EMPLOYMENT TRIBUNALS

Claimant: Ms Alexandra McMillan

Respondent: ESPH Healthcare Limited

Heard at: London South **On: 8, 9, 10 and 11 November 2022**

Before: Employment Judge Khalil (sitting with panel members)
Ms Bird
Mr Hutchings

Appearances

For the claimant: Ms Brooke-Ward, Counsel
For the respondent: Ms Jervis, Senior Litigation Consultant, Peninsula

JUDGMENT WITH REASONS

Unanimous Decision

The claim for unfair dismissal for the making of a protected disclosure (s) contrary to S.103A of the Employment Rights Act 1996 is not well founded and fails.

The claim for detriment for the making of a protected disclosure (s) contrary to S.47B of the Employment Rights Act 1996 is not well founded and fails.

The claim for unfair dismissal contrary to S.94/98 of the Employment Rights Act 1996 is well founded and succeeds.

The parties were encouraged to resolve remedy privately. If that is not possible, the parties should write to the Tribunal within 28 days of the sending of this Judgment requesting a Remedy Hearing with dates to avoid.

Reasons

Claims, appearances and documents

(1) This was a claim for ordinary unfair dismissal, 'automatic' unfair dismissal under S.103A ERA, detriment for the making of protected disclosures and holiday pay.

(2) The claimant was represented by Ms Brooke-Ward, Counsel and the respondent was represented by Ms Jervis, Senior Litigation Consultant (Peninsula).

(3) The Tribunal had a Bundle running to 487 pages.

(4) The Tribunal heard from the claimant and for the respondent, from Mr Max Sharp, co-founder and Director of the respondent. Two other witnesses who had prepared statements were not called following the claimant's confirmation that no questions would be put.

(5) Both parties provided closing written submissions, supplemented orally.

Relevant Findings of fact

(6) The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the Hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

(7) Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant to an issue in the case.

(8) The respondent is a gym and exercise business. The parent Company is ESPH LLFG Ltd. There is an associated company called ESPH Clinic Limited.

(9) The claimant commenced employment on 1 February 2018 as an assistant Exercise Manager. The claimant was promoted to Exercise Manager in November 2019, reporting to the Exercise Director (Alexei Sharp). In her role, she was responsible for the exercise team.

(10) Following the onset of the Covid-19 pandemic and the national lockdown, the claimant was placed on furlough with effect from 24 March 2020 (page 110). The claimant agreed to the arrangements (page 111).

(11) On 24 March 2020, the claimant exchanged texts with Mr Gary Delahunt, Clinic Manager. In this exchange, the claimant and Mr Delahunt believed that they could not be furloughed and work (from home) concurrently. The claimant said

she had a 'feeling' they want us in. These texts were exchanged between 9.03 and 9.10am. The claimant said she had spoken to ACAS about this the day before (23 March).

(12) On the same day, from 17.37 onwards, further texts were exchanged. The claimant asked Mr Delahunt if he had left yet and if there was an update. In response, Mr Delahunt said this was not expected until the next day or the day after that. The Tribunal found this was a reference to the Furlough Guidance or rules. Further, the claimant added that legislation had not been set yet about being furloughed and working for your employer.

(13) The foregoing chronology was important as the claimant asserted that a team meeting had taken place at 11.00am that day (in person) with several attendees, including managers, when she had asserted that she could not work whilst furloughed. In response, the claimant said she was told by Mr Sharp that it was not clear and he subsequently added 'he had found a way around'. This meeting and/or comments were not referred to in the contemporaneous text exchange. Mr Sharp accepted in oral testimony that this meeting did take place, but he did not accept he had said he had 'found a way'. He said he recalled saying they were trying to find a way of keeping the business going; on that date, he said, no-one knew what the situation meant. He said he was trying to protect the business and do everything he could reasonably do. The Tribunal accepted that the claimant asserted that she could not be furloughed and work but also preferred the evidence of the effect and gist of Mr Sharp's response and comments, noting, critically, the timing and the proximity of the announcement of the lockdown and that the situation was uncharted and unprecedented. This was asserted as the claimant's first disclosure. The Tribunal also accepted that there was some discussion on this day, subsequently, about the possibility of individuals working self-employed invoicing the Clinic business instead (page 199).

(14) On 26 March 2020, there was a zoom meeting at 9.30am at which the claimant said she could not raise an invoice for work done and would not do so, unless it was confirmed in witing that she could work whilst furloughed. This, the Tribunal found linked to some of the discussion on 24 March 2020. In response, Mr Sharp said that was not possible (which the Tribunal understood to mean confirm in writing) and to leave it with him. Mr Sharp accepted in testimony there was a meeting on this date, but he could not recollect the content.

(15) There were text messages exchanged between the claimant and Mr Delahunt before 9.30am which referred to seeking written confirmation (which the Tribunal found to mean any work done whilst furloughed). Further, from 12.20pm onwards, there were further texts exchanged, including a reference to Mr Sharp not wanting to provide written confirmation. There was also discussion, on text, about whether the physio part of the business could remain open and whether the terms of the handbook allowed a reduction in work (page 285). The claimant also asserted, in a text to Mr Delahunt that 'we are being asked to commit fraud'

in response to a question about why another employee was not prepared to do self-employed work (page 286). The Tribunal found that there was a discussion at this meeting about the prospect or possibility of employees invoicing the respondent. This was the claimant's second asserted protected disclosure.

(16) The Government published Furlough Guidance on 26 March 2020.

(17) On 28 March 2020, the claimant sent a text to Mr Sharp. This was at page 221. In this text the claimant referred to the previous zoom meeting and said as follows:

"Hi Max, following on from the zoom we had the other day and discussions on working whilst furloughed, as there has now been guidelines released about the furlough, it's clear we (the employed staff), cannot undertake any work for the company. We have looked into how to keep services going with self-employed staff and both of us have had various discussions with who can do what, this will enable us to keep the income flowing. We (myself and Gary) will of course complete a smooth transition to the self-employed staff. We'd need to have discussions with the potential self-employed staff asap. Please let us know how you would like us to proceed."

This was the claimant's third asserted protected disclosure.

(18) On 30 March 2020, Mr Sharp advised staff that the Government guidelines were clear that staff on furlough could not work, unless volunteering and not generating an income.

(19) On 6 April 2020, the claimant emailed Mr Sharp about Pilates, 'Josh', Scheduling and Yoga. Under the section entitled Pilates, she said that 'Georgia' was not happy volunteering until she had been paid in full. She also expressed the view that morale had sunk dramatically due to rapid change and uncertainty. She said whilst the staff understood business needs and were happy to help, they felt they had to do the classes and they are volunteering their time. She said she was trying to reassure them and looking out for their mental well-being (page 122).

(20) The claimant alleged that on the following day (7 April 2020), Mr Sharp had called her to say she was lucky to have a job and they didn't take too kindly to the claimant raising her concerns. In her witness statement (paragraph 17), the claimant referred to setting up classes in breach of the scheme, but this was not mentioned in the email. Further, when this issue was raised subsequently at the claimant's appeal (against dismissal) page 190, the claimant expressed this issue being related to the delay in Georgia's pay. In response to that, the claimant said Mr Sharp expressed the view that they did not have to be furloughed and could instead have been made redundant and he did not take too kindly to the way it had been handled by her. The Tribunal found that Mr Sharp had expressed frustration that the business was being challenged about the delay in pay, which had caused him to remark that employees were lucky to

be on furlough (and not made redundant) but not because of any comments about the staff volunteering their time.

(21) The parties had agreed facts about ‘work’ being performed by the staff after furlough. This was as follows:

(22) From 24th March 2020 until the 3rd June 2020 the Claimant undertook services/duties for ESPH Healthcare Ltd which included scheduling classes and instructors for free online services and classes.

(23) From 6th May 2020 until 30th June 2020 the Claimant undertook Front of House duties which included scheduling appointments for physiotherapy and administration.

(24) In response to questions from the Tribunal, the claimant confirmed that the Front of House duties was the volunteer work for ESPH Clinic Limited.

(25) Between April and June 2020, various Board meetings took place about finance/cost measures consequent on the impact of Covid-19 pandemic. Extracts from these meetings were at page 240-241. Whilst the original minutes were not before the Tribunal, it was not asserted by the claimant that these were not an accurate account or extract of the meetings. In summary the following matters were recorded:

- 7 April 2020 - it was stated that costs needed to be reviewed with a view to making significant reductions quickly.
- 14 April 2020– staff costs were being reduced by the resignation of 2 physios.
- 21 April 2020 – a 3-month payment holiday had been declined by a lender.
- 28 April 2020 – Mr Donoghue and Mr Sharp had started work on a formal cost reduction plan focusing on big ticket items (staff, property, loans).
- 5 May 2020 - ongoing discussion of how to reduce costs (staff, property, loan). Negotiating with a lender and landlord with a view to freezing both payments. Employed staff largely on furlough but there are still NIC costs associated. Mr Donoghue and Mr Sharp to analyse all roles, see where savings can be made & report back.
- 12 May 2020 – Mr Sharp had spoken to Peninsula last week re encouraging staff to take A/L whilst on holiday. They sated that we can mandate this although the legal position isn't 100% clear.
- 19 May 2020 - All "non-essential payments" to be held again until the end of the month to put away money for staff payments and loan.

- 1 June 2020 - With Mr Sharp aiming to complete his PT course in the next 3-4 months, it was suggested that he and Mr Alexei Sharp could comanage the gym thereby obviating the need for an exercise manager. Discussion and agreement to consult Peninsula.

- 30 June 2020 – Mr Sharp spoke to Peninsula yesterday to discuss the prospect of making the exercise manager role redundant. They laid out the various options which are: Settlement Agreement, Redundancy process (business case, 3 meetings, 1 week for each year of service + notice + annual leave). Mr Sharp to go back to Peninsula to discuss demoting to PT role as an option under redundancy.

(26) On 4 May, the claimant had agreed to volunteer on the Front of Office (for the Clinic business). This was evidenced by the text message exchange on pages 222 to 223. The texts did not show reluctance on the part of the claimant although as she was volunteering elsewhere too, she needed to make arrangements for Wednesdays in May as requested by Mr Sharp.

(27) On 3 June 2020, the respondent decided to ask the staff to utilise 2 days of annual leave per month during furlough. The holiday pay would be topped up to 100% (page 135). The claimant expressed she was content with this on 5 June 2020 (page 138).

(28) On 4 June 2020, the claimant emailed Mr Sharp asking if the business would reconsider its decision on staff taking holidays during furlough. She said she was doing so on behalf of the staff who were not content to do so. These were the concerns referred to in the email. The concerns did not relate to any breach of the furlough scheme/volunteering as referred to in paragraph 18 of the claimant's witness statement.

(29) On 25 June 2020, the claimant emailed Mr Sharp about the 'flexible furlough' scheme which was due to commence on 1 July 2020 whereby staff could return to work and be paid (for the work done) and continue to be furloughed and paid 80% furlough pay. The claimant enquired if this meant that those staff currently volunteering would be paid for these hours (page 139). This was the claimant's fourth asserted protected disclosure.

(30) On 29 June 2020, the claimant attended a zoom call. She asserted that staff could not continue to volunteer under the flexible furlough scheme, but that Mr Sharp said that was only right if the business was generating an income. In oral testimony, Mr Sharp accepted there was a meeting, but he could not recall the detail. The Tribunal noted that in paragraph 15 of Mr Sharp's witness statement, he had said about this date:

"*However, I do recall the Claimant saying staff should be paid and people cannot volunteer under the rules of the scheme and in response I said that they could still volunteer unless it generated an income."*

(31) This corroborated and supported the claimant's account which was accepted by the Tribunal. This was the claimant's fifth asserted protected disclosure.

(32) On 30 June 2020, the claimant was informed that she no longer needed to perform her Front of House duties. This was stated in a text (page 224). In response the claimant said 'Thank you. Will you be confirming re the exercise staff/situation today/tomorrow?' In oral testimony, Mr Sharp said this was changed as physio was returning to an in-person service/face to face service and the pre-furlough incumbent in that role ('Hannah') was returning to do it.

(33) The respondent, with support from Peninsula, prepared a business case for the claimant's redundancy. This was at page 141 and 142. It set out the drop in revenue and membership being 80% and two thirds respectively. It was stated that the respondent was reducing its therapy team as two physiotherapists had resigned and now left the organisation and one self-employed massage therapist had moved back to her country of birth and won't be returning to the UK. Further, the respondent was automating several of its front of house tasks by employing a chatbot which would reduce the number of self-employed front of house staff thereby reducing admin costs. The respondent said it had actively encouraged its self-employed FOH team members to obtain fitness qualifications so they could join the exercise team so the respondent could develop a more flexible workforce. It stated that Max Sharp, had been doing his level 2, 3 & 4 Fitness Instructor and Personal Trainer qualifications and would be co-leading the Exercise Team with fellow director Alexei Sharp when he has completed his studies. As a result, the role of an Exercise Manager was no longer needed, as the duties could be jointly undertaken by the directors.

(34) In addition, the business case stated the respondent had terminated its cleaning contract and would be doing all facilities management in house when it reopened. It had reduced its marketing spend and was looking at alternatives to the current marketing setup.

(35) The claimant was invited to attend a meeting on 15 July 2020.

(36) At the meeting, the claimant was informed she was at risk of redundancy. The meeting was postponed on the claimant's request until 17 July 2020. At this meeting, which was the first consultation meeting, in response to a question from the claimant, Mr Sharp confirmed that at this stage only her position was at risk of redundancy but that the need to save costs was ongoing and other roles could well be at risk. The claimant asked if her furlough could be extended until October 2020 and the situation re-evaluated then. Mr Sharp said he would give consideration to this. The minutes were at pages 145-146. The next meeting was fixed for 22 July 2020.

(37) A letter confirming the claimant was at risk of redundancy was sent on 17 July 2020 (page 147).

(38) In advance of the next meeting, the claimant emailed Mr Sharp on 21 July 2020. She asked what would happen with her clients if she was made redundant and queried what clients might think if there was a lack of female gym employees. She also asked Mr Sharp to consider the possibility of bringing the claimant back on a freelance basis when/if her role was made redundant. This was in addition to her request previously to have furlough extended to October and the situation re-evaluated then. She also asked for a redundancy estimate (page 148).

(39) The minutes of the meeting on 22 July 2020 were at page 149. At this meeting, the claimant suggested reducing costs to attract new members. Mr Sharp said this was unlikely to happen as the treatment prices had already been increased. Mr Sharp acknowledged the claimant's suggestions in her email of 21 July 2020 and said he would go away and consider them.

(40) The claimant was invited to a third consultation meeting to take place on 29 July 2020 by a letter dated 28 July 2020. The claimant's 2 alternatives/options were referred to in this letter. The claimant was also provided with a redundancy estimate (as requested by her).

(41) The minutes of the meeting on 29 July 2020 were at pages 154-155. At this meeting, Mr Sharp rejected the proposal to extend the claimant's furlough until October as there was a pressing need to save costs now and because the cost of furlough was to increase from August 2020. In relation to the proposal to become freelance, Mr Sharp said they could not commit to this now. Mr Sharp also stated that both Penny Elkins and Morgan Turner were recently qualified personal trainers and the company was considering adding them to the PT team. The clamant queried this and wondered how this sat with a recruitment freeze. Mr Sharp replied that as both Ms Elkins and Ms Turner currently work for the respondent neither had been recruited. The claimant also queried how the respondent would be saving money if it took them on as Personal Trainers as they would have to be paid in the same way as the respondent would have to pay the claimant to which Mr Sharp replied that they had not made any firm decisions about this yet and would continue to consider the claimant on a selfemployed basis as well. At the conclusion of this meeting, the claimant was made redundant. In the amended version of the minutes (amended by the claimant), in respect of further discussion around Penny Elkins and Morgan Turner, Mr Sharp had said:

"*MS advised the exercise manager role was a considerable cost but to take on someone to do a few hours at PT would be considerably lower and he had to be mindful of the membership and providing Gender Balance workforce"*

(42) The Tribunal found Ms Elkins was employed by the respondent and had Pilates expertise; Ms Turner was self-employed. This evidence was not challenged.

(43) The claimant's redundancy was confirmed by letter (page 161). She was given a right of appeal which was exercised. She was given 3 months' notice of termination.

(44) On 5 August 2020, the claimant wrote to Mr Sharp raising issues about the minutes of previous meetings, communications to her clients and notice pay (pages 163-164). Further queries were raised by the claimant about her redundancy on 6 August 2020, which Mr Sharp dealt with by cross reference to the redundancy consultation minutes and the business case. He also extended the timeframe for an appeal until 14 August 2020 (pages 166-170). Mr Sharp also responded to a separate question, confirming that the claimant's role was the only one currently going through a redundancy process, but that further redundancies could not be ruled out (page 171A).

(45) The claimant appealed by her email dated 14 August 2020. She said she had been singled out and treated unfairly for 'blowing the whistle' on contraventions of the furlough regulations (page 172). This was the first mention of whistleblowing. The appeal was summarised by Mr Sharp on 22 August 2020 (page 173). The appeal was outsourced to a Consultant at Face to Face, a Company linked to/associated with the respondent's HR/Employment Relations advisers, Peninsula, who were concurrently advising the respondent.

(46) The appeal took place on 3 September 2020. The hearing was recorded, consensually. It was chaired by Rebecca Macleod. At this hearing, the claimant referred to 'Alison' and 'Marita' as also working in the front of house in the context of her whistle blowing allegation. It was also agreed that there was a missing section of the transcript in respect of a question or assertion by Ms Macleod about whether the claimant had reported her alleged disclosure to an external body (page 187). The claimant also raised issues about delays in receiving pay at this hearing, referring to delay in relation to 11 out of 12 of her own salary payments as well as the pay of others causing stress and mental health worry (page 189). Towards the end of the appeal hearing Ms Macleod said:

"*Obviously I've got enough at the moment to go away to balance my report out but now I need to speak to Max and some of the other people that you have mentioned there. And perhaps get witness statements as well. So, I would possibly want to speak to Marita, Alison, and Max just as a starter…Yes I'll need to first speak to him [Max Sharp] then gather more evidence from other parties as well. And to balance the argument out, I would then speak to Max and the other people you've mentioned who have also been alleged to have worked on furlough"*

(47) By a report dated 7 September 2020, the appeal was rejected. The outcome letter was at page 194 to 200. It was clear from paragraph numbered 13 that Ms

Macleod only spoke to Mr Sharp as part of her further investigation. In paragraph 29 of her report Ms Macleod stated:

RM noted that AM would not be covered by the Public Interest Disclosure Act 1998, as this was not an official public disclosure, this was not put in writing stating the allegation and on what grounds and/or stating that she was protected by such. Therefore, AM simply raised a concern to which MS consulted his legal advisors and RM is in the belief that MS has in fact contacted HMRC during this allegation.

And in paragraph 33 she concluded:

"After a thorough investigation of the information available to her RM finds that this point of appeal is not upheld. RM notes that the matters regarding flexible furlough and if AM should have been working to generate an income or not has no bearing on her redundancy, as already explained in this investigation the business case for her post being made redundant due to essential restructure was the 9th July 2020 and the proposed organisation structure was submitted in March 2020 therefore the decision to make AM's role redundant is not connected to the furlough arrangements. The company has explained they have sought legal advice regarding this and have communicated this to HMRC."

(48) The outcome was conveyed to the claimant by Mr Sharp by email on 11 September 2020.

(49) After the appeal hearing, on 9 September 2020, another employee, Joanna Puchala was put at risk of redundancy and made redundant thereafter. The Tribunal accepted that further employees were also made redundant thereafter (in 2021) but given the lack of proximity, the Tribunal did not consider it necessary to analyse those redundancy exits further. The Tribunal accepted however that those further redundancies remained sufficiently causally linked to the respondent's general business case caused by the pandemic.

Applicable Law

(50) Unfair Dismissal: S.94/98 Employment Rights Act 1996 ('ERA')

(51) The respondent relied on S.98 (2) (b) (Redundancy) in relation to its potentially fair reason for the claimant's dismissal. The burden to show the reason rested with the respondent.

(52) In ***Williams and Others v Compair Maxam [1982] ICR 156***, it was established that the features of a fair redundancy would involve consideration of:

Early warning of redundancy
Consultation (and with the union if applicable)
Fair selection criteria

Fair selection in accordance with criteria
Consideration of alternative employment

(53) In ***Polkey v AE Dayton Services Ltd 1987 UKHL 8***, it was said an employer will not normally act reasonably unless he consults employees affected.

(54) The range of reasonable responses applies both to the substantive decision to dismiss and to the procedure. (***Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23).***

Protected Disclosure claims

(55) Under S.103A ERA, an employee 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.

(56) By virtue of S.47B ERA, a worker has the right not be subjected to a detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. ***In NHS Manchester v Fecitt and others 2012 IRLR 64***, it was stated that the test is whether the protected disclosure "materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower".

(57) A protected disclosure qualifying for protection is one made in accordance with S.43A (which refers to S.43 C to S.43H about the conveyance of a qualifying disclosure) and S.43B (which defines a qualifying disclosure).

(58) S.43B ERA says:

Disclosures qualifying for protection:

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, is being or is likely to be deliberately concealed.

(59) S.43B ERA requires consideration of whether the claimant had a reasonable belief that the information disclosed is made in the public interest and tends to show one of the six matters listed above. The test is twofold: the subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed. The objective element is that that belief must be reasonable. ***Chestertons Global Ltd v Nurmohammed 2018 ICR 731 CA and Babula v Waltham Forest College 2007 EWCA Civ 174.***

(60) Pursuant to S.48 (2) ERA, the burden of proof in relation to the reason for the alleged detrimental treatment rests on the respondent. However this is once a protected disclosure has been established and that the respondent has subjected the claimant to a detriment.

(61) In relation to S.103A ERA, the burden of proof in relation to dismissal was addressed in ***Kuzel v Roche Products Ltd [2008] EWCA Civ 380, CA***:

"*57…when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*

58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."

(62) There must be a disclosure of information. In ***Cavendish Munro Professional Risks Management Ltd v Geduld UKEAT/ 0195/09***, the EAT held that to be protected a disclosure must involve information, and not simply voice a concern or raise an allegation.

It suggested that:

"*The ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information." (Paragraph 24.)*

(63) In ***Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436***, the Court of Appeal rejected the suggestion that, in Cavendish, the EAT had identified the categories of "information" and "allegation" as mutually exclusive. The Court held that the wording of the legislation should not be glossed to introduce a rigid dichotomy between "information" on the one hand and "allegations" on the other. Sometimes a statement that could be characterised as an allegation would also constitute information and amount to a qualifying disclosure. However, not every statement involving an allegation would do so. It would depend on whether it had sufficient factual content and was sufficiently specific.

(64) In ***Norbrook Laboratories (GB) Limited v Shaw [2014] ALL ER (D) 139*** it was said that linked complaints taken together could amount to a qualifying disclosure.

Conclusions and analysis

24 March 2020 – first alleged Protected Disclosure

(65) The Tribunal concluded that the claimant's statement to Mr Sharp that she could not work whilst furloughed was not an allegation of any wrong-doing of the respondent, let alone an allegation containing information that the respondent had breached, was breaching or intended to breach a legal obligation relating to the furlough scheme. The claimant's statement was simply a re-statement of what she had been told by ACAS. It was also noted by the Tribunal that she also had received information from her HR Director contact and her brother (page 283). The Tribunal concluded that at that stage Mr Sharp was not intending to breach the law. The claimant accepted in oral testimony that until 24 March 2020, there had been no discussion about the possibility or prospect of working whilst on furlough. At that stage the Tribunal concluded that the situation was extremely uncertain and Mr Sharp's subsequent comment about having 'found a way' was

at its highest an attempt to be creative, thinking outside the box, in the context of trying to explore the prospect of working in some capacity. There was no evidence or suggestion that this involved possible wrong-doing. Whilst the Tribunal has accepted that Mr Sharp did thereafter seek to find a solution for the business and did respond, later in the day, that he had found a way, in order for the claimant to have an arguable disclosure on 24 March, she needed to allege or disclose some further information thereafter or in response. The comment earlier in the day was not sufficient to amount to a disclosure of information which tended to show the respondent had breached, was breaching or intended to breach a legal obligation.

26 March 2020 – second alleged Protected Disclosure

(66) By the time of the zoom meeting on 26 March 2020, the Tribunal concluded that Mr Sharp's thought process had evolved and moved on. The Tribunal accepted there had, on 24 March 2020, been the suggestion of self-employed working with consequential invoicing for on-line services. The Tribunal concluded that Mr Sharp had got hold of this idea with a more intended plan. The Tribunal was not able to conclude exactly when the Government guidelines on furlough (first published on 26 March 2020) were available on 26 March 2020. However, it was more likely than not that Mr Sharp's plans were being formed before. The Tribunal concluded that the claimant did disclose information which she believed tended to show the respondent was intending to breach a legal obligation by asking her to submit invoices for work done. The Tribunal concluded she had a genuinely held belief which was objectively reasonable. The language and context here was important. She had said she could not do this and would not do this. She also asked for a written guarantee in the alternative which the Tribunal concluded she would not have requested, absent
real concerns. This was not a situation where the claimant was already set up as a self-employed person to work on a freelance basis.

28 March 2020 text – third alleged Protected Disclosure

(67) The Tribunal concluded that the claimant's text message to Mr Sharp that there had been more guidelines published confirming the employed staff could not work whilst furloughed and the plans to transition the work to self-employed staff, was not an allegation of any wrong-doing of the respondent, let alone an allegation containing information that the respondent had breached, was breaching or intended to breach a legal obligation relating to the furlough scheme. By then, the Tribunal concluded, it had either been mutually understood and/or accepted between the claimant, Mr Delahunt and Mr Sharp, that employed staff would not be asked to work on a self-employed/invoicing basis. Instead, it would be carried out by the pre-existing self-employed staff and the work handed over. At this stage, they were working towards a common goal.

25 June email – fourth alleged Protected Disclosure

(68) The Tribunal concluded that the claimant's email to Mr Sharp, which raised queries in the light of the planned new flexible furlough scheme, was not an allegation of any wrong-doing of the respondent, let alone an allegation containing information that the respondent had breached, was breaching or intended to breach a legal obligation relating to the furlough scheme. It was a query, nothing more nothing less. It was raised in advance of a planned meeting to discuss the effect of flexible furlough on the volunteer work which the claimant (and others) had been doing. In more everyday day language, it was nothing more than a heads up about matters which the claimant expected to discuss/raise at the meeting on 29 June 2020.

29 June 2020 meeting – fifth alleged Protected Disclosure

(69) The Tribunal concluded that the claimant's comment at this meeting that she could not continue to volunteer under the flexible furlough scheme, was not an allegation of any wrong-doing of the respondent, let alone an allegation containing information that the respondent had breached, was breaching or intended to breach a legal obligation relating to the furlough scheme. Once again, the language used and the context was important. On the information before the Tribunal, the claimant's comment did not go far enough. She referred expressly, to continuing to volunteer i.e. from now onwards and in the context of the advent of the flexible furlough scheme, she was not able to continue to volunteer. In oral testimony, the claimant agreed that this was about the arrangements. The Tribunal concluded that she was trying to establish what would happen next. This comment had to be viewed and or interpreted with the email sent on 25 June 2020 which posed a question about what would happen. There was no reference to the previous arrangements or the volunteering she had done to date. The evidence about that was that it had been consensual, alternatively the concerns had only been because of historic delays in being paid.

Detriment S.47B ERA– 30 June 2020

(70) In the light of the foregoing conclusions, there was only one disclosure this could be causally linked to. Given the weight/reliance placed on the proximity of this occurrence to the alleged disclosure on 29 June 2020, this made the claimant's assertion highly improbable. In any event and even if the Tribunal was wrong in relation to the fifth alleged protected disclosure, the coincidence or proximity of the date was neutralised or trumped by the advent of flexible furlough at that time. The invitation to have 'Hannah' back was in close proximity to business reopening. There was no challenge to the evidence that Hannah was the previous incumbent or that she was not the right person to return. The Tribunal concluded the respondent was not materially influenced or indeed influenced at all by the disclosure on 26 March 2020 or, alternatively was not materially influenced by any disclosure (if it was a qualifying disclosure) on 29 June 2020. It was not necessary to analyse whether or not this was a detriment, even though, strictly, the burden of proof rests on the claimant to establish that first. It would have been

doubtful for the claimant to assert, that objectively viewed, it was a detriment that she was no longer being asked to volunteer her time.

Dismissal – S.103A ERA

(71) In the light of the foregoing conclusions, there was only one disclosure this could be causally linked to. The Tribunal noted there was a significant gap between that date and the subsequent decision to put the claimant at risk of redundancy. That did not happen until the claimant was invited to a meeting on 13 July 2020. However, the respondent had contemplated deletion of the claimant's role at Board level on 1 June 2020 which did make the timeline more proximate. The timeline however was only one consideration. The respondent's business case for cost saving, was, in the Tribunal's conclusion unimpeachable. It was those cost considerations which were the reason why the claimant's position was put at risk of redundancy. The respondent had genuinely identified an option to remove a managerial layer and the attendant/commensurate salary. Mr Sharp had started his PT training, such that he and another Director could absorb those duties. There were multiple other costs considerations including the non-replacement of resigning employees. The disclosure on 26 March 2020 was not operating on Mr Sharp's mind. Even if the Tribunal was wrong about the alleged disclosures on 25 and 29 June, the deletion of the claimant's role had already been contemplated on 1 June 2020. In addition, the Tribunal concluded that the relationship between the claimant and Mr Sharp was cooperative. Even the written dialogue used to support the alleged disclosures for example, on 28 March and 25 June 2020 was constructive and cordial. There was no evidence of Mr Sharp being disturbed or bothered by the claimant. There was no supporting or corroborating evidence relied upon by the claimant. No one had been called to give evidence e.g. Mr Delahunt or Ms Alison Foster. In testimony, Mr Sharp appeared measured, albeit passionate about the survival of the business.

(72) The claimant's disclosure on 26 March 2020 was not the reason or principal reason for the claimant's dismissal.

Ordinary Unfair Dismissal – S.98 ERA

(73) The Tribunal was satisfied there was a genuine redundancy situation. Some of the Tribunal's conclusions just announced are repeated in relation to the reason why the claimant was dismissed. The business case was clear and emphatic. The Tribunal raised the issue about the economic basis for the downturn and whether it could take Judicial notice of the downturn in this industry. However, that was not ultimately required as the unchallenged evidence before the Tribunal was of an 80% reduction in income and two thirds reduction in membership. The business case, albeit created to support the case for the claimant's redundancy, was genuine. Various other cost savings measures were taking place and it was relevant that Mr Max Sharp and Mr Alexei Sharp were able to take on PT/FI training with the consequential opportunity to eliminate the role of Exercise

Manager. It did not go against the grain of a genuine redundancy that the respondent was contemplating increasing its availability of self-employed personal trainers – that resource was inherently going to be flexible and intermittent on an as needed basis.

(74) In relation to whether there was warning of an impending redundancy, the Tribunal concluded that no such warning was announced before the first consultation meeting on 15 July 2020. However, as that meeting was postponed, the claimant had by then been warned that she was to be placed at risk of redundancy at her rearranged first consultation meeting on 17 July 2020. She, therefore knew before then, what that meeting would be about.

(75) In relation to consultation, the Tribunal was satisfied there was reasonable, meaningful consultation. It was not a tick box process or a fait accompli, albeit that the respondent had been advised to follow a structured 3 meetings process. A lengthy period of consultation or a large number of meetings is not evidence of fair consultation. The Tribunal's overwhelming regard is to the nature of the consultation. In this case, the claimant had a genuine right of reply, she tabled options for consideration in advance of the meetings and at the meetings and these were considered and responded to.

(76) The question of whether there was consideration of a pool, or ought there to have been, engaged the Tribunal in a fair amount of deliberation. Having done so, the Tribunal concluded that whilst there no active consideration of a wider pool, indeed, the Tribunal concluded that such a concept was not even known to Mr Sharp, the respondent had indirectly applied its mind to the need to keep/retain Ms Penny Elkins, because of her Pilates expertise and Ms Morgan Turner was self-employed. The Tribunal noted that the prospect of demoting the claimant to a PT role was considered as an option at Board level on 30 June 2020. The Tribunal concluded it was likely to have been rejected thereafter following further discussions/advice. Ultimately, the Tribunal concluded that it was open for the respondent to consider the claimant's role as a unique post at Manager level. There was some thought process in eliminating consideration of Ms Elkins and Ms Morgan. The Tribunal had regard to the size of the respondent's undertaking. It was a small family run business. In addition, in the prevailing circumstances, it was open to the Respondent not to enable the claimant to continue her Pilates training and then pooling her with Ms Elkin. It was entitled to maximise its cost saving as quickly as possible. Its decision making in this regard was not outside the band of reasonable responses.

(77) In relation to alternative employment, the only option which the Tribunal had any information or evidence about was the option of the claimant to become self-employed. That would not have avoided the need to make the claimant redundant as an employed member of staff.

(78) The Tribunal considered lastly the Appeal. In paragraph 32 of the outcome report, it was clear that certain allegations were not put to Mr Sharp, or a response

sought – for example in relation to the assertion that he had 'found a way'. In addition, he did not appear to have been asked about the assertion/allegation that staff were lucky to have a job on 7 April 2020. Given that the appeal was significantly premised on the basis that the dismissal was connected to alleged whistleblowing, this was problematic. Ms Macleod also had concluded that the whistle-blowing complaint needed to be in writing (paragraph 29) which was not a legal pre-requisite for protection. This too was problematic. It was also clear from paragraph 33, that not all the alleged disclosures were considered in reaching this conclusion as only those around flexible-furlough were cited. There was also a reference to a March restructure which did not appear to relate to any evidence before the Tribunal. Ms Macleod did not speak to any other witness which she had said she would do and even take statements as needed, or indicate why this was not done. Absent that further investigation, the Tribunal could not assess what further information might have been forthcoming or its relevance or whether it would have made any difference at the time. There was also considerable doubt in the Tribunal's view about the independence of the appeal process. It could not be said that an external consultant engaged by the respondent, who was from a linked or associated company of the respondent's HR and Employment Relations advisers (who were advising the respondent, and specifically Mr Sharp, on the claimant's dismissal) could be independent. The appeal outcome presented recommendations for the respondent to implement. The outcome was conveyed to the claimant by Mr Sharp. The Tribunal concluded thus that the appeal was not handled independently.

(79) A Tribunal should assess the fairness of a dismissal at the appeal stage if an appeal is instigated and heard. As a result of the foregoing conclusions on the appeal, the Tribunal concluded the appeal was flawed which rendered the dismissal unfair. However, in the light of the Tribunal's conclusions at this Hearing, whether individually or collectively there would have been any difference in the outcome, is beyond the Tribunal's consideration at the liability stage.

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Employment Judge Khalil

DATED 25 NOVEMBER 2022