EMPLOYMENT TRIBUNALS

Claimant: **Mrs V Pearson**

Respondent: **PMS Managing Estates Limited**

Heard at: **East London Hearing Centre** **On: 12 & 13 March 2020**

Before: **Employment Judge McLaren**

Representation

Claimant: In Person

Respondent: Mr J Taylor (Counsel)

JUDGMENT

The judgment of the Tribunal is that: -

1. **The Claimant was dismissed for poor performance and not for making a protected disclosure.**

2. **The Claim for unfair dismissal does not succeed.**

REASONS

Background

1 The Claimant was employed for just over 2 months within their accounts department as a client accountant. The Respondent's business is the management of service charge accounts for large developments of leasehold flats.

Issues

2 The list of issues that I should determine had been agreed at a preliminary hearing in August 2019 and were these.

Remedy for unfair dismissal

(i) If the Claimant was unfairly dismissed and the remedy is compensation:

a. would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

b. did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

c. should the Claimant's compensation be reduced under s106A ERA 1996 (disclosure not made in good faith).

Public interest disclosure (PID)

(ii) Did the Claimant make one or more protected disclosures (ERA section 43B) as set out below? The Claimant relies on subsections (a) and (b) of section 43B(1). The respondent defends the claim on the following basis, namely that it dismissed the Claimant because of her performance.

(iii) What was the principal reason the Claimant was dismissed and was it that she had made a protected disclosure?

(iv) The alleged disclosure the Claimant relies on is as follows. The Claimant claims that around 23rd October 2018 she spoke to her manager Daniel Malone about an issue she had discovered in client accounts/invoicing she was dealing with. She says she told Mr Malone that she had found an issue with a historic invoice and told him which building it related to. She says she told him the problem was that it was a historic invoice originally billed to the wrong client in the 2014-2015 financial year of a large amount, now being rebilled in the current year to the right client which she said to him the Respondent couldn't do because of the RICS Code of Conduct 18 month rule which requires billing the client within 18 months. When Mr Malone said in response that technically the year end was very close and they hadn't closed the accounts for the 2015-2016 year so it could still be done, the Claimant says she said that this didn't follow the RICS Code of Conduct and that she wasn't comfortable doing this because it was it was morally not right to manipulate the situation and it was borderline fraud.

Evidence

3 I heard evidence today from the Claimant on her own behalf and from two witnesses for the Respondent, Mr Daniel Malone, Managing Director and line

manager for the accounts department, and Ms Debbie Cook, Human Resources Business Partner for the respondent. I was also provided with a written statement from Mr B Rudlin in support of the Claimant. Mr Rudlin did not attend. I therefore gave little weight to his evidence.

4 I was provided with a bundle of documents amounting to 531 pages. In reaching my decision I considered the evidence before me together with those pages of the bundle to which I was directed. I was also assisted by helpful submissions from both parties.

Finding of facts

Job Application and Contract.

5 The Claimant made an application for a client accountant position on 25th July 2018. She was invited for an interview on 2nd August 2018. It was agreed by the parties that in that interview the Claimant advised that she had an awareness of RICS and client money rules, but her knowledge had gaps and she had not worked in the service charge industry since 2011.

6 The Claimant explained that she was currently winding down her event planning business and was not looking to return to full-time employment until October. To start earlier she would still have some ongoing commitments that she would need to deal with.

7 On 15th August the Claimant was made an offer of employment and was provided with a contract, employee handbook and job description. The contract was signed and returned on 28th August 2018.

8 The contract provided that her employment was subject to an initial probationary period of three months during which employment could be terminated by giving one weeks' notice. It also specified that the period up to the end of the probation period was deemed to be a trial period in all respects. Successful completion of the probation period would be confirmed in writing. The Claimant was dismissed within the probationary period.

9 I was told by Mr Malone that the Claimant's job was to gather all the necessary information and to check it so that the accounts could be sent to the accountant to audit and sign. He explained that the Claimant's role was to find and rectify errors and that is what he expected her to do. It was common for mistakes to be made and the accounts' function was to remedy these. The Claimant did not challenge this account of her role.

Meetings with the Claimant

10 The Claimant started work on 28th August. On 4th September, after 1 week, the Claimant was invited to a meeting with Mr Malone and Ms Cook to discuss expectations regarding dress code, phone usage and punctuality. I find that this meeting did occur, and performance concerns were flagged.

11 The Claimant suggested that she was on her phone during working hours because she had to wind up her business affairs and that complaints about her performance based on this were unfair. The Respondent was aware of her need to wind up commitments from her business. It was not disputed that she did use her phone for her own business while working for the Respondent.

12 After the first performance concerns were raised in this meeting on 4th September, on 13th September performance and conduct concerns were discussed via email between Mr Malone and Ms Cook. An email at page 143 records that outside matters and the issue of her hours had been distracting the Claimant. The email references constant mistakes being made and a general concern by those responsible for training the Claimant that she is not absorbing the information given to her. It is not disputed that the Claimant was not aware of this email, but I find that it reflects Mr Malone's opinion and state of mind about the Claimant at the time. He was concerned about performance and these are serious and wide-ranging concerns.

13 To assist the Claimant, her training schedule breakdown was re-sent to her on the same date. The bundle also contained an email from a colleague asking the Claimant to let her know which things she needed to go through again in order to update the training schedule. The Claimant's initial response was that there were a couple of things she needed to do, and she would practice by doing and making mistakes. In response she was asked what she needed to go through again and she replied that she knows what had been gone through, she just needed to do it in order to understand it. I find that she was happy with her training at this point and that she had been provided with training on several topics.

14 A further meeting was held with the Claimant, Ms Cook and Mr Malone on 17th September. This was week 4 of the Claimant's employment. Page 142 of the bundle records Ms Cook notes of the meeting. I find that these notes identify performance concerns and that she is told she "is spinning around, here there and everywhere". Further, a second meeting is scheduled at which it is hoped she will have made progress on the Propman front. These meeting notes record that Mr Malone had formed the view, based on the Claimant's comments, that she needed repetition to reinforce learning.

15 Mr Malone asked Ms Cook to raise his concerns with the Claimant's recruiter. Ms Cook emailed the recruitment organisation on 24th September advising them that a meeting will take place on the following day, the 25th which will identify whether the Claimant would be kept on or not. I find that by 25th September the Respondent was considering dismissing the Claimant for poor performance.

16 On 25th September meeting the meeting duly took place. The Claimant was asked to bring her training notes to the meeting for review. Notes of the meeting were prepared some days afterwards, on 27th September. Concerns about the Claimant's timekeeping were raised. The notes record that ways to support the Claimant with training were discussed. It was suggested that she compile a basic step-by-step process that she could reference rather than asking somebody. Mr Malone is noted as saying that while the Claimant has her own way of working, making mistakes and learning from them is an unreliable learning method as what would happen if the mistake went unnoticed?

17 Following the meeting, Ms Cook sent the Claimant an email. This gave the Claimant instructions about which topics she should write up and set out the support that she would be provided. Ms Cook explained that while Mr Malone had his way of saying things, she we always looking to help an individual improve and this had been her suggestion.

18 In order to provide this support to the Claimant, Ms Cook contacted Ms Phillips, a colleague, to ask her which processes the Claimant should write up first and to help suggest an order of priority. The email in response from Ms Phillips identified that several mistakes appear to be made due to lack of attention to detail rather than not understanding. Ms Phillips considered that her own work was suffering by having to support the Claimant.

19 On 1st October Mr Malone emailed the Claimant about missing a pending deadline. On 2nd October Mr Malone again expressed concerns about the Claimant and that there was a problem with the Claimant not listening or taking note of instructions. I conclude that by early October Mr Malone's serious concerns remained.

Issues with colleagues

20 Ms Cook asked all the client accounts department members to meet to discuss and review current training requirements. This was on 3rd October. The key points discussed were set out in a follow-up email and this set out the steps that the Claimant was to put in place to help her learning and development.

21 Informal grievances were raised on the same day by two of the Claimant's colleagues. An email from Debbie Cook to Daniel Malone at page 213 of the bundle on 11th October states that a colleague is reported as saying that if the Claimant passes her probation she will leave. The complaints are about the Claimant's behaviour, conduct and her ability. Ms Cook concludes that these 2 colleagues do not want the Claimant to continue working for the organisation.

22 The Claimant accepted that the meetings had occurred as described by Ms Cook and Mr Malone. She considered it was unfair to compare her performance to that of the colleague who joined after her since she had always been clearly did not have the experience that he had. She disputed that all the complaints made related to her work rather than other peoples. While the comparison may have been unfair, I find that Mr Malone had a genuine concern about the Claimant's performance. This was based on the information that was sent to him by others, or that he had himself observed. I also find that he raised these concerns with the Claimant prior to 11th October.

Whistleblowing on 11th October (St James 2)

23 On 11th October Mr Malone says that a large disruption occurred in the office. He was contacted at home on several occasions and the external accountant was contacted several times. The documents relating to this were pages 203 to 212 of the bundle. It related to the accounts for St James 2.

24 The Claimant's account in oral evidence was that she considered that there was something about the St James 2 account which did not match up. While this could have been human or system error, because of her experience on a previous account in which she felt something had not been done correctly, she was also concerned about the St James 2 account. She had a reasonable belief that there was an act of wrongdoing which amounted to a breach of a legal obligation in the way the account had been put together. She considered that there could be a breach of regulations involved. The code of conduct is designed to stop malpractice. While she is not an accountant, she could not put her name to accounts that were not factually correct. She considered that raising this issue

was in the public interest as money was being charged wrongly to clients and that would be of concern more widely.

25 The Claimant says her first protected disclosure was about this property and points to the email chain. The email at page 203 of the bundle was sent at 11.39. It says she is waiting for queries on this property as "we cannot close 2016 as she can't see any schedules and the amounts don't match". This email does not refence any wrongdoing or breach of law. It does not voice any concerns. It gives limited information, that is the amounts don't match. I have accepted Mr Malone's unchallenged view that the Claimant's role was to identify mistakes and I conclude that is what she was doing.

26 The Claimant cannot recall any conversations that she had Mr Malone around this. She cannot therefore provide any further details about what her protected disclosure may have been beyond anything she said in this email.

27 By 12.10 on that day Mr Malone sent an email to another member of the accounts department saying that he had explained to the Claimant that what she was attempting to do was a waste of time and there was nothing to say the draft accounts were not valid.

28 At p355 the accountant also explains to the Claimant that errors were probably due to the I&E used being incorrect and needing adjustments to fall in line with the respondents Propman data. The accountant also contacts Mr Malone saying errors are due to Propman and that the issues had already been agreed with previous staff.

29 After this exchange of emails, the Claimant was taken off the account which was passed to another colleague to deal with. In April 2019 as part of the respondent's investigations into the Claimant's case this colleague sent an email at page 358 setting out 4 errors that had led to reconciliation issues. He states it took a considerable amount of work and time to consolidate the financial information into the correct year and place but concluded that the accounts were correct.

30 Mr Malone accepted that he took the work away from the Claimant and accepted that the colleague who took it over did spend time sorting the issues out. He did not dispute the validity of the facts set out in the 19th April email. I find that there were discrepancies that needed to be addressed. I also find that addressing them was part of the internal accounting functions role.

31 Mr Malone told me that he was concerned about what had happened on this day. His concern was not, however, because the Claimant had raised these queries. That was her job. His concern was because of the way that she had done so. It was her behaviour and causing so much disruption that was the issue for him. His oral evidence reflects the email exchanges at the time. Page 207 of the bundle shows Ms Cook emailing Mr Malone saying it's all kicking off here. All 3 client accountants have their backs up and everyone has that be asked to take a step back and calm down. I accept that Mr Malone's concerns about the Claimant based on this incident were in relation to her conduct and not in relation to the discrepancies she said that he had found on the accounts.

32 The Claimant's evidence was that she discussed this issue with Ms Cook and then sent email which was at page 212 of the bundle. In this she asked Ms Cook whether she should speak to the company's owners. The email

does not specify on what issue. The Claimant said it was about these accounts. However, the Claimant's evidence was that she was not whistleblowing by talking to Ms Cook, or later sending this email to Ms Cook. She would not have done so because Ms Cook is not a technical subject matter expert in accounts being on HR professional and therefore would have had no understanding of the issues being raised. The whistleblowing was solely to Mr Malone and was her email of 11 October.

33 Ms Cook's recollection was that while the Claimant had come to her and talked about the accounts, she was not qualified to deal with those and therefore recommended that the Claimant speak to somebody else. In that conversation both Ms Cook and the Claimant agree that she raised a 2nd issue about what she thought was a conflict of interest between the accountant and a member of staff because they were married.

34 It was Ms Cook's recollection that when she responded to the email sent by the Claimant on 11 October, which she did on 15 October, her response "definitely not" i.e. do not talk to the chairman, was about the conflict issue. On balance I accept Ms Cook's recollection. The Claimant's evidence as to what happened, and the nature of her claim has continued to evolve from the date she left the company up to an including during this hearing and I find her account less reliable than that of Ms Cook. In any event, even if the email response had been about the accounts, the claimant does not rely on this as whistleblowing.

Issues after 11th October whistleblowing

35 On 15th October the Claimant was asked to attend a meeting again with Mr Malone and Ms Cook to discuss concerns arising from the incident of 11th October.

36 On 17th October Mr Malone asked Ms Cook to take HR advice on how they could dismiss the Claimant. At page 237 Mr Malone updates Ms Cook on a conversation with a colleague in the accounts department and which he says he discussed at length the issues relating to the Claimant. He records that he advises this colleague that even if the Claimant was to fail her probation because of her work performance there could be a claim of bullying and harassment. I find that by 17 October Mr Malone is seriously contemplating dismissing the Claimant for poor performance.

37 On 18 October Ms Cook took HR advice and her request for advice sets out in some detail concerns about the Claimant's issues. She rehearses the performance issues and the steps that have been put in place in the meetings that have been held and asks for advice on whether the Claimant can bring a case of bullying and harassment.

38 There was a dispute between the parties as to whether weekly meetings continued to be held after 15 October and prior to dismissal. Ms Cook's recollection was that they had been. Mr Malone is uncertain, and the Claimant said not. The Claimant also took issue with the fact that she had not been made aware that the dismissal was possible. On the balance of probabilities, I think it more likely than not that the meetings did continue as Ms Cook recollects. There would be no reason why the parties would tell the Claimant they were thinking of dismissing her. They had no reason to do so as she was within her probationary

period. Despite not being clear with the Claimant about this, I am satisfied that this was very clearly in Mr Malone's mind by 17th October.

39 On 31st October a colleague complained to Mr Malone again about the Claimant's work which meant that she was having to undo that work, send apology letters and redo a shutdown and this was impacting her own workload. The colleague concludes that the errors are made by the Claimant not paying attention and not doublechecking.

40 On the same day Mr Malone received a complaint from another colleague about incorrect reversing and reposting on tenants' accounts. On 2nd November Mr Malone sent Ms Cook an email saying that the issue is lack of attention to detail. On 6th November an issue with cheques was identified and attributed to the Claimant.

41 I find that Mr Malone was genuinely concerned about the Claimant's poor performance and the errors pointed out to him as being down to the Claimant by her colleagues. I make no finding as to whether the errors that were attributed to the Claimant were in fact ones that she had carried out or, whether as the Claimant seems to be suggesting, others had blamed her for their own errors. I find that Mr Malone genuinely considered that the Claimant was responsible for these errors and had formed the view that she was seriously underperforming.

Whistleblowing on 6th November (Chinook 1)

42 The Claimant says that she raised her 2nd protected disclosure on 6th November. This related to an invoice that had been incorrectly attributed to the wrong client. The invoice was at page 490F of the bundle. The invoice was for 1st September 2015. It was her understanding that because this invoice was more than 18 months old it could not be charged to the correct client in 2018. To do so was a breach of RICS standards. This she believed would be malpractice and a breach of regulations as well as being a moral issue. Public interest applied because this was an example of new tenants being charged for debts incurred by former tenants and therefore it was in the wider public interest to be aware of such malpractice.

43 The Claimant sent an email to Mr Malone at 9.33 a.m. on 6th November saying that she was picking up a lot of errors with the system, that she would try to close down the invoice but did not understand why it was not queried over the last 2 years. This does not raise any question of wrongdoing. It does not provide information but simply expresses surprise about why this hasn't been addressed in the past.

44 The Claimant says that she then had a telephone conversation with Mr Malone that day. The Claimant said that she was concerned by what he said to her during that call. She said that he told her that mistakes happened all the time, that mistakes cost the business thousands of pounds and they could not afford to absorb this cost but needed to charge the client. The Claimant therefore believed Mr Malone was going to breach a regulatory requirement and bill a client outside the 18-month window. She considered that to raise this was in the public interest because it was inappropriate for tenants who had left to pay for service charges incurred by previous occupants. In her mind incorrectly charging clients amounted to fraud. It was unclear whether the Claimant considered her email, or

this phone call, the act of whistleblowing or whether they should be taken together.

45 The Claimant was unable to say if this conversation was the moment when Mr Malone decided that he was going to dismiss her. She simply thought it was strange that she made the statement and in less than 24 hours she was asked to leave.

46 Mr Malone does not recollect any such conversation taking place on this day. He did recollect that there had been many conversations with the Claimant about whether small errors in accounts should become the responsibility of the Respondent and explained that this would be the case when payments on a tenants account were in arrears, they could not be transferred over to a new owner's account.

47 The document at page 90b shows that the invoice was for the period of August 2015 and was paid by the wrong client in error on 1 September 2015. The accounts system had already noted almost immediately that an error had been made. Mr Malone confirmed that what had not happened was the transfer of money from one client to another. The remedy had not been finished, but the mistake was already 1 the Respondent was aware of.

48 He concluded that the Claimant's reference to an 18-month rule was to s 20B of the Landlord and Tenant Act. Essentially, section 20B of the Act provides that:

> "if service charges were incurred more than 18 months before a demand for payment is served on the tenant then the tenant is not liable to pay; unless the tenant was notified in writing (within 18 months of the costs being incurred) that the costs have been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

49 Mr Malone explained that the invoice in question was for gardening. For both properties i.e. the one that was charged incorrectly and the one who had the gardening services, budgets were prepared a year in advance. In both cases that included gardening charges for 12 visits a year. Where the wrong business had been charged for gardening it was a simple matter to put right by transferring monies from one account to another. Section 20 B did not apply to Chinook 1 because no demand for payment needed to be issued. The invoice amount was effectively within the budget and the monies were already held on the correct client's account.

50 This was a simple matter to correct and again was within the Claimant's role. No wrongdoing had occurred. I prefer Mr Malone's account of what happened on the day to the Claimant's. The Claimant's account of what occurred and the events that she is relying on as whistleblowing have varied significantly from the date of her dismissal onwards. I therefore find Mr Malone to be a more reliable witness than the Claimant. I conclude that the conversation reported by the Claimant on which she relies did not take place. I've also found above that the email did not provide any information.

Dismissal

51 On 7th November the Claimant was issued with notice of termination. The Claimant was told that it had become apparent that a significant amount of training was still required and that she lacked the attention to detail the role demands. She was paid one week's notice. I find that this letter reflected the concerns about the Claimant's performance that had been voiced by Mr Malone to the Claimant, in emails between Mr Malone and Ms Cook and in emails from the Claimant's colleagues to Mr Malone.

52 The Claimant questioned why the dismissal occurred when it did if the Respondent says it had made of his mind before the whistleblowing on 6th November. Ms Cook explained that she works part-time and therefore it took a while for everything to be put in order. Mr Malone also said that it can take some time to get letters ready. I accept their evidence on this point.

Raising allegations of whistleblowing

53 Following the dismissal, the Claimant exchanged some WhatsApp messaging with Ms Cook which referred to potential discrimination but did not raise whistleblowing as a potential concern.

54 On 9th November the Claimant wrote to Ms Cook raising a formal complaint. This refers to Mr Malone doing his utmost to convert the Respondent to the correct procedures. It also states that she had drawn attention to several areas relating to accounting managing practice for client money. The Claimant says this was her referring to her whistleblowing complaint. I find this is not clear.

55 Ms Cook responded to this written complaint by letter 16th November which summarises the Claimant's points as being not satisfied the training was provided, bullying and harassment and unfair treatment by the respondent. She does not address whistleblowing.

56 The Claimant responded on the same day referring to not getting adequate training and again references the bullying. There is no reference to whistleblowing. The 1st time whistleblowing is made clear is in an email of 7th January. The Claimant explained that she had taken advice from ACAS and this was the first time she had properly framed her claim having had that advice.

57 The claim form references her picking up a very bad mistake which she reported and 5 days later she was dismissed. The Claimant provided further particulars of this document at page 15 of the bundle. She talks about an issue with an invoice been posted to an account in October 2018 and this is an invoice relating to a date some 5 years prior. Neither the incident set out in her claim form nor that in this document match the dates or description of the incidents the Claimant now relies on.

58 At the prehearing review on 22nd of August the issues were set out as reflected in this judgement under the heading issues. That refers to an event on around 23 October and again talks about an historic invoice, but the Claimant refers only to one incident.

59 In an email exchange in November 2019 the Claimant states that she is not relying on St James's 2. The Claimant says this is not relevant and it clearly does not follow her timeline or the email trail.

60 There had been a 2nd Preliminary Hearing on this matter in December 2019 at which there had been some discussion about the Claimant's witness evidence and the fact that her statement did not set out her whistleblowing claim. Both parties agreed that the Claimant had raised some 4 properties where she said things had occurred that contravened what she described as the "18-month rule". This was the breach of legal obligation on which she was relying. She believed that it was a requirement of the RICS that clients can only be charged for invoices that have been raised with them up to 18 months after the charge has been incurred. The properties where she said there were issues were Berkeley Gardens, Chinook 1, Goodfordridge and Alfred Mews.

61 During the hearing the Claimant then said that the 2 whistleblowing events were those of 11th October relating to St James 2 on the 6th November relating to Chinook1. She confirmed that she was not relying on anything else and that the 3 other properties referred to in 12th December order were not whistleblowing.

62 The Claimant said that she had difficulty in putting her case together because the Respondent had not provided her with a paginated bundle. On her dismissal should also been asked to leave immediately and had very limited time to download documents. She had been handicapped in preparing her case and identifying the issues because of what she said was the respondent's lack of cooperation and failure to disclose things properly and failure to comply with court orders.

63 It was not disputed that the Claimant had a bundle, albeit an unpaginated one, since December 2019. I find that the Claimant raised her whistleblowing allegations very late. The 1st time she does so is 2 months after her dismissal. The nature of her whistleblowing allegations continues to evolve up to and including during the hearing. The Respondent was not in a position to be aware of the case it had to answer until after the Claimant had given her evidence on day 1 of the hearing.

64 As referred to above, the Claimant's continual evolution of her position has led me to prefer the evidence of Mr Malone and Ms Cook where there is a conflict between what they say and the Claimant's evidence. I conclude that at the relevant time of her dismissal the Claimant did not think that she had blown the whistle. This was a position she reached some 2 months afterwards.

Relevant law
Burden of proof

65 In *Kuzel v Roche Products Limited* the EAT considered the approach to the burden of proof in claims for automatically unfair dismissal under section 103A of ERA 1996 for having made a protected disclosure. It rejected the employee's argument that the approach to the burden of proof in discrimination cases, as set out in *Igen v Wong*, should be applied in whistleblowing cases. However, it did lay down guidance for the tribunal on how to approach the burden of proof.

66 In cases of ordinary unfair dismissal under section 98, it is for the employer to show that the reason for dismissal is one of the potentially fair reasons in section 98(2). If it fails to do so, the dismissal is unfair. If it can establish a potentially fair reason, the tribunal must then decide if the dismissal

was fair or unfair, applying section 98(4). At this stage the burden of proof is neutral.

67 Where an employee argues that section 103A applies, if the employee has less than one year's service (and so could not claim under section 98), the employee must first establish that they made a protected disclosure and that this was the reason for the dismissal.

Whistleblowing

68 The Public Interest Disclosure Act 1998 (PIDA) came into force on 2 July 1999, inserting sections 43A to 43L and 103A into the ERA 1996 providing protection for workers reporting malpractices by their employers or third parties against victimisation or dismissal.

69 Whether a whistle-blower qualifies for protection depends on satisfying the following tests:

Have they made a qualifying disclosure? There are a number of requirements for a qualifying disclosure (section 43B*, ERA 1996*):

a. Disclosure of information. The worker must make a disclosure of information. Merely gathering evidence or threatening to make a disclosure is not sufficient.

b. Subject matter of disclosure. The information must relate to one of six types of "relevant failure".

c. Reasonable belief. The worker must have a reasonable belief that the information tends to show one of the relevant failures.

d. Further, the worker must have a reasonable belief that the disclosure is in the public interest.

70 Disclosure must also qualify as a protected disclosure (sections 43C-43H, ERA 1996; which broadly depends on the identity of the person to whom disclosure is made. PIDA encourages disclosure to the worker's employer (internal disclosure) as the primary method of whistleblowing. Disclosure to third parties (external disclosure) may be protected if more stringent conditions are met.

71 The public interest test was considered by the Court of Appeal in Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979.. Upholding an employment tribunal's decision that the disclosure was a qualifying disclosure, the court gave the following guidance:

the tribunal has to determine

a. whether the worker subjectively believed at the time that the disclosure was in the public interest; and

b. if so, whether that belief was objectively reasonable.

There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the tribunal should not substitute its own view.

72 In assessing the reasonableness of the worker's belief, the Tribunal is not restricted to reasons that were in the mind of the worker at the time. The worker's reasons are not of the essence, although the lack of any credible reason might cast doubt on whether the belief was genuine. However, since reasonableness is judged objectively, it is open to a tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.

73 Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. The statute uses the phrase "in the belief…" which is not same as "motivated by the belief…".

74 In *Ibrahim v HCA International Ltd [2019] EWCA Civ 2007*, the Court of Appeal held that a Claimant alleging whistleblowing must have the opportunity to give evidence directly on the point of whether they had a subjective belief that they were acting in the public interest at the time of making a disclosure They can then be cross-examined and a tribunal will be able to evaluate the evidence and make findings as to subjective belief and the reasonableness of that belief.

Compensation

75 The compensatory award may be reduced where the Claimant's conduct has contributed to the dismissal, commonly referred to as "contributory conduct" or "contributory fault". The reduction can be anything up to and including 100%.

76 The basic award may be reduced where the Claimant's conduct before the dismissal is such that it would be just and equitable to reduce the award. There is no need for the conduct to have contributed to dismissal or for the employer even to have known about it at the time of dismissal

77 Where the Tribunal finds that the dismissal "was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding" (section 123(6), ERA 1996).

78 Three factors must be present for a reduction of the compensatory award for contributory fault: The Claimant's conduct must be culpable or blameworthy. It must have caused or contributed to the dismissal. The reduction must be just and equitable (Nelson v BBC (No.2) [1979] IRLR 346 (CA).

Conclusion

79 While I have concluded that the Claimant did not consider that she had been dismissed for whistleblowing at the time of her dismissal, it is possible for Claimants to become aware of things after dismissal as they take legal advice. I have therefore gone on to consider the whistleblowing incidents. Applying the relevant law to the findings of fact I have made, I conclude that the Claimant did not make a protected disclosure on either 11th October or 6th November. I have found that she did not disclose any information on either of these occasions. She

does not therefore meet the 1st hurdle necessary for a successful whistleblowing claim. There is no protected disclosure.

80 If I am wrong on that, I conclude that there was no wrongdoing. On the Claimant's best case all she can say about St James 2 is it didn't feel right. I conclude that that is not enough for a subjective belief that wrongdoing had occurred and further it is not objectively reasonable to hold such a belief. On Chinook 1 I accept that she could have had a subjective belief that there was a breach of the landlord and tenant act, but that it was not objectively reasonable for her to hold such a belief.

81 In any event, I conclude that the Respondent had clearly decided that her performance was not adequate and had reached that view before the 1st of the whistleblowing incidents the Claimant relies on. I find that it was not influenced by the incident on 11th October as whistleblowing as part of its thinking that dismissal was appropriate. I have found that there were many other incidents of poor performance following that date and that by 17th October the decision had in fact been made the dismissal would occur.

82 The reason for the timing was the imminent ending of the probationary period. The principal reason for dismissal was performance. This is a fair reason and the claim is accordingly dismissed.

Employment Judge McLaren
Date: 18 March 2020