Programme Director, who was someone the claimant had a good relationship with and who she trusted. During the call she told Mr Marsden about Mr Husband’s alleged behaviour towards Susan Evans in Oxford on 4 March, and about the dressing gown comment. The respondent admitted, in May 2021 that the disclosures made by the claimant to Sarah Farrell on 13 March and to Andy Marsden on 15 April were protected disclosures.
30. In the week commencing 4 May 2020 Andy Marsden spoke to Stephen Watson and told him about the incident in Oxford on 4 March, and about the dressing gown comment. Stephen Watson then spoke to Sarah Farrell, who was by that time on furlough, and she said that she thought the issues had been resolved. Stephen Watson decided to have a call with Jen Willows, Susan Evans and Mark Batch who at the time comprised Mike Husband’s team. Stephen Watson was very clear in his evidence that the alleged behaviour of Mr Husband was not acceptable and would not be tolerated within the respondent’s business.

31. On 13<sup>th</sup> or 14<sup>th</sup> May 2020, the claimant called Stephen Watson to talk about Jen Willows, Susan Evans and Mark Batch. She spoke to Stephen Watson about the 4 March incident and the dressing gown comment, and said she'd been having regular calls with Jen Willows and Susan Evans to discuss the situation. Stephen Watson thanked her for bringing matters to his attention and said he would pick up with Jen Willows, Susan Evans and Mark Batch separately to understand what to do next. As far as Stephen Watson was concerned, the claimant was a third party as she had not witnessed any of the events, and his focus was on the wellbeing of Jen Willows and Susan Evans.
32. Stephen Watson arranged a Zoom call with Jen Willows, Susan Evans and Mark Batch, which took place on 15 May. The claimant was not present during that call but arranged calls with Jen Willows and Susan Evans before and after it took place. During the call both Susan Evans and Jen Willows were nervous when talking about the incidents. Susan Evans brushed off the 4 March incident and asked why the matter had come to Stephen Watson. He explained that his role was to ensure that staff were safe at work and free from any discrimination. Susan Evans said that she felt this had been blown out of all proportion and that Mike Husband had just been trying too hard to be friendly, behaving as if he'd known her for 3 years rather than 24 hours.
33. Stephen Watson asked her if Mike Husband had done anything inappropriate that she felt uncomfortable about and she said no. Susan Evans also said that she did not want to make any formal or informal complaint.
34. Stephen Watson's evidence on this issue contradicts the version of events given by the claimant in her witness statement. She said that Susan Evans called her after the Zoom call and said that "*the team had absolutely gone for it with Stephen Watson on the Zoom call with him and had 'hung Mike out to dry'*". We prefer Stephen Watson's version of events to that given by the claimant, which is based on hearsay as she was not at the meeting, whereas Stephen Watson was. Stephen Watson's version of events was not challenged by the claimant in cross examination.
35. During the meeting on 15 May, they also discussed the dressing gown incident. Jen Willows became upset and said that she had found Mike's comment a bit odd but not inappropriate and that she had not felt uncomfortable. She also did not wish to raise a complaint, either formal or informal, about the behaviour.
36. On 18<sup>th</sup> May, having given Jen Willows and Susan Evans the weekend to reflect and consider their position, Stephen Watson telephoned each of them separately to ask how they were feeling, whether they'd had a change of heart, and whether there was anything more that he could do to help and support them. Jen Willows told him that she felt she was being forced by the claimant to 'do this'. She said she'd had numerous calls and Teams meetings with the claimant and that the claimant had an axe to grind. She felt she could handle the situation and did not want the claimant to get involved. She wanted to put things behind her and focus on her work.

37. Susan Evans told Stephen Watson that she also wanted to put things behind her, and that she felt the claimant was putting in more calls than usual to her. She said that at first, she had thought this was the claimant acting out of care and concern for her, but then it became strange.
38. Both Susan Evans and Jen Willows were keen that their names should not be disclosed and wanted Stephen Watson to keep the matter confidential.
39. Stephen Watson updated the respondent's CEO, Alex Williamson, who asked whether Mike Husband should be suspended. Stephen Watson's advice was that suspension was not appropriate and it was agreed that Stephen Watson would approach Mike Husband and give him feedback.
40. On 19 May Stephen Watson telephoned Mike Husband and talked to him about behaviour generally and how the respondent operated and dealt with people. He told him to be aware of how he came across and spoke to people, and to make sure that it was in line with the respondent's values. He also told him to ensure that he was respectful of others and that the respondent would not tolerate any behaviour or banter that might upset anyone. Mike Husband asked if Stephen Watson was referring to any particular incident and Stephen Watson said no, he was referring to his conduct generally. Mike Husband apologised if he had done anything wrong.
41. Stephen Watson did not tell Mike Husband about the incidents on 4 March or the dressing gown comment, nor did he disclose the names of Jen Willows, Susan Evans or the claimant during that conversation. We find, on the balance of probabilities, that Stephen Watson did not tell Mike Husband that the claimant had made allegations of inappropriate behaviour against him until the claimant raised her grievance in October 2020.
42. Stephen Watson also spoke to the claimant on 19<sup>th</sup> May. The claimant wanted an update on Stephen's conversations with Susan Evans and Jen Willows, and whether he had spoken to Mike Husband. Stephen Watson found this strange because it was nothing to do with the claimant anymore. He explained that he had dealt with the situation, spoken to Jen Willows, Susan Evans and Mike Husband and that Mike Husband had apologised for any behaviour that had come across in the wrong way.
43. The respondent's business was, like many businesses, seriously affected by the Covid 19 pandemic. Prior to the pandemic, the respondent employed approximately 650 staff in quiet times of the year. Its business is however seasonal, with spring and summer being the busiest period, and staffing levels can increase to 1100 or 1200 at busy times of year.
44. A large part of the respondent's business is providing residential stays for groups including groups of school children. When the pandemic hit,

and the country went into lockdown, schools closed, and residential trips were not permitted. As a result, the respondent's income reduced to zero for a period of time. The respondent's wage bill was approximately £1,000,000 a month and at times the respondent did not have sufficient funds in its bank account to cover this bill.

45. The respondent therefore needed to take urgent and serious action to reduce its costs. Between June and October 2020 approximately 300 employees were made redundant.
46. The respondent is managed by a Senior Leadership Team (“**SLT**”), of which Stephen Watson and Mike Husband were both members. Each member of the SLT was tasked with reducing headcount and cost within their department, whilst at the same time ‘future proofing’ the department and ensuring the sustainability of the business. Each produced a plan which involved redundancies and presented that plan to a meeting of the SLT. The redundancies were then discussed and agreed by the SLT.
47. Stephen Watson produced a cost saving plan for the HR department, which involved 18 redundancies within that department.
48. Mike Husband produced a cost saving plan for the Sales department. That plan included reducing the number of ‘Experience Experts’ working in the respondent’s contact centre in Norwich and combining the roles of Head of Schools (held by the claimant) and Head of Groups (held by Jennifer Willows) into one role – Head of Sales, UK Groups & Schools. That role was benchmarked from a salary perspective and the salary was set at £45,000. At the time Mike Husband wrote the plan schools were closed and residential trips were banned.
49. Mike Husband also decided to create a new role based in the contact centre in Norwich, Sales Centre Manager, also on a salary of £45,000. Mr Husband wanted the Sales Centre Manager to have experience of running a call / contact centre and to be based in the centre. The centre was considered to be the ‘life blood’ of the Sales team but was dysfunctional in Mr Husband’s view. He wanted a senior manager on site five days a week to improve the performance of the team and help them to make the most out of government announced funding for apprenticeships which the respondent considered to be a big opportunity for it.
50. Although the Head of Sales role was on the face of it a bigger role than the claimant’s because it combined the roles previously carried out by Jen Willows and the claimant, the strategic oversight component of the role was removed and taken on by Mike Husband. This resulted in the new role being benchmarked at a lower salary.
51. Mr Husband presented his proposals to the Senior Leadership Team and they were approved. At the time he developed the proposal, and indeed throughout the subsequent redundancy consultation process, on the evidence before us we find on balance that Mike Husband did not know that the claimant had made protected disclosures. The



protected disclosures did not therefore influence his decision to put the claimant's role at risk of redundancy.

52. Stephen Watson did know about the protected disclosures made by the claimant at the time he was involved in the discussions at SLT about Mike Husband's proposed redundancies. There was no evidence however before us to suggest that the fact that the claimant had made protected disclosures influenced Stephen Watson's views on the redundancy in any way. To the contrary, Stephen Watson was very complimentary about the claimant's abilities and we accept his evidence that he did not want to lose her from the business.

53. Both Jen Willows and the claimant were put at risk of redundancy. Both were invited to apply for either the new role of Head of Sales or the role of Sales Centre Manager. On 20<sup>th</sup> July 2020 the claimant was told by Mike Husband that her role was at risk of redundancy, and that there would be a period of consultation with her. Mr Husband wrote to the claimant the same day confirming the position and inviting her to a meeting on 22<sup>nd</sup> July.

54. Also on 20 July Stephen Watson wrote to the claimant extending her furlough leave until 31<sup>st</sup> October 2020. The claimant suggested that this letter and a conversation that she had with Stephen Watson on 28 May about holiday entitlement were an indication that the respondent had already decided to dismiss her, and that they did not want her in the business. We find that was not the case. It was clear from the evidence of Stephen Watson in particular that the claimant was highly valued by the respondent. He spoke in glowing terms about her performance and told us that he considered her to be a potential future director of the business. Mike Husband's evidence was that he wanted the claimant to apply for the Head of Sales role.

55. The first redundancy consultation meeting took place on 22 July 2020. During the meeting Mike Husband discussed with the claimant the business reasons behind putting her role at risk of redundancy, and the claimant confirmed that she fully understood those reasons. There was a discussion about the two new roles that were being created and the claimant was asked to indicate whether she was interested in them.

56. A second consultation meeting took place on 24 July. The notes of that meeting record that the claimant said she "*completely understands the rationale behind why the business needs to make savings*". The claimant was asked whether she had any alternative suggestions with a view to avoiding redundancy, and she came up with a number of proposals to save money:

- a. Removal of a team leader in the call centre, as that role would no longer be required if a Sales Centre Manager was recruited;
- b. Moving an existing employee into the Sales Centre Manager role on a lower salary; and
- c. Making a Business Development Manager in Norwich redundant.

57. The claimant also asked if the salary of the Head of Sales role could be increased if she applied for it, to avoid her having to take a £20,000 pay cut. She told Mike Husband that the Sales Centre Manager role was not suitable for her because of the location, as Norwich is 152 miles and a 3.5 – 4 hour drive from her home.
58. The claimant also told Mr Husband that she would be happy to carry out the combined role of Head of Sales with the Sales Centre Manager duties also, as she was doing that anyway. She said she would be willing to accept the role at a reduced salary of £55,000. Mr Husband discounted this as an option because he wanted a full time Sales Centre Manager based in Norwich five days a week to deal with what he considered to be a dysfunctional team.
59. After the meeting on 24<sup>th</sup> July, Mike Husband sent an email to Stephen Watson setting out three of the options proposed by the claimant and asking Stephen Watson to provide some wording for him to decline all of the options. Mr Watson provided some suggested wording rejecting all of the proposals suggested by the claimant.
60. On 27 July a further meeting took place between the claimant and Mr Husband. During that meeting there was a further discussion about the rationale for the redundancies and about the Sales Centre Manager role. The claimant explained again that the role was not suitable for her because of the salary and the distance from her home.
61. The claimant did not apply for either the Head of Sales or the Sales Centre Manager role because of the substantial difference in salary. Jen Willows was subsequently appointed to the Head of Sales role.
62. After the meeting on 27 July, Mike Husband sent an email to the claimant stating that her suggested costs savings had been considered but rejected and attaching a notice of termination of her employment due to redundancy. The letter giving the claimant notice of termination informed her that she had the right to appeal against the decision. She did not do so.
63. The claimant did however send an email to Mike Husband on 27 July in which she wrote:
- “Thank you Mike and for way you have dealt with this also.  
I would have loved to have stayed and worked with you in the new structure however the £20,000 was just too low hence my decision to move on. I do hope that our paths cross and that I will hear from you again so as we can work together going forward...  
Take care of you.”*
64. The claimant remained on garden leave or furlough until 31 October 2020 when her employment terminated.
65. In September 2020 the claimant sent Mike Husband a LinkedIn connection request which he promptly accepted.

66. In October 2020 the claimant became aware that the respondent was advertising for two Business Development Manager roles on salaries of £35,000 a year.

67. On 20 October 2020 the claimant raised a formal grievance alleging that she had made protected disclosures and that she believed she had been made redundant because of those disclosures. The grievance was considered on the papers by Stephen Watson. He chose not to arrange a grievance hearing because he considered he had enough information to make a decision without one.

68. On 28 October Stephen Watson wrote to the claimant informing her of the outcome of her grievance. None of her grievance was upheld. On 30 October the claimant asked to appeal against the grievance outcome. Stephen Watson decided that there was no right of appeal as the respondent had already gone beyond what would normally be expected given that the claimant had been dismissed and had less than two years' service.

69. The claimant suggested that Mike Husband was aware that she had made protected disclosures, because Stephen Watson or Andy Marsden had told him. She accepted however that she had no evidence that Andy Marsden had told Mike Husband about the disclosures, and we accept Stephen Watson's evidence that he did not tell Mike Husband about them until October 2020 when the claimant raised her grievance.

70. The claimant also suggested that there was an orchestrated campaign to remove her from the business. We have no hesitation in finding that not to be the case.

## **The Law**

71. Section 103A of the ERA provides that "*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.*"

72. In a complaint under section 103A of the ERA an employee does not need to have two years' continuous employment. Where an employee does not have two years' service however, the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair one lies with the employee (***Smith v Hayle Town Council 1978 ICR 996***).

73. In an automatically unfair dismissal claim under section 103A the claimant will succeed if the Tribunal is satisfied that the reason or the principal reason for the dismissal is the protected disclosure. When deciding this issue the Tribunal must consider the reason that operated on the employer's mind at the time of the dismissal. This was summarised by the Court of Appeal in ***Abernethy v Mott, Hay and Anderson [1974] ICR 323*** as being "*the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*".

74. This approach was also approved by Lord Justice Underhill in **Croydon Health Services NHS Trust v Beatt [2017] ICR 1240**, when he held that the reason for a dismissal is ‘the factor or factors operating on the mind of the decision-maker which cause him to dismiss the employee’.
75. In the case of **Fecitt and Ors v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372**, Lord Justice Elias confirmed that the causation test for unfair dismissal is stricter than that for unlawful detriment under section 47B of the ERA. In an unlawful detriment claim the protected disclosure just has to be one of many reasons for the detriment, in an unfair dismissal claim the disclosure must be the primary motivation for the dismissal.
76. There are therefore different causation tests that apply in detriment and dismissal claims, and the ‘material influence’ test that applies in detriment claims does not apply to claims under section 103A of the ERA.
77. When deciding the reason for dismissal in a claim under section 103A of the ERA, the Tribunal must consider both the conscious and the unconscious reasons for the dismissal. In **Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065** the House of Lords held that the causation exercise for Tribunals is a factual rather than a legal one, and that the Tribunal should ask itself “*Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason?*” Although in that case the claim being brought was one of victimisation under the discrimination legislation, the EAT held that the same approach could be taken in claims under section 103A of the ERA in **Trustees of Mama East African Women’s Group v Dobson EAT 0220/05**.
78. The Tribunal can draw inferences as to the real reason for dismissal. In **Kuzel v Roche Products Ltd [2008] ICR 799**, the Court of Appeal confirmed that, when considering the reason for the claimant’s dismissal, a Tribunal can draw ‘reasonable inferences from primary facts established by the evidence or not contested in the evidence’. The Tribunal is not however under any obligation to draw an inference.
79. If the person who takes the decision to dismiss an employee does not know that the employee has made protected disclosures, then the reason for dismissal can not normally be the protected disclosures, and a claim under section 103A of the ERA must therefore fail. However, in **Royal Mail Ltd v Jhuti [2020] IRLR 129**, the Supreme Court held that in a claim for unfair dismissal under section 103A of the ERA. The reason for the dismissal could be a reason other than the reason given to the employee by the decision maker, if someone more senior than the decision maker determined that the employee should be dismissed and hid the reason behind an invented reason which the decision maker then adopted. The Tribunal, in such circumstances, has a duty to ‘penetrate through’ the invented reason for dismissal and find the true reason.

80. In ***University Hospital North Tees and Hartlepool NHS Foundation Trust v Fairhall EAT 0150/20*** the EAT held that the principle established in ***Jhuti*** only applies where an ‘innocent’ decision maker is manipulated into dismissing an employee who has made protected disclosures for an apparently fair reason and is not aware of the ‘machinations’ of the person or persons wanting to dismiss the whistleblower for making protected disclosures.

81. Finally, when considering whether an employee has been dismissed for making protected disclosures, questions of reasonableness (which are of significant importance in ‘ordinary’ unfair dismissal claims) do not arise. In ***ALM Medical Services Ltd v Bladon [2002] ICR 1444***, Lord Justice Mummery held that the “*alleged unfairness of aspects of [the employee’s] dismissal, which would be central to a claim for “ordinary” unfair dismissal, are of less importance in a protected disclosure case. The critical issues is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence.*”

82. Section 139 of the ERA states that:

*“(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 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...*

*(6) In subsection (1) “cease” and “diminish” mean cease and diminish either permanently or temporarily and for whatever reason...”*

## Conclusions

83. We reached the following conclusions on a unanimous basis, having considered carefully all of the evidence, the oral submissions of the parties and the legal principles set out above.

84. The only issue that we had to decide in this case was whether the claimant was dismissed by reason of redundancy, as the respondent asserts, or because the claimant made protected disclosures.

85. We have reminded ourselves that in a case such as this where the claimant has less than two years’ service, the burden of proving that the reason or principal reason for the dismissal was the protected

disclosures lies with the claimant. The claimant has not, in our view, discharged that burden. The claimant's case, at its best, was based on speculation on the part of the claimant that Mr Husband was motivated by her protected disclosures when dismissing her. She had no direct evidence to support her claim and accepted that she did not know whether Mr Husband knew about the protected disclosures.

86. We recognise that an employer is not likely to admit that an employee has been dismissed for whistleblowing, and that in some cases artificial reasons for dismissal are created. We find however that this is not such a case, and that the reason given by the respondent for dismissing the claimant is in fact the true reason for her dismissal.

87. We have no hesitation in finding that the reason for the claimant's dismissal in this case was redundancy. We find that Mike Husband was not aware that the claimant had made protected disclosures until after she had been dismissed. He could therefore not have been influenced at all by the protected disclosures when he made the decision to make the claimant redundant, either consciously or subconsciously. What was in his mind at the time he decided to dismiss the claimant was the need to reduce headcount, save costs, and ensure that the business could survive in the future. He therefore decided that the claimant's role of Head of Schools was no longer required.

88. Although Stephen Watson was aware of the protected disclosures at the time of his involvement in the claimant's redundancy, we find that the protected disclosures did not motivate him in any way to make the claimant redundant or to influence Mike Husband to do so. The original redundancy proposal was made by Mike Husband at the same time as other senior leaders, including Stephen Watson were making similar proposals for their teams. We accept that Stephen Watson did not want to lose the claimant from the business.

89. This is not a *Jhuti* situation, in which Mike Husband was manipulated by Stephen Watson into dismissing the claimant. It was Mr Husband who first proposed that the claimant be made redundant, not Stephen Watson, and Stephen Watson's involvement was limited.

90. There was substantial evidence before us that the respondent was in a dire financial situation as a result of the pandemic and a massive loss of income, and that it needed to make substantial cost savings in order to survive. The claimant was one of approximately 300 employees who were made redundant within a period of a few months.

91. The claimant was therefore dismissed by reason of redundancy as her discrete role of Head of Schools was no longer required. This was therefore a redundancy situation falling within section 139 of the ERA. The reason for the claimant's dismissal was redundancy, and not that she had made protected disclosures.

92. The claimant's claim for automatic unfair dismissal under section 103A of the ERA therefore fails and is dismissed.

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Employment Judge Ayre

9 June 2022

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