EMPLOYMENT TRIBUNALS

Claimant: Ms P Slavikova

Respondent: SSG Recruitment Partnerships Ltd

Heard at: Watford **On:** 12, 13 & 14 February 2024

Before: Employment Judge Davey

Representation
Claimant: In person
Respondent: Mr Hannen, Financial Controller for the respondent

JUDGMENT

1. The claimant's claim for automatic unfair dismissal contrary to s103A of the Employment Rights Act (ERA)1996 is not well founded and is dismissed.

2. The claimant has no claim under s100 ERA 1996 and/or any other detriment claim (under the ERA 1996) and/or any discrimination claim (under the Equality Act 2010) before the Tribunal and her application to amend her claim made on 13 February 2024, is refused.

REASONS

Introduction

1. By a claim form presented on 9 June 2022, the claimant ticked the unfair dismissal box and provided just enough information to indicate there may be a public interest disclosure (PID) and/or health and safety (HSR) complaint.

2. By a response form presented on 13 July 2022, the respondent stated that it

did not know what the claimant was claiming and disputed that the claimant had any grounds for bringing any claims.

Preliminary hearings on 17 January 2023 and 9 May 2023

3. At the first preliminary hearing on 17 January 2023, Employment Judge Davidson describes spending "a long time with the claimant in attempting to get her to articulate her claims". This did not prove possible and so, at paragraph 8 of the case management summary, Employment Judge Davidson set out some guidance for the claimant to consider and ordered that by 1 March 2023, she provide the respondent and the tribunal with a detailed submission addressing her claims. The respondent was ordered to send the claimant and the tribunal its reply, incorporating any amendments to the response. A second preliminary hearing was ordered to consider and determine which, if any of the claims, could proceed to a full hearing.

4. On 28 February 2023, the claimant sent three documents to the tribunal (two were headed for the tribunal's attention only). All three documents were sent by the tribunal to the respondent. On 1 May 2023, the claimant sent three further documents "For the Eyes of the Employment Judge Only".

5. There was a preliminary hearing in person on 9 May 2022, before Employment Judge Alliott. Employment Judge Alliott is recorded in the case management summary as spending approximately 90 minutes with the claimant trying to establish the matters constituting the claimant's claims. Employment Judge Alliott concluded that the claimant's public interest disclosure claims could continue to a final hearing whereas her health and safety claims could not as they had not been properly articulated. A list of issues was agreed with the parties, case management orders were issued and the claim was listed, in person on 19-21 September 2023. The hearing was postponed by the tribunal on 18 September 2023 and relisted to 12-14 February 2024. This was entirely the decision of the tribunal and not because of an application for postponement from one of the parties.

6. The claimant has sent a substantial amount of correspondence to the tribunal since the outset of her claim. She has often failed to copy the respondent into correspondence contrary to Rule 92 of the Employment Tribunal Rules (Constitution and Rules of procedure) Regulations 2013 (the ET Rules). She has been sent 2 Rule 92 letters about this. The claimant also applied to have her case heard before a panel of three judicial office holders. This was refused by Employment Judge Quill on 14 September 2023. The claimant also applied for the hearing to be transferred to East London Employment Tribunal on 8 and 9 February 2024, this was refused by Regional Employment Judge Foxwell on 9 February 2024.

Conduct of the final hearing

Day one

7. At the outset of the hearing, I confirmed the claimant's claims were for automatic unfair dismissal contrary to s103A Employment Rights Act (ERA) 1996, that she was dismissed and the reason or if more than one reason, the principal reason, for dismissal was for making a protected disclosure. The claimant confirmed this to be the case.

8. I confirmed the witnesses in the case. Each party had one witness, the claimant and Mr Hannen for the respondent. Ms Joanne Butters provided a witness statement for the respondent but was unable to attend the hearing. I explained to Mr Hannen that I would only be able to give this statement limited weight. Neither party was legally represented.

9. I confirmed that the issues were as stated from the record of a preliminary hearing dated 9 May 2023 (and included in the respondent's bundle at pages 29-30). The parties confirmed this was the case.

10. I told the parties that should they require any additional breaks or other reasonable adjustments during the hearing, they should let me know. Neither party requested additional breaks or any other adjustments.

11. I discussed the disclosure bundle (totalling 131 pages) with the parties, noting it was entitled 'respondent's disclosure bundle'. Mr Hannen stated he considered it to be a joint bundle albeit it had not been agreed with the claimant. The claimant had brought three bundles of evidence she had compiled to the hearing. I spent about 30 minutes attempting to establish what bundles had been disclosed to the respondent, reminding the claimant this was a requirement. Bundle number one was sent to the tribunal on 24 September 2023. This bundle was supplied to the respondent. Bundle number two was sent to the tribunal (and respondent) on 10 February 2024. The claimant confirmed that much of the evidence in this bundle "might not help my case" and did not speak to the issues. The claimant confirmed bundle number three (or specifically the complaint) was sent to the tribunal on 2 August 2023 and chased on 24 August 2023 and should not have been shared with the respondent, but the tribunal did this. I explained Rule 92 of the ET Rules. Mr Hannen did not object to the inclusion of any of the claimant's evidence. I agreed that the claimant could rely on bundle number one as it had been provided in good time for the hearing and supplied to the respondent, I refused to allow bundle number two to be included as evidence due to the late provision and the fact it appeared to overlap with some of the claimant's other evidence and did not appear to speak to the issues. I decided not to allow bundle three (and the claimant accepted is) as the bundle had a cover letter not disclosed to the respondent. I handed bundles two and three back to the claimant.

12. I then endeavoured to establish with the claimant why she had not produced a witness statement in accordance with the case management order dated 9 May 2023. The claimant told me she thought she would be able to explain her case to the tribunal and that as she was attending, she did not require a witness statement. I considered how the tribunal should proceed and concluded that as the claimant has sent a number of letters and documents setting out her case and some of her concerns to the tribunal that had been shared with the respondent, she may be able to put together a 'statement' from these documents. The claimant agreed to this. She stated she would have preferred to write a statement, commenting she had notes but did not have anything in finished format. I did consider whether to agree an adjournment for the remainder of the day for the claimant to draft a statement but concluded this was not in accordance with Rule 2 of the ET rules as it could result in the hearing going part heard. I was also concerned Mr Hannen would need time to reflect on and prepare questions based on a new statement whereas Mr Hannen was already familiar with the statements and letters already produced by the claimant. After some discussion (and an adjournment of approximately one hour) the claimant confirmed she would rely on two letters sent to the ET (30 January 2023 and 28 February 2023 – referred to as statement one and statement two below).

13. As both parties were not legally represented, I explained the legal principals to establish in a s103A ERA 1996 claim and the evidential burden of proof. The claimant complained that we should reconsider the 2 year continuous service rule under s108 ERA 1996. I explained the tribunal had no jurisdiction to do this and it was not a matter for the tribunal to vary a statute. I also suggested the parties keep a bookmark on the pages in the respondent's bundle with the list of issues throughout cross examination.

14. The above matters took some time to resolve so cross examination of the claimant did not commence until 14.40hrs. At this point, the claimant stated she thought she could take her bundle of evidence to the witness table. I explained the tribunal worked from clean copies of documents on the witness table. She stated she would not remember what she wanted to say. I told her that she would be answering questions from the respondent and that she should be able to do this with the evidence on the witness table, which I assured her, consisted of the statements and bundles already in her possession. I asked if there was a health reason why she needed her own bundle and she confirmed there was not.

15. On examination in chief, the claimant said she had not read her statements recently, this was despite being given an extended period over lunch to decide what documents she had produced that she would like to use in place of a drafted witness statement. I suggested she review the documents and gave her an opportunity to do this.

Day 2

16. Cross examination of the claimant concluded at 11.15 on day 2. Cross

examination of the respondent's only witness, Mr Hannen commenced at 11.35hrs. I reminded the claimant to focus on the issues in her case. This was because she started to ask questions about health and safety issues in the context of the respondent's workplace. I took her to paragraph 9 of the Record of a Case Management Hearing dated 9 May 2023, which states:

"In the case management summary before Employment Judge Davison at paragraph 4(v), health and safety issues refer to soap being missing in toilets, no hot water in the kitchen and the kitchen being unclean. By reference to the claimant's 28 February 2023 document absolutely no details at all are given in relation to these claims. Consequently, in my judgment, these claims cannot continue to a full hearing as they have not been properly articulated."

17. The claimant averred that part of her claim included raising health and safety concerns. I reminded the claimant there were two preliminary hearings where she had the opportunity to articulate her case and that any objections to any decisions taken at the case management hearing on 9 May 2023, should have been made, to the tribunal, within 14 days. The claimant asserted she did this and assumed it had been dealt with. I explained this was not the case. I further explained that at the outset of the hearing on day one, I confirmed the issues, checked if there were any preliminary matters and explained the law. I explained the claimant had an opportunity to raise this at the outset of the hearing and she did not. The claimant then said she thought she was bringing a harassment and victimisation claim also. As the claimant only had one claim under s103A ERA 1996 before me, I decided to treat the claimant's complaints regarding the absence of her harassment or victimisation claims (under the Equality Act 2010) and/or any other detriment claim and the dismissal for health and safety reasons (s100 ERA 1996) as an application to amend her claim to include these additional claims.

18. My decision was not to allow the claimant to amend her claim. My reasons were that the claimant had not adequately articulated any of her other complaints to the tribunal other than s103A ERA 1996 despite having two preliminary hearings; had not made an application to amend her claim at the beginning of the hearing; had not provided any evidence to support any of the additional claims she wanted to bring and there was also no paperwork among her letters and statements that provided enough information to indicate either a s100 ERA 1996 claim, a harassment or victimisation claim contrary to s26 or s27 of the Equality Act 2010 (respectively) or any other detriment claim. I also considered that the claimant had already given her evidence so any amendment would require that the current hearing would have to be adjourned, a new list of issues and case management orders be agreed and another hearing be listed.

19. I considered the balance of prejudice test (***Selkent***) and concluded the balance of injustice and hardship in allowing any amendment at this stage would cause greater injustice and hardship to the respondent than the injustice and hardship of refusing the application would cause the claimant**.** The respondent was also not legally represented and Mr Hannen had prepared the respondent's defence, the evidence bundle and his questions to the claimant based on the list of issues

which reflected the s103A ERA 1996 claim only. I also concluded that an amendment would not be in accordance with the overriding objective (Rule 2 the ET Rules) because it was not in the interests of justice and would waste the time and resources of the tribunal and the parties. Notwithstanding that the claimant wanted to amend her claim, I concluded that despite this fact, an amendment would not assist her.

20. Following this decision not to allow any amendments, the claimant said she had no further questions. She started asking about her right to a reconsideration or appeal and I told her she could take steps in this regard after the hearing should she choose to do so. I then suggested the claimant may wish to reconsider her position regarding questioning the respondent's witness and adjourned until after lunch so could use the lunch period to reconsider her position in this regard. The claimant did put some further questions to the respondent after lunch. Cross examination of the respondent finished at 14.30 and oral submissions commenced at 15.00 until 15.45. I gave the parties the opportunity to provide written submissions by 10.00 on day three.

Day 3

21. I received written submissions from the parties and delivered oral judgment.

Issues

22. The issues were agreed at the case management preliminary hearing on 9 May 2023 and are set out below. For consistency, I have used the numbering provided in the Record of a Case Management Hearing dated 9 May 2023 (9.1-9.6).

9. Issues – Public Interest Disclosure – Whistleblowing

9.1 Did the claimant make one or more protected disclosures as follows:

9.1.1 In an email and team meetings, the claimant reported to her line managers, Mr Oliver Smith/Ms Joana Butters, that a computer programme was impairing her eyesight.

9.1.2 The claimant reported in an email to Ms Joanna Butters that a client wanted an invoice to be included in the wrong period and Ms Butters told the claimant to do what the client wanted.

9.1.3 In a discussion with Ms Georgiana Mitrica the claimant reported that a client wanted to put a shed against expenses and the claimant was told by Ms Mitrica to do that.

9.1.4 The claimant reported to the police in an email that the respondent was:
   (i) Adopting incorrect accountancy procedures.
   (ii) Possibly intercepting her phone calls.
   (iii) Possibly someone was impersonating her clients in emails to her.

9.1.5 The claimant sent emails to Mr Oliver Smith and/or Ms Joanna Butters and/or Mr Oliver Hannon and said in team meetings that:

   (i) VAT rules had not been followed for clients before the claimant took over their files.
   (ii) That she was being asked to prepare management accounts without the relevant information.

9.1.6 In an email the claimant reported to the IT department that there was no security on her laptop.

9.2 The claimant contends that the information tended to show that:

   (a) A criminal offense had been, was being or was likely to be committed; and/or
   (b) A person had failed, was failing, or was likely to fail to comply with a legal obligation; and/or
   (c) The health and safety of any individual had been, was being or was likely to be endangered.

9.3 Did the claimant believe the disclosure of the information was made in the public interest?

9.4 Was that belief reasonable?

9.5 What was the principal reason the claimant was dismissed and was it because she made a public disclosure.

Remedy

9.6 If the claim succeeds, in whole or in part, the tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

Law

Public interest disclosure

23. S.43A and s43B ERA 1996 provide as follows:

s.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.

s43B 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—
(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

24. S43C ERA 1996 sets out that a qualifying disclosure can be made to an employer as follows:

s43C 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, or
(b)……

25. The qualifying disclosures can only be made to certain categories of people (including an employer s43C). If a disclosure is made to an external body, such as the police, it must be made in accordance with additional requirements. S43G ERA sets these out as follows:

43G Disclosure in other cases.

(1) A qualifying disclosure is made in accordance with this section if—
(a). . . . .
(b) the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
(c) he does not make the disclosure for purposes of personal gain,
(d) any of the conditions in subsection (2) is met, and
(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—
(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or
(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—
(a) the identity of the person to whom the disclosure is made,
(b) the seriousness of the relevant failure,
(c) whether the relevant failure is continuing or is likely to occur in the future,
(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.]

26. S103 ERA 1996 provides:

s103A 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.

27. ***Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT*** sets out the test to be applied by a tribunal when deciding whether to exercise its discretion to grant an amendment.

28. ***Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979*** where the Court of Appeal (CA) gave guidance on the correct approach in whistleblowing cases where a worker makes an alleged protected disclosure that serves a private interest. Underhill LJ stated 'The particular issue that arises in this appeal is whether a disclosure which is in the private interest of the worker making it becomes in the public interest simply because it serves the (private) interests of other workers as well.' Matters to consider include the numbers in the group whose interest the disclosure serves; the nature of the wrongdoing disclosed; the nature of the interests and the extent to which they are affected by the wrongdoing disclosed and the identity of the alleged wrongdoer.

29. ***Williams v Michelle Brown AM UKEAT/0024/19***, the EAT gave further guidance on the five issues which a tribunal is required to decide when

establishing if there has been a 'qualifying disclosure'. *"First, there must be a disclosure of information. Secondly the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a believe it must be reasonably held."*

30. ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325, EAT*** sets out that a disclosure of information must convey facts and cannot simply be an allegation.

31. ***Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA***, where the Court of Appeal held that 'information' in the context of S.43B is capable of covering statements which might also be characterised as allegations. The Court of Appeal in *Kilraine* went on to stress that the word 'information' in S.43B(1) has to be read with the qualifying phrase 'tends to show' — i.e. the worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. A statement or disclosure must have sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f) applies.

32. ***Eiger Securities LLP v Korshunova 2017 ICR 561, EAT*** confirms an oral disclosure is capable of being a qualifying disclosure.

33. ***Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT***, which held that reasonableness under S.43B(1) involves applying an objective standard to the personal circumstances of the discloser.

34. ***Phoenix House Ltd v Stockman 2017 ICR 84, EAT***, where on the facts believed to exist by an employee, a judgment must be made firstly, as to whether the belief was reasonable and, secondly, as to whether objectively, on the basis of those perceived facts, there was a reasonable belief in the truth of the complaints. Thus, the subjective element is that the worker must believe that the information disclosed tends to show one of the relevant failures and the objective element is that that belief must be reasonable.

35. ***Kraus v Penna plc and anor 2004 IRLR 260, EAT*** concerned whether an alleged failure is 'likely to occur (s43B ERA). The EAT's view was the failure required more than a possibility or a risk. It had to be more probable than not.

36. ***Dobbie v Felton (t/a Feltons Solicitors) [2021] IRLR 679*** confirmed a qualifying disclosure must serve the interests of more than just the claimant.

37. ***Hibbins v Hesters Way Neighbourhood Project 2009 ICR 319, EAT*** provides that there is no limitation whatsoever on the people or the entities whose wrongdoings can be the subject of qualified disclosures.'

38. ***Abernethy v Mott, Hay, and Anderson (1974) ICR 323, CA*** confirms the 'principal' reason (for dismissal) is the reason that operated on the employer's mind at the time of the dismissal.

39. ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*** deals with the distinction between detriment material influence (by the disclosure test in s47B detriment claims) and principal reason (for the dismissal) in s103a.

40. ***Maund v Penwith District Council [1984] ICR 143 (CA)*** confirms that the burden of proof, in an automatic unfair dismissal claim, will fall to the claimant if they do not have the qualifying service as set out in s108 ERA to bring an unfair dismissal claim in accordance with the ordinary principles of fairness as set out in s98 ERA.

Evidence

41. I heard oral evidence from the claimant and Mr Oliver Hannen, financial controller at the respondent.

42. I had a bundle totalling 131 pages from the respondent. Where I have referred to a document in the bundle, I have used the relevant page number.

43. I had an unpaginated bundle from the claimant which she referred to as 'new evidence' when she submitted it on 24 September 2023. The bundle consisted of a cover letter, a statement and eight science/research articles. Neither party made direct reference to any of the evidence in this bundle during cross examination.

Findings of fact

44. The relevant facts are set out below. Where I have had to resolve any conflict of relevant evidence, I indicate how I have done so at the material point. Most of the factual issues were not disputed.

45. The claimant was employed from 4 August 2020 until 17 February 2022, when she was dismissed with immediate effect and provided with pay in lieu of notice. The claimant was a full-time accounts manager and her role was to look after a portfolio of around 25 clients. Her gross salary was £2500 per month.

46. The respondent is a small company with approximately twenty employees providing services to recruitment businesses that includes support with accounting and payroll among other services.

47. Mr Hannen's oral evidence was that on commencement of employment, the claimant was provided with an induction and then ongoing support, supervision, and appraisal. The respondent conceded that training and support was ad-hoc.

48. At the commencement of her employment, the claimant was provided with a used laptop with she argued had no security installed and that a "malicious computer programme was on my laptop right from the beginning. This was ca(u)sing me visual impairment and was disrupting my cognitive functioning". The claimant says she raised security concerns about her laptop throughout employment (giving no dates) and this was not disputed by the respondent who provided documentary evidence confirming the same.

49. The claimant's oral evidence was that she sent emails to the respondent and also raised concerns in Teams meetings that VAT rules were not being followed and she was being asked to prepare management accounts without the correct information. She told the tribunal she raised these concerns throughout her employment, stating that there were lots of problems created by a live platform and the problem was caused by someone before her, that most clients were providing information for management accounts at the last minute, that she did not want to provide nil management accounts and no information, she did not find it appropriate to challenge her clients and she was trying to tailor her approach to client needs. Issues arose because the claimant stated the accounting information should be provided monthly whereas VAT returns were filed quarterly, so the information she requested from clients was often not forthcoming. The claimant also stated that management would often request this accounting information and she was unable to provide it due to her clients not providing it to her. The claimant was unable to confirm exactly when these concerns and difficulties arose.

50. Mr Hannen's oral evidence was that there were email chains specifically about the claimant's concerns about VAT in November and December of 2020 and later email chains about the claimant's frustration with the management accounts. He also stated he had praised the claimant when she had spotted errors with VAT which was not disputed by the claimant. He also stated that management accounts were not the same as statutory accounts.

51. I accept there was sufficient oral evidence from both parties and documentary evidence from the respondent to confirm the claimant raised concerns and asked for information about VAT matters and management accounts and these were ongoing issues throughout the claimant's employment which appears to have caused problems with how she managed client relations (see below).

52. The claimant's oral evidence was that around the middle of her employment (April-June 2021) she raised concerns with Ms Butters about the way a client of Option One was reporting their income. Option One was a client of the

respondent. She told the tribunal that she had inherited this client from a previous accounts manager and had discussed the matter with Ms Butters because the client was not happy with the claimant's perceived preference to do the "correct reporting". This conversation appears to have run across email correspondence and a video call. The claimant was concerned about this because the client of Option One was claiming universal credit (UC) and was supposed to inform the Department of Work and Pensions (DWP) about income at the material time. According to the claimant, the client wanted her income placed in the 'wrong period', the claimant did not want to do this and she told Ms Butters this and explained her reasons why. Ms Butters told her to do as the client requested.

53. Mr Hannen's evidence in this regard was that for the purpose of management accounts, it was standard accountancy practice to use cut off procedures and this is accepted industry practice and was often on a "best estimate basis". If new information came to light after accounts were submitted, it was reconciled in the next period.

54. I accept this email and video conversation did happen. The respondent did not dispute this in cross examination. I note in Ms Butter's witness statement, she says she cannot recall this incident. In the absence of Ms Butters giving evidence under oath, I give her statement limited weight and prefer the evidence of the claimant.

55. The claimant told the tribunal that she had a conversation with Ms Georgiana Matricia, another accounts manager, about one of the respondent's biggest clients with "lots of payroll" wanting to put a shed against expenses. The claimant honestly confirmed that she could not remember the date or even provide an approximate date/month when this conversation occurred, the name of the client or whether she had reported her concerns to a more senior member of staff and she put this down to the passage of time. Mr Hannen's oral evidence was that he was not aware of this matter though thought it may have been a genuine business expense as people do convert sheds into office space.

56. I accept there was a conversation of some kind between Ms Mitrica and the claimant about whether it was correct to put a shed against expenses. Beyond this, I can make no further findings due to the lack of detail.

57. On 1 April 2021, the claimant raised concerns that someone was connecting to her computer so the IT department ran a check the same day and nothing was found. Over the next few days, the claimant reported someone was damaging her work remotely, words were being deleted while she was working on the computer, her password was changed and phone calls were being diverted. The claimant installed AVG/VPN anti-virus software on her work laptop in response to her concerns. On 6 April, IT ran investigations into user access and found no evidence of remote access and intrusion. Stronger internet security

(Webroot) was installed. The claimant installed AVG/VPN again and was advised to remove it as it may conflict with Webroot (101).

58. On 27 August 2021, Ms Butters emailed Mr Oliver Smith and Mr Hannen to alert them to a number of issues including complaints that had been raised by the respondent's clients against the claimant who was covering accounts for a colleague 'Mira'. This was not the first time and the complaints were down to the (lack of) attention to detail in the claimant's emails and that there may be a training need. Ms Butters also said the claimant had raised further security concerns about her laptop alleging the anti-virus software did not work and it was affecting her sleep and cognition and that IT checked the computer for suspicious activity and found nothing. Mr Hannen responded to state these issues needed to be addressed and referenced that the claimant should be asked when she wanted to take her remaining annual leave (89).

59. The respondent carried out a further security check on the claimant's laptop in September 2021 and could not find any suspicious activity (102).

60. By an email dated 11 November 2021, to Mr Chris Ion from IT (98), the claimant states:

    "I would like to report that yesterday when working on Option One someone kept deleting payments on account while I kept adding them on.

    This has happened twice.

    Also, the virus I had previously reported seems to still be on my computer and makes it impossible for me to work at least for half of the day. It slows me down immensely and disrupts my cognitive functioning. It is most definitely not filtrable by the current antivirus program.

    Could please my computer be checked?"

61. On the same day Mr Hannen responds to say:

    "Chris has checked the laptop and reports everything to be ok. Do let Jo or I know if you experience any other concerns.

    You mentioned that your cognitive functioning is being disrupted – please feel free to take a break and use some of your holiday to rest. We actively encourage this for all our employees."

62. The respondent ordered a new laptop for the claimant (and installed Webroot) which she collected in January 2022. It was common ground between the parties the claimant never used the new laptop.

63. The claimant's oral evidence was that she could not remember the dates she raised concerns relating to her laptop security and the impact on her health though she did not dispute the authenticity of the email and documentary evidence provided by the respondent in this regard. She told the tribunal that the lack of security on her laptop was affecting her eyesight and cognitive functioning. She stated that "I was not sure if I was doing mistakes or someone was changing my accounts, I was 100% sure the accounts were correct and I came back then they had changed". When asked if she thought this was due to malware she said "No, someone in the company was tampering with my computer. This happened in two previous employers". The claimant stated that when she installed VPN, her eyesight improved. The claimant did describe herself as photosensitive.

64. By an email dated 26 January 2022, Ms Butters asks the claimant to complete an appraisal form and said she would like to conduct her appraisal on 11 February (84).

65. By an email dated 1 February 2022, the respondent received a complaint from a client 'Option One' complaining about the claimant, asking for a new accounts manager and stating that she had made errors with the accounts (48). The claimant told the tribunal she was aware of this complaint and believed it was because the client had a problem with her "correct working procedures".

66. On 1 February 2022, Ms Butters arranged a meeting with the claimant to discuss her work and requested she bring her old computer to be audited and wiped as it was no longer required (100). The claimant responded to say there were no issues with the old computer anymore and she would prefer to keep it and will bring the new one back for someone else to use (99).

67. On 4 February 2022, Ms Butters had a meeting with the claimant and Mr Oliver Smith. Following the meeting, she reported to Mr Hannen that the claimant continues to complain about security issues on her laptop but refuses to take a new laptop and that nothing had been uploaded to 'Out Books' (a third party bookkeeping service) although the claimant agreed she would do this going forward. Ms Butters also told the claimant that there had been a complaint from 'Option One' and she needed to investigate it and asked the claimant to send over correspondence between the claimant and Option One. Ms Butters also expressed concerns that the claimant was having difficulty looking at the accounts as 'MMAs' (management accounts) and not as full statements.

68. There were a series of emails between the claimant and Mr Marc Brown from Porter Brown, one of the respondent's clients, between 13 August 2021 and 3 February 2022 (53-61). These related to bank statements and VAT returns. Porter Brown had ceased trading and Mr Brown wanted to liquidate the company. The claimant had insisted on statements for August and December 2021 VAT returns and bank information to be placed on Quick Books. By an

email dated 2 February 2022, Mr Brown told the claimant there were no bank statements for this period as the company ceased trading in July 2021 and the bank account had been closed. On 3 February 2022, the claimant responded still wanted the accounts from July. The claimant's handling of this matter resulted in a complaint. The claimant's oral evidence was that she did not want to file nil VAT returns, that the client was not providing the information required to correctly do accounts, that she spent half a year chasing information and that she reported suspicious behaviour to the respondent about this but could not remember when. When asked if she was aware of the complaint she said "I am copied in to the email so I would have been aware".

69. By an email dated 9 February 2022, Ms Butters tells the claimant not to attend the office due to a covid outbreak, asks her to arrange her appraisal with Mr Smith and asks her to provide the correspondence between her and Option One (83).

70. By an email dated 10 February 2022 (81), Ms Butters tells Mr Hannen the claimant had upset two colleagues 'Diane' and 'Viks'. She says:

    "I want to know what the next step is because she is now upsetting clients and her team with her 'I am always right attitude' and taking a disproportionate amount of time to manage".

    She goes on to say:

    "I am coming to the opinion that we look at pushing more to Out Books, spread the work among the team for now and 'rip' the plaster off' as the time she is taking up and the upset she is causing our very hardworking team is not acceptable. I appreciate its not a good time for this, it never is but, in all honesty, she is becoming more of a risk as the days go on and there is never a good time to do this but I don't want to lose clients or team members because of this".

71. On 16 February 2022, the claimant sent an email to 'Danny' instead of 'David' at a client of the respondent 'Wentworth James' where she disclosed confidential information about an investment unbeknownst to Danny and other staff at Wentworth James. This was done without the authority of senior management at Wentworth James. There followed a series of emails on the same day.

72. By an email to Mr Hannen of the same date, sent at 14.08hrs, the claimant acknowledges this error and states (79):

    "I have already apologised to the client.'

    At 14.13hrs she explains the error (78):

"It starts with D and Danny has been emailing me the sales invoice requests".

At 14.20hrs, she again acknowledges the mistake though goes onto say (77):

"Most recently someone has completely changed settings on my Outlook while we were having training session through teams. Once the harassment has stopped I will stop making mistakes".

73. At 14.34hrs Mr Hannen acknowledges mistakes happen and asks the claimant to provide examples of the harassment (77). With reference to IT, he says:

    "I am keen to do everything we can to help, but all previous investigations have not shown anything, if there are specific things you would like me to look at please let me know."

74. The claimant responds at 19.04hrs to say (76):

    "My examples range from gaslighting software to impair my cognitive functioning to damaging my work deliberately. Gaslighting me into performing my functions improperly and also not providing the information I need to serve my clients properly.

    We had discussed all of the above in the meeting."

75. At 19.10hrs, Mr Richard Bruce (Managing Director) responds to this email to the claimant saying (69):

    "*Please come to the offices tomorrow and bring your equipment with you. I will deal with this matter urgently*".

76. Wentworth James submitted a complaint to the respondent about the breach on the same day. There follow several emails between senior management at the respondent about the breach and its potential consequences on the respondent (74-75).

77. Mr Hannen's oral evidence was that the respondent appraised all staff annually in January and/or February. Earlier on 16 February, the claimant had an appraisal with Ms Butters and Mr Oliver Smith (105-106). By an email of the same date at 19.58hrs, Ms Butters reported back about the appraisal to Mr Hannen. She summarises towards the end as follows:

    "In summary it was a really tricky two hours, it was not really an appraisal and Petra came across as feeling there wasn't anything massively positive to discuss about the last year at all. Oliver was exceptionally patient and handled it very well, he tried to give positive examples of work done and did not react negatively to anything she said. We took it in turns to try to move it on and get

back to the purpose of the meeting as again she was quire fixated on technical points rather than her persona development.''

78. Mr Hannen responded on the same day at 20.43hrs (105) stating:

    "Unfortunately in my opinion the performance of duties is below an acceptable standard. Instructions on passing bookkeeping to Outbooks have been ignored and communication with clients has been inappropriate, there have also been complaints from some clients and from staff.

    I will take the necessary steps from here.

    What access does Petra have to our clients information and our systems and how can we protect it?"

79. The claimant sent Mr Bruce an email on 17 February at 08.29hrs acknowledging his request for her to attend the office. She states:

    "I would like to let you know that the most of my issues I have been experiencing are not connected with my laptop".

80. The claimant oral evidence about the above email was "I was replying to something out of context, I don't know what I was replying to". The claimant was taken to the email chain of which this email is at the end that confirmed the statement was made in context. The claimant stated in oral evidence, the problems may be the laptop, it may be the signals and no security which she thought was enabling the respondent to access her computer remotely.

81. The claimant attended the office on 17 February 2022 and was dismissed with immediate effect by Mr Bruce. The dismissal was for gross misconduct due to the data breach. This was confirmed in a letter of the same date (122). The claimant's oral evidence was that when she attended the office, she believed her concerns were finally going to be addressed and instead she was dismissed. She told the tribunal the data breach 'was a mistake, a genuine error' and that Danny looked after self-invoices only and not expenditure.

82. Mr Hannen's oral evidence was that Mr Bruce made the decision to dismiss the claimant and would have been aware of the issues reported by the claimant but not as they happened but more in summary. The report chain would be the claimant to the team leader, then Ms Butters, then Mr Hannen and then Mr Bruce.

83. Mr Hannen's oral evidence was that he and other senior management had been reporting concerns about the claimant's performance and behaviour towards other team members and clients to Mr Bruce for some time and it was his

opinion the claimant was not capable of performing her role despite attempts to accommodate her with a reduced caseload and alternative tasks.

84. With reference to her reports to the police, the claimant's oral evidence was that she reported "everything to the police". She said she reported to the police that "Someone was impersonating the clients and I was being harassed by the clients. For seventeen days before I left, someone was harassing me to make mistakes". Mr Hannen's oral evidence was that it was unlikely someone from the respondent was doing this and that the respondent was a small and friendly team and he doubted anyone would have the technical know how to do this. The claimant's oral evidence about when she filed her report(s) to the police was vague. She stated this was between January and March 2022.

85. The claimant's written evidence to the tribunal was that "I believe that it is not possible to see my claim through without considering the police reports I have submitted as all is connected" (34). The claimant provided two statements as her evidence in chief in place of witness statements, both statements start with the same paragraph "My name is Petra Slavikova….". One of these statements appears to address mitigation and the second paragraph starts "Please see my testimony below". I will refer to this as statement one. The other statement addresses issues at the respondent (and two previous employers) and the second paragraph starts "I would like to state that I never had any kind of representation". I will refer to this as statement two. In statement one, the claimant states:

"I have reported SSG to the police for the first time in May 2021. If the Tribunal has not been able to obtain copies from the police or IOPC I will forward these to yourself if you wish. The reports are extensive and relate to my previous three employers, NHS as well as my domestic situation and some other issues I was having. I believe that some of it could be classified as sociopathic behaviour.

I have reasonable doubt to believe that the police may have been involved in my situation with SSG Recruitment Partnerships Ltd the same way as NHS was."

86. In statement two, the claimant says:

"I would like to also state that events happening to me at SSG Recruitment Partnerships Ltd are very much similar to the events happening to me at Miller & Co and David Lindon & Co.

I would also like to mention that the reports filed with the police are connected and therefore is not possible to annex them. I am willing to provide the police reports filed, however under no circumstances are these reports to be shared with SSG Recruitment Partnerships Ltd if requested please."

87. The claimant goes on to say in (statement two) that she filed an "extensive report" at Watford police station via email in May 2021 and also in November 2021.

88. The claimant did not supply any of the emails she alleges to have sent to the police or the reports (if sent as an attachment) as part of her evidence to the tribunal.

89. I accept the claimant filed a report of some kind to the police in May 2021 and November 2021 and her statement suggests this was the same report filed twice.

90. The claimant has not supplied enough evidence for me to make a finding that she filed another report with the police at a later date. Her evidence was vague (January to March 2022), this report is not referenced in her two statements referred to above and in any event, the purported content "Someone was impersonating the clients and I was being harassed by the clients. For seventeen days before I left, someone was harassing me to make mistakes" suggests this report was filed with the police after she was dismissed as the claimant makes reference to "seventeen days before I left".

91. It was common ground between the parties that the claimant had not told respondent about her reports to the police before or after she was dismissed. The claimant confirmed this in oral evidence. Ms Hannen's oral evidence was that the respondent only learned that the claimant reported concerns to the police after she was dismissed and because of the tribunal proceedings and the police had never been in touch with the respondent. I accept the respondent's evidence in this regard.

Relevant law and conclusions

92. In summary, a disclosure is protected if it fulfils two requirements. The first requirement is that it is a 'qualifying disclosure' (s43B ERA 1996) and the second requirement is that it must be disclosed in accordance with a limited number of permitted routes (s43C-H ERA 1996).

93. S43B ERA 1996 provides that 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 matters listed in paragraphs (a) – (f) has occurred. The claimant is relying on:
(a) A criminal offense had been, was being or was likely to be committed; and/or
(b) A person had failed, was failing, or was likely to fail to comply with a legal obligation; and/or
(d) The health and safety of any individual had been, was being or was likely to be endangered.

94. Did the claimant make one or more protected disclosures as follows:

In an email and team meetings, the claimant reported to her line managers, Mr Oliver Smith/Ms Joana Butters, that a computer programme was impairing her eyesight (numbered 9.1.1 in the list of issues);

and

In an email the claimant reported that there was no security on her laptop. (numbered 9.1.6 in the list of issues).

95. I have dealt with these purported disclosures together due to the overlap because in oral and written evidence the claimant referred to her eyesight, cognitive functioning, no security on her laptop and her belief that the respondent was accessing her laptop remotely interchangeably.

96. It was common ground between the parties that the claimant reported concerns about data security on her laptop throughout her employment and that she informed the respondent this was causing problems with cognitive and visual functioning. These concerns were investigated by the respondent and nothing was found. The claimant was provided with a new laptop but did not use it because she had installed 'WPN' on her old laptop, which she said had a positive impact on her eyesight, and she was concerned she would not be able to control the settings on her new laptop.

97. The list of issues references visual impairments and data security only. The claimant's position appears to be that the data security issue was causing cognitive impairment and enabling remote access and I accept this is why these matters were referenced in her complaints to the respondent interchangeably.

98. The first requirement is to establish whether there was a disclosure of information. A disclosure of information must convey facts and cannot simply be an allegation and must tend to show a failure under s43B(1) ERA 1996 has taken, is taking or will take place (***Cavendish Monro****e*) .

99. I accept that the emails reporting these issues with health or data security convey just enough in terms of facts to amounted to 'a disclosure of information'. To tell someone that a laptop may be causing visual impairments is conveying a fact, as is telling an employer about concerns with data security and why (cognitive impairment, a malicious programme and/or external access) is conveying a fact. Further, the respondent took these reports seriously and investigated them and even provided the claimant with a new laptop.

100. However, the word 'information' in s.43B(1) ERA 1996 has to be read with the qualifying phrase 'tends to show'. The worker must reasonably believe that the information 'tends to show' that one of the relevant failures in s.43B(1) has occurred, is occurring or is likely to occur (***Kilraine***). I do not accept this to

be the case with the claimant because the claimant's concerns about her eyesight and data security were entirely personal to the claimant's health and ability to perform her role (***Dobbie***). These concerns raised by the claimant served a private interest only. There was no indication of how others may be impacted either at the respondent and/or elsewhere by the alleged wrongdoing (***Chesterton Globel***).

101. I accept that the claimant does genuinely believe that she had made a disclosure of information that tendered to show a failure under s. 43B(1) and that these reports were made in the public interest. However, my finding is that she would not be able to demonstrate this belief was reasonably held in both instances. There is a requirement to attach an objective standard to the personal beliefs of the discloser (***Korashi***). The claimant has provided no explanation for why an external person from the respondent would be accessing her computer and changing her work nor how she reached the conclusion. She has also not explained why multiple agencies or former employers were involved in this type of behaviour towards her (the respondent being the third employer to subject her to this type of behaviour) or provided any evidence to support these allegations other than assertions. Further, it is difficult to see what failing under s43B(1) was 'likely to occur' (***Kraus***).

102. The above issues (and numbered 9.1.1 and 9.1.6 in the CMA) are not protected disclosures.

<u>The claimant reported in an email to Ms Joanna Butters that a client wanted an invoice to be included in the wrong period and Ms Butters told the claimant to do what the client wanted.</u>

103. I have found that there were conversations by email and a video call between Ms Butters and the claimant.

104. Did these conversations with Ms Butters amount to a 'disclosure of information' that 'tends to show' that one or more of the listed failures in s43B took place. I find that it did. A disclosure of information can be oral (***Eiger Securities***). There is enough information being disclosed that conveyed facts, this being that a client of Option One who was in receipt of Universal Credit (UC) was relying on the respondent's way of dealing with the management accounts (that relied on a cut off period) to report incorrect income to the DWP. The claimant conveyed this information and her concerns that this was unlawful.

<u>The claimant contends that the information tended to show that :</u>

(a) <u>A criminal offence had been, was being or was likely to be committed; and /or</u>
(b) <u>A person had failed, was failing or was likely to fail to comply with any legal obligation; and/or</u>

(c) The health or safety of any individual had been, was being or was likely to be endangered.

105. I find the claimant did believe that both of the first two matters listed above (being sections 43B(a) & (b) ERA 1996) were taking place.

Did the claimant believe the disclosure of information was made in the public interest?

106. The next requirements are to establish if the claimant believed the disclosure was made in the public interest and if so, whether this belief was reasonably held. Making a disclosure about the failure of a client to correctly report income when in receipt of state benefits is in the public interest. There was no personal interest served and state benefits are paid from the public purse.

Was that belief reasonable?

107. Finally, if the worker does hold this belief, it must be reasonable held. I find that the claimant reasonable believed that the information she disclosed showed a relevant failure (S43B(1)(a) and (b) ERA 1996). The respondent's evidence was that for the purpose of management accounts, it was standard accountancy practice to use cut off procedures and this is accepted industry practice. However, the claimant had concerns about a client of Option One, itself a client of the respondent was relying on this practice with a view to misleading the DWP. The failures being:

(i) potential benefit fraud on the part of a client relevant to S43B(1)(a) ERA 1996; and

(ii) incorrect accountancy practice on the part of the respondent relevant to S43B(1)(b) ERA 1996.

108. The failure does not have to be that of an employer (***Hibbins***).

109. I find the above conversation with Ms Butters is a qualifying disclosure.

110. The qualifying disclosures can only be made to certain categories of people (including an employer s43C(1)(a) ERA 1996). The claimant made the disclosure to her employer as she told Ms Butters, her line manager's manager. Therefore, the disclosure was made in accordance with s43C ERA 1996.

111. I find this is a protected disclosure.

In a discussion with Ms Georgiana Mitrica the claimant reported that a client wanted to put a shed against expenses and the claimant was told by Ms Mitrica to do that.

112. The claimant was very vague about this incident. She could not remember the client other than 'it was a client with lots of payroll, one of the

bigger clients. That's all I remember'. She also could not remember when the incident occurred. Ms Mitrica was also an accounts manager like the claimant. The claimant stated she could recall whether she told anyone else about the incident.

113. I accept there was a conversation of some kind I find between Ms Mitrica and the claimant about whether it was correct to put a shed against expenses.

114. Did this conversation with Ms Mitricia amount to a 'disclosure of information' that 'tends to show' that one or more of the listed failures in s43B took place? The claimant has simply not provided enough information about this incident to show that this conversation amounted to a 'disclosure of information' for me to make a finding about whether it conveyed facts, as it must (***Cavendish***). The conversation appears to have been a dispute between two colleagues about the correct way to account for expenditure and not a disclosure of information, the content of which and time this conversation took place, being forgotten, as the details of most conversations between colleagues are.

115. I do not find this conversation to pass the first requirement, that it is a disclosure of information. This conversation was not a protected disclosure.

<u>The claimant reported to the police in an email that the respondent was:</u>

(i) <u>Adopting incorrect accountancy procedures</u>
(ii) <u>Possibly intercepting her phone calls.</u>
(iii) <u>Possibly someone was impersonating her clients in emails to her.</u>

116. I accept that the claimant reported concerns to the police via email in May and October 2021. However, the claimant failed to disclose the email(s) which would have contained the exact date of the disclosure and their content prior to the final hearing.

117. Her two statements reference concerns about treatment to her from the respondent, two previous employers, the NHS and potentially the police. They do not set out the exact content of the email or reports to the police so it is not possible to make a finding about whether she reported the above three concerns detailed above at (i)-(iii) to the police.

118. The claimant was reluctant to disclose her email and/or reports to the police to the tribunal "I am willing to provide the police reports filed, however under no circumstances are these reports to be shared with SSG Recruitment Partnerships Ltd if requested please". Open justice is a fundamental principal of the court and tribunal system in England and Wales and is vital to the rule of law. The claimant received two Rule 92 (Employment Tribunal Rules) letters reminding she must copy in the respondent on all correspondence to the

tribunal as she often failed to do so and the case management order dated 9 May 2023 at paragraph 5.1 was clear that all documents the parties wished to rely on during the final hearing needed to be disclosed.

119. Her oral evidence was that she reported matters again sometime between January and March 2022 and I found that if there was a further report, it was sent to the police after the claimant was dismissed (regardless of the content) so would not have impacted on the decision to dismiss her.

120. The claimant's evidence to the tribunal was that she did not tell the respondent she made these disclosures and Mr Hannen confirmed the first time the respondent learned about the disclosures to the police was through tribunal proceedings. I accept this evidence from both parties in this regard.

121. The claimant has simply not provided enough information about the reports and emails to the police and has failed to disclose them and her oral evidence was vague. The claimant has not provided enough evidence to show that these emails and/or reports amounted to a 'disclosure of information'. The evidence before me is limited to allegations with insufficient factual content to amount to a disclosure of information (***Cavendish***).

122. Notwithstanding that the respondent did not know about the disclosures at the time of the dismissal, I do not find the above emails and reports to the police to pass the first requirement, that it is a disclosure of information. This conversation was not a protected disclosure. Consequently, I will not go on to set out the additional requirements for a disclosure to be protected as required under s43G ERA 1996.

<u>The claimant sent emails to Mr Oliver Smith and/or Ms Joanna Butters and/or Mr Oliver Hannon and said in teams meetings that:</u>

<u>(i) VAT rules had not been followed for clients before the claimant took over their files.</u>

<u>(ii) That she was being asked to prepare management accounts without the relevant information.</u>

123. It was common ground between the parties that the claimant sent emails to Mr Smith, Mr Hannen and Mr Butters about concerns she had about the VAT rules not being followed and the requirement she prepared management accounts without all the information she thought was required. The respondent's documentary evidence confirms its frustration with what it perceived to be the claimant's very fixed opinions about these matters and the impact this had on relationships with the respondent's clients.

124. Did these emails and conversations in Teams meetings amount to a 'disclosure of information' that 'tends to show' that one or more of the listed

failures in s43B(1) ERA 1996 took place? There must be a disclosure of information and not simply an allegation or an opinion and must convey facts (***Cavendish***).

125. I find that it does not, this is because the claimant was asserting that the accountancy information should be provided monthly, this was an opinion and not the provision of information and did not want to submit nil accounts, this is an assertion and not the provision of information (***Cavendish***). Management was asking the claimant to provide information to them about the accounts and the claimant was raising queries and asking questions in response. This was not the claimant providing information 'that tendered to show' a failure under s43B ERA had taken place (***Kilraine***). The claimant's concerns appear to be more about her frustration about being caught between client and management expectations rather than providing information that 'tended to show' a failure under s43B ERA was taking place.

126. I do not find this conversation to pass the first requirement, that it is a disclosure of information. These emails referenced above and conversations in Teams meetings were not protected disclosures.

S103A ERA 1996 - Unfair Dismissal

What was the principal reason the claimant was dismissed and was it that she had made a protected disclosure?

127. Turning to the reason for dismissal. The first matter to consider is whether the claimant was dismissed for making a protected disclosure as she asserts or whether she was dismissed for gross misconduct and capability as the respondent asserts.

128. I have held that 'That the claimant reported in an email to Ms Joanna Butters that a client wanted an invoice to be included in the wrong period and Ms Butters told the claimant to do what the client wanted' (9.1.2.) is a protected disclosure that was correctly reported.

129. S103A ERA 1996 provides that an employee who is dismissed shall be regarded 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.

130. The protected disclosure must be the principal reason for the dismissal (***Fecitt***). The 'principal' reason is the reason that operated on the employer's mind at the time of the dismissal (***Abernethy****).* It is not enough that the claimant made a protected disclosure somewhere in the middle of her employment and was then dismissed some nine months later by the respondent. This will not be sufficient to make a finding of automatic unfair dismissal. The protected disclosure – that the claimant reported in an email to Ms Joanna Butters that a client wanted an invoice to be included in the wrong period and Ms Butters told

the claimant to do what the client wanted (9.1.2.) must be the reason, or principal reason for the dismissal.

131. As the claimant does not have the qualifying period of service necessary to bring a claim for ordinary unfair dismissal the burden of proof is on her to show the reason for the dismissal (***Maund***). Accordingly, for the claimant's claim under s103A ERA 1996 to succeed she must prove that the protected disclosure referenced above was the principal reason for dismissal.

132. In cross examination, Mr Hannon asked the claimant if she thought this was the reason for her dismissal and she replied "not just this particular issue".

133. The respondent's case is that there were ongoing performance concerns and a number of complaints about the claimant from the respondent's clients and are referred to in the findings of fact and I accept these complaints, referenced across a number of emails supplied by the respondent occurred. The claimant acknowledged in evidence that she was aware of at least some of these complaints.

134. There was also an appraisal on 16 February 2022, where a decision was taken to 'take the necessary steps from here'. Mr Hannen told the tribunal this was halted due to the data breach on the same day as the appraisal. The claimant shared confidential data of a major client without its consent. This resulted in a complaint. The claimant acknowledged she disclosed this data in error so this incident is common ground between the parties.

135. Mr Hannen told the tribunal that following this data breach and ongoing performance concerns and complaints from both colleagues and clients, Mr Bruce, the managing director at the respondent, decided to terminate the claimant's employment. I accept this to be the reason for the claimant's dismissal. As the claimant does not have the qualifying service to bring a claim for unfair dismissal in accordance with the principals in s98 ERA 1996, it is not for me to assess whether this dismissal was fair.

136. My finding is that the principal reason for dismissal was the data breach and capability concerns and not for making a protected disclosure. I do not find 'that the claimant reported in an email to Ms Joanna Butters that a client wanted an invoice to be included in the wrong period and Ms Butters told the claimant to do what the client wanted' operated in the respondent's mind when a decision was taken to terminate her employment.

137. The claimant was not dismissed for making a protected disclosure. Her claim for automatic unfair dismissal contrary to s103A ERA 1996 is not well founded and is dismissed.

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Employment Judge E Davey

28 March 2024
Date________________________
JUDGMENT SENT TO THE PARTIES ON

4 April 2024

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FOR THE TRIBUNAL OFFICE

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