EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MS J FAIRRIE	**AND**	**WHITE EAGLE LODGE**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 5TH / 6TH / 7TH / 8TH FEBRUARY 2024

EMPLOYMENT JUDGE MR P CADNEY **MEMBERS: MS C LLOYD-JENNINGS**
MS P SKILLIN

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON (ASSISTED BY MCKENZIE FRIEND – MS A IBRU)**

FOR THE RESPONDENT:- **MS C CASSERLEY (COUNSEL)**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim that she was automatically unfairly dismissed pursuant to s103A Employments Right Act is not well founded and is dismissed.

2. The claimant's claim that she was discriminated against pursuant to s15 Equality Act 2010 is not well founded and is dismissed.

Reasons

1. By this claim the claimant brings a claim of automatic unfair dismissal pursuant to s103A Employment Rights Act 1996, and discrimination arising from disability (s15 Equality Act 2010).

2. The tribunal has heard evidence from the claimant, Ms Rebeca Doorbar, and Ms Rachel McGarrigal on her behalf; and from Mr Jason Wilson, Ms Clayre Williams, and Ms Tara Lohn on behalf of the respondent.

Background Facts / Summary

3. The respondent (WEL) is a spiritual organisation and a registered charity. It was established in 1936 and has hundreds of volunteers and approximately 1500 members. The charity is administered by a board of voluntary trustees. In 2019 the Head of Administration and the Office Manager resigned. This led to the restructure of the respondents operations, and the new job role, Operations Manager was created. The role was advertised on the 10th January 2020. The claimant applied, and was interviewed and offered the role. The respondent took the view that the role was not suitable for remote working, and initially it was intended that the claimant would work remotely for four days a week, being on site for one day per week, for the first four months of her contract in order to allow her time to relocate to Hampshire. In fact the claimant entered the respondent's employment on the 1st April 2020 by which time the first COVID-19 lockdown had started. On 12th June 2020 claimant informed the respondent that a court order prevented her from relocating to Hampshire. This resulted in a variation, which was that the claimant could attend the site on two days per week following the removal of lockdown restrictions.

4. In November 2021 claimant alleged at that she was being bullied, and there was a reciprocal claim of bullying made against the claimant by Ms A Hayward. In December 2021 the respondent commissioned Bespoke HR to carry out an investigation into both bullying allegations. The report identified that there had been a significant breakdown in the working relationship between the two.

5. The report recommended that the current situation was not sustainable, and that the respondent should review roles, and the management structure. The respondent's case is that they concluded that the existing management structure was not working well, and decided to move towards a collaborative leadership team structure. This meant moving away from a single point of management, which in turn meant that the role of Operations Manager would be made redundant. At a meeting on 16th February 2022 the claimant was informed that her role had been made redundant, and she was dismissed with immediate effect, with pay in lieu of notice.

6. The claimants case is that this was not a genuine redundancy, and she was in fact dismissed either by reason of her disability or its consequences, or because she had made public interest disclosures.

Disability

7. The claimant contends that she is a disabled person within the meaning of s6 Equality Act 2010 by reason of:

i) Covid 19 / long covid symptoms; and/or
ii) Mental Health Issues.

8. For the reasons set out below the respondent does not accept that she was a disabled person by reason of either or both conditions.

9. Covid 19 / long covid- The claimant's case that is that she suffered acutely with Covid-19 in late August and September 2021, and had to take three weeks sick leave. In October 2021 she was diagnosed with long Covid and is currently under the treatment of Oxford Health NHS Foundation Trust long Covid clinic to manage her symptoms. She describes the effects upon her daily life and activities as, "*I was struggling with crippling tiredness, brain fog and memory loss which prevented me from functioning normally. As a result of these symptoms and the stress I was experiencing due to bullying I was having difficulty coping with work and frequently unable to attend my regular meetings*…..". In addition in her further information provided on 24th April 2023 the claimant states *" In terms of the effects on my day to day life and activities, I continue to struggle with crippling tiredness (post viral syndrome), dyspnoea , muscle aches, low mood, anxiety, brain fog and memory loss, which prevent me from functioning normally….I continue to rely on friends and teachers to help with the school run. I cannot spend sustained periods of time on the computer, and am unable to concentrate or maintain long conversations or meetings."*

10. Mental Health Issues – The claimant asserts that has been under the care of the mental health team since June 2020, and in May 2021 went on the waiting list for EMDR therapy, which started in September 2021. The claimant describes this as therapy for stress , anxiety, depression and trauma. There is evidence that she was suffering from insomnia in June 2020 and that she was taking diazepam, but no other entries in her medical specifically in relation any mental health issues separate from those relating to long covid set out below.

11. The respondent does not accept that either individually or cumulatively the two conditions had or would be likely to have a long term substantial adverse effect on the claimants ability to carry out normal day-to-day activities.

Law

12. A disabled person means an individual who has a "physical or mental impairment" which has a "substantial and long term adverse effect on the ability to carry out normal

day to day activities". In this context "substantial" means more than minor or trivial; and long term means lasting or likely to last for twelve months or more.

13. A general summary of the overall structure of the law is set out below and specific points relevant to this case are dealt with in relation to the individual issues:

The Relevant Law

Section 6 of the Equality Act provides as follows:

a person (P) has a disability if-
P has a physical or mental impairment, and
the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Schedule 1 to the Equality Act 2010 contains further clarification on the matters to consider when determining disability and provides in so far as is relevant:

Long-term effects

2 (1) The effect of an impairment is long-term if—
it has lasted for at least 12 months,
it is likely to last for at least 12 months, or
it is likely to last for the rest of the life of the person affected.

Impairment

The meaning of impairment is dealt with at A3 of the Guidance which provides: "the term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness."

Thus 'Impairment' in s.6 EQA 2010 bears 'its ordinary and natural meaning… It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects' (McNicol v Balfour Beatty Rail Maintenance Ltd 2002 ICR 1498, CA) The term is meant to have a broad application.

The meaning of 'substantial adverse effect' is considered at section 212(2) EQA 2010 and paragraph B1 of the Guidance which provides "a substantial effect is one that is more than a minor or trivial effect".

The Tribunal's focus, when considering adverse effects upon day-to-day activities, must necessarily be upon that which claimant maintains he cannot do as a result of his physical or mental impairment" (see Aderimi v London and South Eastern Railway Ltd UKEAT/0316/12, [2013] ICR 591).

In that context, the appendix to Schedule 1 of the Equality Act 2010 includes examples of factors which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. These include "a total inability to walk, or inability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue, and persistent distractibility or difficulty concentrating."

Conversely the guidance indicates that the following factors would not reasonably be regarded as having such an effect: "experiencing some tiredness or minor discomfort as a result of walking unaided from a distance of about 1.5 kilometres or 1 mile; inability to concentrate on a task requiring application of several hours."

Day-to-day activities include normal day-to-day activities and professional work activities, even if there is no substantial adverse effect on activities outside work or the particular job (see Igweike v TSB Bank Plc [2020] IRLR 267). In conducting that assessment, the tribunal should disregard the effects of treatment (see Guidance at sections B12 to B-17).

The Guidance addresses recurring or fluctuating effects at C5. Examples of how to address episodes of such conditions as depression, or conditions which result in fluctuating symptoms are given at paragraphs C6, C7 and C 11; they provide:

C6. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long term.

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the "long-term" element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.

C11. If medical or other treatment is likely to permanently cure condition and therefore remove impairment so the recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those are facts. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stops, as is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur.

In order to determine whether a claimant has a disability the tribunal should consider four questions (see Goodwin v Patent Office [1999] ICR 302, EAT):-

i) did the claimant have a mental and/or physical impairment? (the 'impairment condition')

ii) did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')
iii) was the adverse condition substantial? (the 'substantial condition'),
iv) and was the adverse condition long term? (the 'long-term condition').

It will not always be essential for a tribunal to identify a specific 'impairment' if the existence of one can be established from the evidence of an adverse effect on the claimant's abilities — J v DLA Piper UK LLP 2010 ICR 1052, EAT. Similarly, it is not always necessary to identify an underlying disease or trauma where a claimant's symptoms clearly indicate that he or she is suffering a physical impairment — College of Ripon and York St John v Hobbs 2002 IRLR 185, EAT

Disability Discrimination Claim (s15 Equality Act 2010)

14. As set out below there is only one claim of disability discrimination, the allegation that the claimant's dismissal was causally linked to something rising from disability (s15 Equality Act 2010). As she was dismissed on the 16th February 2022 that is the date at which the issue of disability must be judged (See for example: *Tesco Stores Ltd V Tennant [2019]) .*

Covid 19 / Long Covid

15. There is no dispute that at the end of August 2021 the claimant contracted Covid 19, which was sufficiently severe to require her to be hospitalised on three occasions. She returned to work on 20th September 2021.

16. The relevant entries in the medical records post her return to work start with an appointment on 7th October 2021 which include the following entries:

i) Treatment Escalation plan- No further escalation intended or considered appropriate;

ii) Feels she is recovering;

iii) Taste and smell have come back a bit but not normal yet;

iv) Main concern is feeling tired;

v) Offered to refer to post Covid clinic- would prefer to see if she continues to improve but will contact again if she would like a referral.

17. An entry for 19th October includes,:" *Tired all the time. Recovering from covid*."; and the entry for 23rd December 2021 , "*Referral to post-covid assessment clinic"; and "History – brain fog, crippling fatigue…all related covid or menopausal? Also persistent loss of smell and taste*."

Substantial Effect on normal day to day activities -:

18. The respondent submits that the medical evidence does not support the assertion that a diagnosis of long Covid was in fact made, nor that the claimant in fact suffered from an impairment having a substantial effect on her normal day to day activities; and that there is no evidence that following her return to work on 20th September 2021 that she meets the first criterion for concluding that she was a disabled person as at 16th February 2021, that is that there was a substantial effect on normal day to day activities. The respondent relies on the fact that there is no accompanying fit note from her GP on her return to work suggesting at that point that she required altered or reduced duties, a phased return to work, or any other indication that she was not fit to resume her full time role. Between then and her dismissal the claimant had only one day of sickness absence and was apparently completing all of her work satisfactorily.

19. The claimant's evidence is that with hindsight she should not have returned to work. She was exhausted, suffering "brain fog" and memory loss, and was in reality not fit to return. She was suffering from long Covid , as was subsequently confirmed by the Post Covid Syndrome Service. In a letter dated 11th August 2022 it confirms "your diagnosis of post Covid 19 syndrome"; and records that she was referred by her GP on 31st December 2021, and confirms workshop dates in May and June 2022. A letter from Lisa Johnson following an appointment on 13th May 2022 confirms the diagnosis of Post Covid19 syndrome/ Long Covid. It describes the claimant as having a "boom and bust pattern" of activity cycling. Her energy levels were 40% of normal with fatigue ranging from 6/10 at the beginning of the day and 9/10 at the end of day, "*Due to fatigue Julia has also experienced brain fog, which has impacted information processing skills as well as sustained attention and working memory.*" She concluded that the impact of long Covid has been long term and significant in its effect on her ability to carry out normal day to day activities; and she sets out a proposed phased return to work plan. As is set out above the claimant contends that those symptoms have continued, and remain today

20. Accordingly the claimant's case is that the evidence does demonstrate that she was throughout this period, and certainly up to 16th February 2022, suffering an impairment which did have a substantial effect on her normal day to day activities.

21. We accept the claimant's evidence, and in our judgment it is clear with hindsight and the benefit of the reports referred to above that the claimant is correct to assert that she has been diagnosed with and suffered from Covid 19 infection, followed by long Covid, the effects of which had a substantial adverse effect on her ability to carry out normal day to day activities from the end of August 2021 until the present day.

22. It follows that in our judgment the claimant did, as at 16th February 2022 satisfy this element of the statutory definition by reference to the impairment of Covid 19/long covid.

23. Mental Health/Stress – The discussion above relates to Covid19 /long Covid in isolation. The claimant's case is that she was separately and additionally disabled by reason of mental health conditions. In our judgment this is something of an academic question as there is no claim arising from, or dependant on any finding that the claimant was disabled by reference to this condition.

24. The respondent submits that there is no evidence, and in particular no medical evidence, to support the proposition that there was at any stage any mental health condition which had a substantial effect on normal day to day activities. There has been no diagnosis of any mental health condition; and the claimant has not set out any effect on day to day activities prior to Covid 19/long covid despite contending that it was diagnosed from June 2020. In our judgment this is correct and there is no evidence which would allow us to hold that the claimant was separately disabled by reason of a metal health condition.

25. Long Term - As is set out above the test for us is whether, judged as at 16th February 2022, and judged against the information then available that the claimant's impairment satisfied the "long term" requirement. Clearly at that point any impairment had not lasted for twelve months, and so the questions is whether it was "likely" to do so. An event defined as likely to happen if it 'could well happen', as set out in *Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056 HL*.

26. The respondent submits, and the claimant accepts, that as at February 2022 there was no body of medical evidence so as to allow for any general prognosis for those suffering with long covid, to enable the identification of any likely recovery time either in general, or specifically in this case in respect of the claimant. In the absence of medical evidence, and judged as at 16th February 2022, there is no rational basis to allow us to make any assessment of that question. On the evidence before us the assessment of whether it could well happen that the impairment could last for more than twelve months can never be anything more than speculation.

27. In our judgment, it may be unfortunate for the claimant that the test we are required to apply cannot be rationally answered at the point at which we are required to consider it, simply because of the lack of a body of evidence relating to a relatively new condition, but as a matter of fact that is the position. It follows that in our judgment the respondent is correct and it follows that the claimant does not satisfy the statutory requirement for the impairment to be long term, and as a result was not a disabled person as at the point of her dismissal in February 2022.

Discrimination Arising from Disability (s15 Equality Act 2010)

28. As we have concluded that the claimant was not a disabled person at the time of her dismissal this claim is in any event bound to be dismissed. However in the event that we are wrong in that conclusion we have set out our findings in respect of this claim for completeness sake.

29. Unfavourable Treatment -The claimant relies on her dismissal, which is necessarily unfavourable treatment.

30. "Something arising from disability" – The claimant contends that the something arising from disability was the need for her to work from home and/or her inability to commute from her home in Oxfordshire to the respondent's site at Newlands, Hampshire.

31. The respondent disputes this. It contends that it had already been established that because of the decision of the family court that she was required to remain living in Oxfordshire with necessary childcare obligations, which meant that she could not regularly commute to Hampshire. There is no medical evidence that commuting itself was not something she was able to do. In evidence the claimant asserted that it was self-evident, given her levels of fatigue that she would not have been able to do so.

32. Causal Link – Irrespective of whether that is correct or not the respondent contends that there is no link between any inability to travel to Newlands, and the decision to dismiss. Firstly it is not contended the trustees were ever informed of any medical reason for the claimant's inability to commute, which must be correct given that there is no medical evidence that effect. As they did not know of any link, even assuming there was one, it cannot have played any part in their decision making. If there was any factual link between the decision to dismiss and the inability to travel, that would necessarily be based on their understanding that the reason for that was her childcare responsibilities, and this claim would be bound to fail. Secondly, and fundamentally in this case, if the evidence as to the reason for the decision is accepted there is no factual link in any event, and the claim would equally be bound to fail.

33. As is set out below we have accepted the respondent's evidence as to the reason for dismissal, and accept that the claimant's inability to travel to the site/requirement to work from home played no part in the decision. It follows that even had the claimant satisfied the other elements of the claim, as set out above, we would have dismissed the claim in any event.

Protected Disclosures

34. The claimant contends that she made three protected disclosures. The first two are said to be disclosures of a breach or likely breach of a legal obligation (s43B(1)(b) ERA 1996) and/or the concealment of that breach (s43B(1)(f) ERA 1996). The third is alleged to be a disclosure tending to show that the health and safety of an individual is being or is likely to be endangered (s43B(1)(f) ERA 1996).

Disclosure 1

35. The first protected disclosure relied on is:

i) Charity funds were being misspent on the costs of trustee meetings involving one trustee living in the United states travelling to the UK

Disclosure 2

36. The second protected disclosure is:

i) Private rent being paid for a property for a member of staff who was the spouse of the person the respondent sought to employ, and who had returned to Sweden during Covid lockdown.

Disclosure 3

37. The third disclosure is :

i) Reporting issues relating to health and safety, the allegations of bullying.

The Law

38. The first question is whether the Claimant was an individual (employee or worker of the respondent) who is capable of being protected under the PIDA provisions. This is not in dispute and it is not therefore necessary to set out the law.

39. The second is whether there was a qualifying disclosure within the meaning of S.43B ERA. This requires a) a disclosure of information that b) in the reasonable belief of the worker making it is c) in the public interest and d) tends to show that one or more of the six relevant failures has occurred or is likely to occur. The relevant failure relied on in relation to each disclosure in this case are set out above.

40. If there was a qualifying disclosure was this communicated in such a way as to become a protected disclosure?

Qualifying / Protected Disclosure

There must be a disclosure of information as such (as per the case law: *Cavendish Munro Professional Risks Management Ltd v Geguld [2010] IRLR 38; Goode v Marks and Spencer plc UKEAT/0442/09,* although there is recognised to be a grey area between `information as such` and `allegation`/`opinion`, as noted in cases such as *Western Union Payment Services UK Ltd v Anastasiou UKEAT/0135/13.* The question will always be a fact-sensitive one (see *Kilraine v London Borough of Wandsworth [2018[EWCA Civ 1436*)*:"the dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not be decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that it*

nothing to the point" – per Langstaff J, para 30, an approach upheld by the Court of Appeal.

Thus, the question is simply whether there is sufficient information to satisfy s.43B, which is a question of fact for the tribunal.

The key issue under s.43B(1) is reasonable belief. It is not necessary for a Claimant to show that his belief that the information tended to show one of the relevant categories of failure was, in fact, correct and/or that the disclosure was in fact in the public interest (*Darnton v University of Surrey [2003] IRLR 133).* The key questions are (a) whether he held such a belief at all, and (b) whether such belief was reasonable. The genuineness of the alleged belief (ie whether the employee had such a belief at the relevant time), is a question of fact for the tribunal. The reasonableness of the belief is to be assessed on a subjective basis (it is the reasonable belief of *the worker* which is relevant), taking into account the characteristics of and any particular knowledge or experience the particular claimant may possess *(Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4)***.**

The term `public` interest` is not defined in the legislation. This requirement was introduced to reverse the decision in *Parkins v Sodexho Ltd [2002] IRLR 109***,** to prevent claimants from relying on the PID provisions where the alleged legal obligation was one owed to the employee himself (in that case under the contract of employment). In other words, it was designed to exclude matters which might be described as `private` complaints or grievances. The public interest requirement has been considered in *Chesterton Global v Nurmohamed [2017] EWCA Civ 979***.** It was confirmed that there is no bright line when considering this issue. In a case where there are mixed interests (personal and public), it is for the tribunal to determine, as a question of fact, whether there was a *sufficient* public interest to qualify for protection under the PIDA legislation. In the CA, Underhill LJ noted the following: *"The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest. Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under*

section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but [counsel for the employee's] fourfold classification of relevant factors which I have reproduced … above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph." (My underlining) Those four factors were as follows: *the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect; the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people; the identity of the alleged wrongdoer….. "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far.*

One or more of the six categories of failure, each set out in s.43B(1) ERA, must be established by a claimant seeking to rely on the PID provisions. Where s.43B(1)(b) is concerned (breach of a legal obligation), *("a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject"),* there must be an *actual* or *likely* breach of the relevant legal obligation. The term *likely* requires more than a *risk* or a *possibility* that the relevant obligation may be breached (*Kraus v Penna Plc [2004] IRLR 260)*. A disclosure can be a qualifying disclosure even if the employer is already aware of the information (s.43L).

Protected Disclosures

Disclosure 1

41. There is no dispute that in a trustees meeting in-mid 2021 that the issue of resuming in person meetings after the removal of Covid 19 lockdown restrictions was discussed. The claimant contends that she asserted that the cost of resuming in person meetings could not be justified. The respondents position is that the trustees took and take the view that there were significant benefits in in person meetings, and that the benefits of in person meetings outweighed the cost, and decided to renew using them.

42. The claimant contends that the trustees owed a fiduciary duty to the respondent to apply monies for its charitable purposes, and not to engage in unnecessary expenditure. She contends that this disclosure was a disclosure of information

regarding unnecessary expenditure, and therefore tended to show a breach of a legal obligation, and also alleges that it was a disclosure of information that a breach of the legal obligation was being or was likely to be concealed. As the respondent is a charity there is necessarily a public interest in its funds being distributed appropriately.

43. The respondent does not accept either proposition. Firstly it contends that whilst the trustees have an obligation to the charity, it is to exercise their discretion reasonably in the expenditure of money, and only to expend money when, as in this instance it was reasonably necessary. They contend that the claimant's opinion that Zoom meetings were adequate, and there was no or insufficient benefit in having in person meetings was simply that, an opinion; and that an expression of a difference of opinion at a trustees meeting is not in and of itself any disclosure of information which in her reasonable belief tended show any breach of a legal obligation. Put simply they contend that it is not enough that the claimant disagreed with a piece of proposed expenditure, but would have to disclose information that tended to show that it fell outside the trustees discretion. The claimant has not herself made any such allegation, but simply that she disagreed with the trustees. In this respect they also rely on the fact that the issue was never raised again, and that the claimant did not use their whistleblowing policy in relation to this allegation at any stage. Had the claimant genuinely believed that she was making an allegation that the trustees decision fell outside their discretion she would have been bound to have at least raised it again or made a formal disclosure under the whistleblowing policy.

44. Secondly they contend that she can never have had any reasonable belief that any such breach (if it was a breach), was or would be concealed, firstly as she never made any such allegation in any event. In addition the respondent's accounts are published, as the claimant must have known as the Operations Manager, and trustees expenses always form part of those published accounts. Any expenditure would necessarily and automatically be placed in the public domain and not concealed.

45. Accordingly the respondent submits firstly that whilst the distinction between information, allegation, and opinion may sometimes be difficult, that in this case it was clearly simply an expression of opinion. Secondly, a disagreement as to expenditure is not in and of itself information tending to show a breach of a legal obligation on the part of the trustees, and the claimant did not at the time assert that it was. Fourthly the information is published and publicly available. It follows that the claimant cannot have had any reasonable belief that the disclosures of information tended show a breach falling within either category she relies on.

<u>Disclosure 2</u>

46. The detail in respect of the background to this is set out at paras 38-41 of Mr Wilson's witness statement which we accept as accurate. In summary it was intended that Mr Frank Hansen become the Head of Contact Healing, and that his wife Rozita would become the Spiritual Head of UKWEL. He was to relocate to the UK from Sweden some two years before his wife. In order to defray the costs of running two households

the trustees agreed to provide accommodation for Mr Hansen for two years. This decision was taken before the claimant was employed. It is not in dispute that she raised the issue at a meeting on 20th October 2020.

47. In her witness statement the claimant simply describes it being discussed orally in the meeting and asserts that she was disclosing a waste of the charity's funds. The respondent contends that this was in fact raised as an issue of fairness, in that it was not proposed to pay any relocation costs for the claimant, and was not any assertion that the payment itself was in any way inappropriate.

48. In addition and for the same reasons as given above, and even if the claimant is correct, this was simply the claimant expressing disagreement with a financial decision made by the trustees. The respondent repeats that it was never suggested that it fell outside their discretion, and that it was never raised again at any stage after the 20th October 2020 meeting, whether by the whistleblowing policy or otherwise. It therefore repeats the submissions above. A one off expression opinion, never repeated or pursued cannot be a disclosure of information tending show breach falling within either category.

Disclosure 3

49. The claimant contends that she regularly and frequently made allegations of bullying of her and other members of staff both orally and by email . The respondent accepts that she made a specific allegation of bullying against herself in November 2021, but disputes that there was any other report of bullying. The evidence of both Mr Wilson and Ms Lohn is that no allegation of bullying was made to them by the claimant prior to November 2021. The claimant contends that this is because they have failed to disclose the relevant emails, and are not telling the truth about oral communications. Our impression of the evidence of both was that it was transparently honest and reliable, and we are not satisfied on the balance of probabilities that there had been any earlier disclosures. Even if we had concluded that there had been, and that in general terms the claimant was correct, it would be very difficult for us to make any firm findings of fact. Even if the claimant is correct, it is not possible on the evidence to make any finding about any disclosure having been made, and what was said, to whom it was said, when it was said and what specific information was disclosed so as to allow us to conclude that any specific disclosure was a public interest disclosure.

50. What we are left with is a specific allegation of bullying made by the claimant in November 2021. The respondent submits that an allegation of bullying neither expressly nor implicitly in and of itself involves any allegation that tends to show that the health and safety of any individual is being endangered. If it refers simply to the claimant it would in any event be likely to fail the public interest test; but more fundamentally, it simply tends shows a breach of the employment relationship. Allegations of bullying are often made without any suggestion that it endangers an individual's health and in this case the claimant does not allege, or give any evidence that she made any specific disclosure which would tend to show this. It follows that this was not a protected disclosure .

51. Our conclusions are that we accept the respondent's submissions, and have not concluded that any of the disclosures were public interest disclosures within the meaning of the ERA 1996.

52. However, as with the claim for discrimination arising from disability, we have gone to consider our conclusions as to the other elements of the claim in case we are wrong about this.

Automatic Unfair Dismissal – Law

a) S.103A renders a dismissal automatically unfair where *the reason or principal reason for the dismissal is that the employee made a protected disclosure.* Selection for redundancy on this ground is also automatically unfair (s.105(1), (6A)).

b) The causative link required between the PID and the dismissal is a more stringent one than in the case of a detriment claim (in the later, the PID must only be a material influence and not even the principal reason for the unlawful act) (see *Eiger Securities LLP v Korshunova [2017] IRLR 115,* where it was held on appeal that it was not enough that the PID had been *"on the employer`s mind"* when it dismissed). The leading authority is *Kuzel v Roche Products Ltd [2008] IRLR 530.*

53. The claimant contends that the reason or principal reason for her dismissal was the making of one or more of the disclosures set out above. The respondent disputes this, contending that the reason was the restructure// redundancy which we consider below.

Restructure/Redundancy

54. The respondent's evidence as to the process by which the restructure was agreed and the consequent redundancy of the claimant, is that it arose from the report into the mutual allegations of bullying made by the claimant and Anna Hayward. The report is dated 20th December 2021,and was prepared by Laura Cross of Bespoke HR. She concluded that there had been a breakdown in the working relationship; that there was a lack of trust and respect between them; and a lack of clarity in their roles which was causing friction which without "significant action by all parties… could develop into a hostile work environment.." Both the claimant and AH agreed that the current situation was not sustainable; and Ms Cross concluded that according to the organisational chart that the claimant had more than the recommended maximum of seven direct reports. She made a number of recommendations including, "..I would recommend that the Trustees address the management structure. As outlined in my findings, I feel that the current structure where JF is line managing all staff is unrealistic and may contribute to the friction felt by others in the organisation." .

55. The respondent's evidence is that they accepted the report's conclusions which accorded with their own views in any event. Mr Wilson's evidence, which we accept is that it had already been identified that the claimant was managing too many projects. As a result in December 2021, two Zoom meetings were held between the claimant, Mr Wilson and Ms Lohn to explore amending the claimants job description to remove some of her responsibilities and/or immediate reports. However the claimant was reluctant or unable to agree any areas of her existing responsibilities that she would be content to relinquish. In his witness statement Mr Wilson gives the example of delegating refurbishment of the retreat house. He stated that she would need relinquish all control, but the claimant resisted, stating that she would need the power to veto or overturn any decision with which she did not agree. As a result the discussion of altering her duties reached an impasse at the 8th December 2021 meeting, and was not discussed further.

56. On 13th January 2022 Ms Lohn met the trustees via Zoom to discuss the restructure. Her evidence is that they wanted to move away from a management structure involving a single senior manager with overall responsibility for all staff, and moving to a senior management team. This is reflected in two structure charts, the current structure chart and draft proposed structure chart. The first shows the Operations Manager with all other teams reporting directly to her. The proposed draft structure does not have an Operations Manager role at all, but five Leads (Publishing House / Healing and School of Astrology / Finance Officer / Administration and Estates / Communications) report directly into the Deputy Lodge Mother. Both Mr Wilson and Ms Lohn's evidence is that proposal was not a result of any personal characteristic of the claimant, whether her remote working, or any protected disclosures. During the claimant's appeal Ms Wilday interviewed Mr Wilson, Andrew Busby and Beckett Fish (the Chair of Trustees and two Trustees respectively) all of whom agreed as to the reasons for and genuineness of the new structure. Moreover Ms McGarrigal who gave evidence on behalf of the claimant, accepted that when she left in July 2022 the role of Operations Manager no longer existed.

57. The claimant does not accept that her role was redundant, essentially as all of her duties still need to be performed, and had effectively been spread among other employees. She asserts that if there had been a genuine redundancy situation, that a fair procedure would have been adopted, including consultation and consideration of alternative employment at the very least, whereas she was simply called into a meeting to be told that she was being dismissed with immediate effect on 16th February 2022.

58. The respondent submits that the removal of the role of Operations Manager created a redundancy situation falling squarely within the meaning of s139(1)(b)(i) Employment Rights Act 1996; and the claimant is simply wrong to assert that this was not a genuine redundancy as a matter of law. If she had more than two year's continuous service she is correct that the respondent would very unlikely to be held to have fairly dismissed her without the procedural requirements she relies on, even if there was a genuine redundancy. However she did not have two years continuous service, and as Ms Lohn frankly accepted she advised the respondent that in the absence of

qualifying service it was not obliged to go through the procedure that would be required if she had. It was part of her job as an external HR advisor to give accurate advice on the legal requirements, which she did.

59. In our judgement it is impossible not to have considerable sympathy for the claimant in relation to the circumstances of her dismissal which were on any analysis unsympathetic to say the least, particularly given, as she stated in evidence, that she regarded it not simply as a job but a vocation. However, whatever the level of our sympathy for the claimant in our judgment it is clear from the respondent's evidence, which we accept, that the reason for her dismissal was genuinely that they had restructured the management of the organisation with the consequence that her role no longer existed. It follows that we are satisfied that any protected disclosure was not the reason or principal reason for her dismissal, and this claim would have been dismissed in any event, even had we found that one or more of the disclosures was a protected disclosure

60. For the reasons set out above we are bound to dismiss all of the claimant's claims.

Employment Judge Cadney
Dated: 23rd February 2024

Judgment sent to the Parties on 08 March 2024

For the Tribunal Office