EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr M. Koh	**v**	**(1) Japan Green Medical Centre Limited**

Heard at: London Central

On: 06, 07, 08 and 09 December 2021 (+ 10 & 30 December 2021 in chambers)

Before: Employment Judge B Beyzade
Ms N Sandler
Mr P Secher

Representation

For the Claimant: Mr G Anderson, Counsel
For the Respondent: Ms L Prince, Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the tribunal is that:

1.1. the claimant was unfairly dismissed by the respondent, and any matters relating to remedy for unfair dismissal shall be determined at a 1-day hearing to be listed before the same Tribunal by way of a Cloud Video Platform hearing on the first open date after 1 February 2022;

1.2. the claimant's claim for unfair dismissal for the sole or principal reason that the claimant made protected disclosures pursuant to

section 103A of the Employment Rights Act 1996 is not well-founded and is dismissed;

1.3. the claimant's claim for detriment on the ground that he made protected disclosures is not well-founded and is dismissed.

REASONS

Introduction

2. On 06 April 2020, the claimant presented a complaint of unfair dismissal, unfair dismissal for the reason or principal reason that he made protected disclosures and detriment on the ground that he made protected disclosures. The respondent admitted that the claimant had been dismissed, but stated that the reason for dismissal was redundancy, which is a potentially fair reason for dismissal. The respondent maintained that they acted fairly and reasonably in treating redundancy as sufficient reason for dismissal.

3. A final hearing was held on 06, 07, 08 and 09 December 2021. This was a hearing held by Cloud Video Platform ("CVP") pursuant to Rule 46. The Tribunal was satisfied that the parties were content to proceed with a CVP hearing, the parties did not raise any objections, that it was just and equitable in all the circumstances, and that the participants in the hearing (and the Tribunal itself) were able to see and hear the proceedings. There were also fifth and sixth hearing dates listed on 10 and 30 December 2021 when the Tribunal met in chambers (in private) for deliberations and judgment.

4. The parties filed an agreed Bundle of Documents consisting of 1148 pages (initially 1148 pages, and an additional page [page 1089] were filed on the first day of the hearing). The Tribunal also had in its possession a copy of the Tribunal file which included the claimant's Claim Form, the respondent's Response Form, Notice of Hearing and Case Management Orders dated 19 October 2020.

5. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, the parties being in agreement with these:

(6) …

Unfair dismissal

(i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was redundancy.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'? Particular issues which arise are:

a) Whether the claimant should have been put in a pool for selection with the other 11 doctors?

b) Whether the selection criteria adopted were fair and objective?

c) Whether the application of the selection criteria was fair?

d) Whether the resignation of Dr. Kashima, a part-time doctor and paediatrician in December 2019 was a relevant consideration in terms of the selection of the claimant and Dr. Kodani for redundancy?

e) Did the Respondent fail to offer the claimant alternative employment instead of dismissing him?

Public interest disclosure claims

(iii) What did the claimant say or write which allegedly amounted to protected disclosures? The claimant wrote to the GMC and CQC on 28 and 30 November 2019.

(iv) In either or both of these communications, was information disclosed which in the claimant's reasonable belief tended to show:

a) That the respondent was failing to comply with a legal obligation to which it was subject, in the form of its duty regarding patient clinical safety;

b) That the health and safety of patients was being or was likely to be endangered, as a result of cancelling appointments;

c) That the above matters were being, or were likely to be deliberately

concealed?
(v) If so, did the claimant reasonably believe that each disclosure was made in the public interest?
(vi) Was each disclosure made to a person falling within s 43C ERA?
(vii) Was the sole or principal reason for the claimant's dismissal the fact that he made protected disclosures?
(viii) Was the claimant subjected to a detriment because he made protected disclosures? The detriment relied on is being kept on enforced and unnecessary leave of absence.

Remedy for unfair dismissal
(ix) If the claimant was unfairly dismissed, should reinstatement or reengagement should be ordered?
(x) If the claimant was unfairly dismissed and the remedy is compensation:
a) if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825;
b) has the claimant failed to mitigate his losses, and, if so, to what extent should his compensation be reduced?
c) was there an unreasonable failure by the respondent to comply with a relevant ACAS Code of Practice and, if so, what uplift should be applied to the claimant's compensation?

6. By consent, the Tribunal were required to address matters at the final hearing relating to liability only.

7. The claimant gave evidence on his own behalf. Ms. C. Takano and Ms. M. Yazaki also gave evidence on behalf of the claimant.

8. Dr. S. Wada, and Mr S.J.P. Lewis, Solicitor gave evidence on behalf of the respondent.

9. At the outset of the hearing the parties agreed to work to a timetable to ensure that their evidence and submissions were completed within the four days allocated for the final hearing. The Tribunal were assisted by a Japanese interpreter, Ms. Pearce.

10. Both parties' representatives provided written submissions and a number of authorities from the Employment Appeal Tribunal ("EAT"), the Court of Appeal ("CA"), and the Supreme Court ("SC") on the afternoon of the fourth day of the hearing. Additionally, the parties' representatives made closing oral submissions and provided a Chronology and an Agreed Reading List.

Findings of Fact

11. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues –

Background

12. The claimant was employed by the respondent from 01 October 2017 until 11 December 2019 initially as a general medical doctor. From 19 October 2018 the claimant's job title was changed to General Medical Practitioner/Data Management and System Development Officer.

13. The claimant was employed by Japan Green Medical Centre Limited, a private limited company with its registered office at 10 Throgmorton Avenue, London, EC2N 2DL The nature of the respondent's business was in the private healthcare sector. The respondent employed around forty-one staff.

14. The respondent's revenue was slightly under £5,000,000.00 in 2018/2019 and it was recorded that there were almost 20,000 patient cases dealt with by the respondent in that year.

15. The claimant was qualified to treat UK patients.

16. The respondent's shares were owned by JGH Holdings PTE Limited, a company incorporated in Singapore. Dr. Wada was the main shareholder of that company.

17. The respondent offers private primary medical services from two locations in London (the City of London and Acton). The vast majority of their patients were Japanese nationals based in London. The respondent provided services that were similar to a GP surgery including specialist services for women and Children.

18. The respondent worked with a small number of non-Japanese patients, which formed under 2% of its patient total. The respondent conducted health check procedures for non-Japanese patients, which was a small part of the respondent's business. Typically the patients who underwent health check procedures were employees who worked for Japanese companies.

19. In November 2019, the respondent employed eleven medical practitioners operating from its two surgeries, some of whom worked part time, and some had additional responsibilities. Professor Otsu worked half a day per week, Dr. Kashima worked for 2 days per week, and Dr. Harada worked 1 day a week albeit on a flexible basis.

20. Dr. Kodani was the Chief Executive Officer ("CEO") of the respondent up to January 2020. Dr. Kodani and Dr. Y. Takaya were directors of the respondent with additional management responsibility. Dr. Kurata was the respondent's Responsible Officer. Dr. Ishada was the respondent's Clinical Lead and also Line Manager to the majority of doctors. Dr. Hirakawa had responsibility for Information Governance and GDPR matters. Dr. Otsu was professor of medicine at Kings College, London.

21. Dr. Kodani and Dr. Kashima both had a specialism, in paediatric care.

22. The claimant's basic pay was £150,000.00 per annum gross. This was increased from the claimant's previous salary of £110,000.00 gross in

October 2018 after the claimant was given additional responsibilities relating to IT. His normal working hours were 40 hours per week. He normally worked Monday to Sunday from 08.00am to 7.00pm, albeit he worked on a rota basis.

23. The claimant was issued with a contract of employment dated 19 October 2018.

24. The claimant's line manager was the Medical Director, Dr. Y. Takaya.

25. The respondent had a Complaints Policy dated 01 June 2019. There was also a Speak up to Guardian Policy dated 25 June 2019. The respondent's Employee Handbook contained a Whistleblowing Policy, and a Grievance Procedure.

26. The claimant's contract of employment required that the respondent conduct regular appraisals. In addition to this an external appraisal was conducted.

Redundancy proposal

27. On 01 August 2019 Dr. Wada, Managing Director of JGH Holdings PTE Limited and Mr. Mitsuoka, Finance Director of the respondent's parent company met the respondent's solicitor (Mr. S. Lewis) in London in order to plan the redundancy process after travelling from their head office which was located in Singapore. It was decided that two doctors will be made redundant initially in late 2019 and that the redundancy programme for the doctors would take place in November 2019. At that meeting Mr. Lewis advised Dr. Wada that the claimant had less than two years' continuous service so his employment could be terminated without the requirement to make a redundancy payment.

28. On 08 November 2019 there was a resolution made by JGH Holdings PTE Limited which was signed by Dr. Wada, Dr. Tanaka, and Dr. Chye which approved the implementation of the redundancy procedure for termination of two doctors employed by the respondent. This also gave approval for

Dr. Wada and Mr. Mitsuoka of JGH Holdings PTE Limited to instruct lawyers and to take all actions and decisions necessary to carry out the redundancy procedure.

Notice of possible redundancy

29. On 14 November 2019, a notice of planned downsizing was sent to all eleven of the respondent's medical doctors.

30. The respondent advised all 11 employees concerned that due to the UK's Brexit decision on 23 June 2016, Japanese companies no longer saw the UK as the '*Gateway to Europe*' and that a combination of that and the signing of the EU-Japan Economic Partnership Agreement on 1 February 2019 had led the respondent's parent company to conclude that there will be a downturn in the demand for medical services from Japanese nationals in England. Redundancies were proposed in the areas of the business in which there was an anticipated reduction in work.

31. The letter warned the claimant of possible redundancy. The letter explained that the respondent will conduct a redundancy exercise which will involve a process of consultation and scoring to establish which two doctors are to be provisionally selected for redundancy. The letter stated that the eleven doctors who were at risk of redundancy were to be assessed using the following eight criteria:

- Qualifications and skills;
- Standard of work performance;
- Cost to the Business;
- Disciplinary Record;
- Attendance and time-keeping;
- Team-work;
- No complaints by staff members; and
- No complaints by patients.

32. Each doctor was to receive a score between 1-4 in every category (with four being the highest). The scoring process was to be conducted by Dr. Wada and Mr. Mitsuoka with assistance from Ms. Kato. The two doctors with the lowest aggregate scores would be selected for redundancy.

33. The letter stated that if the claimant had any queries in relation to the proposed criteria he should notify Dr. Wada and/or Mr. Mitsuoka as soon as possible.

34. Dr. Wada was due to travel to London for face-to-face consultations with all eleven doctors from 18 November 2019 to 22 November 2019. Mr. Mitsuoka was also due to be there between 12 November 2019 and 22 November 2019. Any further consultations that needed to be carried out would be conducted via video conference or telephone. The claimant was invited to attend an initial consultation meeting on 18 November 2019 and after this meeting the scoring process was due to be completed and thereafter a further consultation meeting would be arranged.

35. Ms. Bramich (Practice Manager) was advised about the planned redundancies on 14 or 15 November 2019.

36. On 17 November 2019 Dr. Koh telephoned Dr. Kodani and asked for his thoughts on the proposed redundancy. Dr. Kodani advised that there was no advance notice given and it was unexpected. Dr. Kodani confirmed that he was one of the members of the redundancy pool. The claimant stated:

"Well, in general, I agree with this business judgment. The downsizing itself is not a wild idea. But this approach at this speed has caused big troubles. I think they should have followed a fair procedure."

Redundancy process

37. On 18 November 2019, a first consultation meeting took place between Dr. Koh, Dr. Wada, Mr. Mitsuoka, and Mr. Lewis.

38. At that meeting the claimant was asked if he had the selection criteria and he stated that these were mentioned in the letter. The claimant was advised that each person will be given a score of between 1 and 4 and the top scoring nine doctors will not be made redundant. The bottom scoring two doctors would be called to individual meetings to discuss their scoring and whether they thought it was fair or not. There was also discussion about a possible settlement agreement. Mr Lewis asked if the claimant was able to suggest any other categories under the selection criteria. The claimant stated:

"I totally understand Brexit has caused negative impact on our business. I totally agree with you and I totally agree with this idea. However, my bosses here, Dr. Takaya and Dr. Kodani, the two members of the Board team, they, I understand, recruited a new psychiatry doctor to expand this clinic. I understand Dr. Takaya interviewed him a couple of weeks ago. I don't know the outcome."

39. Dr. Wada replied "Wada: [Speaking in Japanese] I haven't heard such a thing but…." Dr. Wada further stated as follows:

"Wada: [In English] I do not know that kind of information from Dr. Kodani or Dr. Takaya so this is first time to have that kind of information. But my decision, this kind of decision is not a sudden decision. For the establishment time, JGMC is never provided [??] dividend to JGH. Never. JGMC has now been in debt in banks. Already three years have passed since Dr. Kodani was (appointed as) CEO but the result is the same. I think Brexit is definitively…"

40. Dr. Wada was asked if he was aware that Dr. Koh had more than one role and Mr. Lewis commented that this may make his qualifications and skills higher than others because he has a second skill. Mr. Lewis also confirmed that there was no weighting between the categories on the scoring matrix. The scoring decisions were to be made by Dr. Wada, but he would receive advice on the commercial side from Mr. Mitsuoka. It was

stated that Ms. Kato (HR Manager) would provide the data and information.

41. The claimant queried whether Dr. Wada and Mr. Mitsuoka could assess his performance or teamwork and Mr Lewis advised that he had an appraisal every year. The claimant also stated that the process was "*too quick and rough for us*" and Mr Lewis discussed this with him. The respondent allowed 30 minutes for this meeting.

42. On 19 November 2019 Dr. Koh sent an email to Mr. Mitsuoka which was copied to Dr. Wada advising he did not want to have a further consultation meeting for now, and he raised a number of other matters including his belief that he should not be included in the redundancy pool as he worked in a unique and non-interchangeable position.

43. A reply was sent from Mr. Mitsuoka by email dated 19 November 2019 confirming that the respondent was not recruiting a psychiatry doctor, the downsizing decision was made by the shareholder, Dr. Wada was aware of his dual role, Dr. Wada was working with the Practice Manager and HR Manager to collect the necessary data and information, and Dr. Koh was asked if he wanted to meet Dr. Wada to discuss his concerns.

44. On 20 November 2019 Dr. Kashima sent an email to Dr. Wada enquiring in relation to whether two doctors will be selected for redundancy even if they came from the same speciality backgrounds. She also enquired about the respondent's voluntary redundancy policy and the payment terms, but she stated that this did not mean she were applying for it. Dr. Kashima sent an email on the same day enquiring about the selection criteria and the redundancy pool, and she received a reply on the same day providing details in relation to the "qualifications/skills" category, including confirmation that working part time will not mean she would receive the minimum score for "teamwork", and that it was entirely appropriate for all eleven doctors to be scored against the same criteria.

Redundancy scoring

45. On 19 November 2019 and 20 November 2019 meetings took place to determine the scores for the scoring matrix between Dr. Wada, Mr. Mitsuoka, Ms. Kato, Ms. Bramich and Mr. Lewis. Mr Lewis made notes in relation to each employee in the redundancy pool including Dr. Koh and the information and data considered under each selection criteria. The notes record that there were no official disciplinary record, so all doctors received four points in respect of that criterion. There were also no records for timekeeping albeit all doctors were awarded four points except for Dr. Kashiwa.

46. Under teamwork it was noted that Dr. Koh had multiple instances of "forcing through his ideas/plans and refusing to discuss matters with other members of staff. Additionally it was noted that he repeatedly uses Japanese phrases meaning 'we will do it my way,' 'don't give me your opinion' . The notes also recorded that Dr. Koh had five complaints against him made by members of staff and set out who those staff members were, that the Practice Manager investigated them, and that they were reported to Dr. Takaya. The reference to Ms. Tsuzuki was incorrect, and this should have in fact referred to Ms. Ferguson. There were three patient complaints mentioned in relation to Dr. Koh including the dates and the clinic where the patient was seen.

47. Attached to those notes were a table setting out the eleven doctors' appraisal scores and revenue data in relation to each doctor. The claimant scored a grade of 93 A (which was the top grading) in his 2019 appraisal. His revenue minus salary and benefits amount was £502,413.14, which was the third highest amongst the eleven doctors.

48. On 21 November 2019 Dr. Koh sent an email to Mr. Mitsuoka in which he stated that he did not intend to challenge or overturn the decision of the stakeholder meeting. The claimant stated that the respondent must execute its decision safely to avoid legal action.

Provisional selection for redundancy

49. On 21 November 2019, a second meeting was scheduled to inform Dr. Koh that he had been provisionally selected for redundancy. Dr. Koh queried why he was chosen for the redundancy pool. Mr. Lewis responded:

"SL: The pool Is the eleven doctors. There are eleven doctors. They are all selected. That is the correct English way to do it. It would be wrong to say like, "OK we analysed, and we don't take all eleven. Actually, we take five out of the eleven doctors." That's wrong under the English law. It doesn't matter whether people have special skills. You select people with the same job title in the same pool."

50. Dr. Koh was shown a copy of the scoring matrix during that meeting, which was anonymised. Dr. Koh scored the maximum available marks (4 marks) for all the criteria except for teamwork, number of staff complaints and number of patient complaints. He scored 1/4 for each of those three categories, bringing his total score to 23 and Dr. Kodani scored 23 also. The next highest score was twenty-seven, which was scored by Dr. Kurata.

51. The claimant queried his scores during the meeting and how they were arrived at. In relation to patient complaints Dr. Koh was advised that they looked at the last 2 years and he had received three patient complaints. He asked if the detail of the complaints were considered and he was advised that the scores were based on whether a complaint was made, and no assessment was made in relation to the fairness of a particular complaint. The following was also discussed in relation to teamwork:
"MK: OK, what about the teamwork?
SL: Again, we've done a lot of investigations. I mean just give you a sort of… Multiple incidents where our information is you were forcing through your ideas and plans and refused discuss matters with other members of the staff. And you were using Japanese frank languages and phrases like, "We will do it my way!" "Don't give me your opinion!"

MK: I didn't say such a thing.
SL: Well, this is, we can work on the basis of the data and information we received. And frankly, I say this quite openly, you should consult your lawyer, absolutely you should. And if your lawyer questions this, then we will swap the documents and we will provide all the evidence to just let this out. Of course, at that stage, you can challenge what is being said. Of course, you can do that."

52. Mr. Lewis delivered a letter by hand to Dr. Koh advising him about his provisional selection for redundancy on 21 November 2019. He was told that there would be a consultation meeting on the following day.

Notice of feedback and period of paid absence

53. On 22 November 2019, a further meeting took place at short notice at the Acton Clinic between Dr. Koh and Mr. Lewis, and Dr. Koh was provided with a copy of a letter titled "*notice of feedback and period of paid absence*."

54. During this meeting Dr. Koh was advised about the payments he would receive, he was told to seek independent legal advice, and that Dr. Wada wanted him to take a period of paid leave to concentrate and think about his position. The claimant replied:
"MK: But it's not safe for my patients."

55. Dr. Koh also expressed that he was unhappy about his scoring. The following conversation took place in relation to Teamwork:
MK: Well how did you score the teamwork? Just by interviewing the managers?
"SL: What we would be doing was…
MK: What's the difference between 1 and 2, 2 and 3, and 3 and 4 in terms of the teamwork?
SL: If you want to challenge that… That's up to you to challenge that. I am not prepared to go into the details. I am not prepared as the tape recorders are going on. If you want to challenge the score, it is entirely your right.

What I can tell you is that basically there were five peoples involved; obviously Dr. Wada, Mr Mitsuoka and myself were involved and then Ms Kato and Ms Bramich. We would be asking for data, we would be asking for information, conducting investigations …"

56. The claimant was advised that he was being placed on a period of paid absence from 22 November 2019 during the meeting.

57. Dr. Koh was provided with a letter dated 22 November 2019 confirming that he was provisionally selected for redundancy because his scores were not in the top nine from amongst the eleven doctors in the redundancy pool. He was told that if he were made redundant he would receive £12,500 notice pay, £7211.54 unused holiday pay, and £2362.50 statutory redundancy pay, and that there was no suitable alternative employment available either within the respondent or JGH Group of Companies. It was confirmed that Dr. Koh was being placed on a period of paid leave from 25 November 2019 for 4 weeks.

58. Dr. Koh initially called Dr. Kodani by telephone on Sunday 24 November 2019 at 2:30pm to raise his concerns about his absence and patient safety as, at the time of calling, he thought he was still the respondent's CEO. When he told Dr. Kodani that he had been selected for redundancy and put on enforced leave he said that he did not know that the claimant was the other doctor that had been selected as Mr. Lewis had not told him. He told him that he too had been selected but that he had signed a settlement agreement and that he was leaving. He said that he had decided to discontinue his relationship with the respondent and return to his hometown in Matsuyama, Japan. He said he predicted that Dr. Takaya would replace him as the new CEO and that Mr. Mitsuoka would return to London.

59. Dr. Koh asked Dr. Takaya later that day during a telephone conversation whether he was aware that he had been provisionally selected for redundancy. He said that he had been told about it the day before

(presumably at the AGM). The claimant asked him for advice on how to deal with the decision to provisionally select him for redundancy and he said that the claimant should take his time and discuss it with Dr. Wada and his lawyer. The claimant said that he was gravely concerned about what would happen to his patients and the IT systems, to which he responded, "*We can look after them. You should not worry about it. We must abide by the decision*." Then the topic of the claimant's absence came up and he told him that the letter clearly stated that the claimant should not come to the clinic or contact his colleagues or patients from Monday 25 November 2019 (the next day). The claimant was shocked to hear that Dr. Takaya was not aware that he was being placed on enforced leave, which appeared to take him by surprise. He thanked the claimant for letting him know about this and the claimant stated he hoped that he might try to persuade Dr. Wada not to make him redundant. The claimant told Dr. Takaya on the telephone call that he could manage the IT job at home if he wanted him to. He replied to the claimant with, "thank you."

Claimant's Disclosure to the GMC

60. On 28 November 2019 Dr. Koh sent a letter to the General Medical Council ("GMC") advising that he had concerns about the serious detrimental effect in terms of clinical safety of the clinic and he urged the GMC to investigate ("Qualifying Disclosure 1"). He set out the number of patients that were booked into his clinics the following week. He also mentioned his telephone conversation with Dr. Takaya and the claimant's concerns about the IT system of the clinic. The claimant complained that the clinic did not inform his patients about his absence in advance.

Claimant's Disclosure to the CQC

61. On 30 November 2019 Dr. Koh sent a letter to the Care Quality Commission ("CQC") which set out the same concerns as had been explained in the letter to the GMC that was sent two days prior to this ("Qualifying Disclosure 2").

Claimant's Disclosure to the Respondent

62. On 02 December 2019, an email was sent from Dr. Koh to the respondent attaching a copy of his letters that were sent to the GMC on 28 November 2019 and CQC on 30 November 2019 ("Qualifying Disclosure 3"). He explained that his enforced leave meant that he was unable to conduct any handover, he could not perform his duties, and this had an adverse impact on patients. He suggested that there were not enough doctors at the practice and that only he could have attended to the non-Japanese patients. He also challenged the redundancy process that was followed and his provisional selection for redundancy. He also advised that Dr. Kashima was retiring that summer so there was no need for the respondent to make two doctors redundant.

63. On 10 December 2019 at 10.05pm Mr. Lewis sent a copy of a termination letter to Dr. Wada by email for signature. The email was copied to Mr. Mitsuoka, Ms. Kato, Dr. Takaya, and Mr. N. Matys.

64. On 11 December 2019 at 01.51am Dr. Wada signed the termination letter. On the same date Dr. Kashima informed Dr. Takaya verbally that she will be resigning with a termination date of 31 January 2020.

Notice of termination of employment

65. Thereafter on the same date, the claimant received by email sent at 4.03pm from Ms. Kato a copy of a letter from Dr. Wada giving notice of termination of his employment by reason of redundancy, and he was advised that his employment would terminate on that date. He would receive statutory redundancy pay of £2362.50 (£525.00 gross weekly pay [statutory cap applied], two complete years' service therefore 3 weeks' pay and 46 years of age), accrued holiday pay of £7,211.54 (£150,000 x 1/260 x 12.5 unused days' holiday) and £12,500.00 (less tax and national insurance contributions) in respect of his contractual notice period. The claimant was also due to receive his salary and benefits for the month of December 2019.

He was told that he was one of two doctors who scored the lowest in terms of the selection matrix.

66. Dr. Kodani was the second doctor who was also made redundant, although his employment did not terminate until January 2020, and he continued working for the respondent until is employment ended.

67. There was no right of appeal afforded to Dr. Koh.

68. On 04 February 2020, the respondent placed an advert for a new paediatrics doctor.

Observations

69. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

70. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of the event was more likely than not, then the tribunal is satisfied that the event did occur.

71. In relation to Dr. Wada's reference to the need to reduce two doctors in paragraph 10 of his witness statement, the Tribunal were not clear in terms of whether this meant two full time equivalent doctors or two doctors out the eleven doctors that were employed by the respondent. The Tribunal formed the opinion that there was insufficient evidence that this matter was given any or any adequate consideration during the 1 August 2019 meeting. The resolution dated 08 November 2019 referred to two doctors being made redundant, which meant that further approval may be necessary if more than two doctors were to be made redundant.

72. Dr. Wada explained in his oral evidence that it was two full time equivalent doctors that were due to be made redundant. This matter was not clarified during the redundancy process.

73. Dr. Wada's evidence in relation to the precise information and data he relied on in order to conclude that there will be a downturn in business was not clear. However, the Tribunal accepted that there was an anticipation that the number of patients would decrease due to Brexit and a number of Japanese companies would depart from the UK as a result of this. This was referred to in the 1 August 2019 meeting, Mr Lewis said that it was raised in that meeting, and the claimant himself commented that he understood that Brexit has caused negative impact on the respondent's business, he agreed with this business judgment and the downsizing itself not being a 'wild idea'.

74. There was no weighting applied by the respondent in any category on the scoring matrix. There was no evidence that there was any or any adequate consideration given to this matter by the respondent.

75. The letter stated that if the claimant had any queries in relation to the proposed criteria he should notify Dr. Wada and/or Mr. Mitsuoka as soon as possible. The claimant did not contact Dr. Wada or Mr. Mitsuoka to query the proposed selection criteria. Dr. Kashima did contact the respondent to query a matter in relation to the selection criteria and the respondent sent a response to this promptly.

76. The timescale for consultation between 18 and 22 November 2019 (the dates prior to the claimant's suspension) was relatively short. Coupled with the absence of an appeal, this did somewhat restrict the claimant's ability to participate in and to challenge his redundancy and the process that was followed in respect thereof.

77. During the 17 November 2019 call the CEO did not appear to have been consulted or notified about the potential redundancies in advance. There was no evidence of any prior discussion with him in relation to avoiding redundancies.

78. The Tribunal noted that there was no discussion about the criteria used in the scoring matrix at the meeting on 18 November 2019.

79. The Tribunal observed that there were no disciplinary records and no timekeeping records. The Tribunal found it difficult to comprehend why these matters were listed as selection criteria in the first instance, and how the respondent proposed to measure or to score these matters objectively.

80. Under the criteria relating to standard of work performance there was some attempt by the respondent in terms of mirroring the appraisal grades of 2019, however, there was no reference to the content of the 2019 appraisal under teamwork or either of the staff or patient complaints criteria. The respondent's reason for not using the appraisal data in this manner was not clear.

81. The Tribunal accepted the claimant's evidence about his call with Dr. Kodani on 24 November 2019. This was consistent with the chronology of events. It was also not contradicted by any other evidence.

82. The Tribunal also accepted that a conversation between the claimant and Dr. Takaya took place on the same day. During this call Dr. Takaya indicated that the patients of Dr. Koh will be looked after. The Tribunal did not accept that Dr. Takaya took no interest in the claimant's patient safety concerns and indeed he attempted to address the claimant's concerns raised during that call.

83. The Tribunal was surprised that there was no response sent to the claimant by the respondent to his email of 02 December 2019 prior to the decision to make the claimant redundant. It was not clear why no reply was sent by the respondent to this email.

84. The respondent's explanation of someone else not being available to hear an appeal was not accepted by the Tribunal. The Tribunal were satisfied that if the respondent addressed their minds to the need for an appeal properly, they could have appointed a person to chair the appeal hearing. The Tribunal rejected the assertion that costs were an adequate reason to decline to provide an independent appeal chair given the circumstances. The respondent had access to a solicitor who was advising them on the

redundancy process since August 2019 and the solicitor could have appointed another solicitor or an external HR person to chair any appeal. Alternatively a less senior member of staff could have taken the redundancy decision, so that Dr. Wada could have chaired any appeal. The Tribunal were satisfied that an appeal hearing could have made a difference to the outcome and enabled an opportunity for the claimant to challenge his redundancy and the process followed.

Relevant law

85. To those facts, the Tribunal applied the law –

86. Section 94 of the Employment Rights Act 1996 ('ERA 1996') provides that an employee has the right not to be unfairly dismissed. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (s98(1)(a) ERA 1996). That the employee was redundant is one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c) ERA 1996). Where dismissal is asserted to be for redundancy the employer must show that what is being asserted is true i.e. that the employee was in fact redundant as defined by statute.

87. An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish (s139(1) ERA 1996).

88. In *Safeway Stores plc v Burrell [1997] IRLR 200* the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide:

a. Whether the employee was dismissed?

b. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

89. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA 1996).

90. In applying s98(4) ERA 1996 the Tribunal must not substitute its own view for the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

91. The Tribunal considered the EAT's decisions in *Eaton Ltd v King & Others [1995] IRLR 75* and *E-Zec Medical Transport Service Ltd v Gregory [2008] UKEAT/0192/08,* and *British Aerospace v Green [1995] IRLR 433* in the Court of Appeal. When considering whether the circumstances of the claimant's dismissal fell within the range of reasonable responses open to a reasonable employer the Tribunal should consider whether the respondent's choice of any selection criteria fell within a range of reasonable responses available to a reasonable employer in all the circumstances and whether based on the evidence before the Tribunal the scoring was applied in a fair and objective manner. The Tribunal's task, however, was not to subject any marking system to a microscopic analysis or to check that the system had been properly operated but it did have to satisfy itself that a fair system was in operation.

92. It is generally for the employer to decide on an appropriate pool for selection. If the employer genuinely applied its mind to the question of setting an appropriate pool, the Tribunal should be slow to interfere with the employer's choice of the pool. However, the Tribunal should still examine the question whether the choice of the pool was within the range of reasonable responses

available to a reasonable employer in the circumstances (*Capita Hartshead v Byard [2012] IRLR 814*).

93. A fair consultation would normally require the employer to give the employee *"a fair and proper opportunity to understand fully the matters about which [he/she] is being consulted, and to express [his/her] views on those subjects, with the consultor thereafter considering those views properly and genuinely*." (Per Glidwell LJ in *R v British Coal Corporation and Secretary of State for Trade & Industry ex parte Price and others [1994] IRLR 72*) cited with approval and as applicable to individual consultation by EAT in *Rowell v Hubbard Group Services Ltd 1995 IRLR 195, EAT* "*when the need for consultation exists, it must be fair and genuine, and should… be conducted so far as possible as the passage from Glidewell LJ's judgment suggests*". A fair consultation process must give the employee an opportunity to contest his selection for redundancy (*John Brown Engineering Ltd v Brown and ors. 1997 IRLR 90, EAT*).

94. The House of Lords in *Polkey v A E Dayton Services Ltd 1988 ICR 142* held that "*in the case of redundancy, the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation.*" The House of Lords' ruling firmly established procedural fairness as an integral part of the reasonableness test in S.98(4) ERA. Their Lordships decided that a failure to follow correct procedures was likely to make an ensuing dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been 'utterly useless' or 'futile.'

95. If the Tribunal decides that the dismissal is procedurally unfair, as part of considering the issue of remedy it ought to consider the question whether the employee would have been fairly dismissed in any event, and/or to what extent and/or when. This inevitably involves an element of speculation (*Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT*). "*In assessing*

compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence" (see *Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT* per Mr Justice Elias, the then President of the EAT).

96. In relation to the claimant's claim that his dismissal was for the reason or principal reason that he had made a protected disclosure the relevant sections of the ERA 1996 state:

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.
43B 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 – (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…
(d) that the health or safety of any individual has been, is being or is likely to be endangered… 43C Disclosure to employer or other responsible person: A qualifying disclosure is made in accordance with this section if the worker makes the disclosure — (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to— (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

103A 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.

97. The word 'disclosure' does not necessarily mean the revelation of information that was formerly unknown or secret. Section 43L(3) of the ERA 1996 provides that:
'*any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention*.'

98. Accordingly, protection is not denied simply because the information being communicated was already known to the recipient. This was confirmed by the EAT in *Parsons v Airplus International Ltd EAT 0111/17*.

99. Not all disclosures are protected under the ERA 1996. For a disclosure to be covered, it has to constitute a 'protected disclosure.' This means that it must satisfy three conditions set out in Part IVA of the ERA: a. it must be

-a 'disclosure of information,'
-b. it must be a 'qualifying' disclosure — i.e. one that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' has occurred or is likely to occur,
-c. it must be made in accordance with one of six specified methods of disclosure.

100. The worker's reasonable belief must be that the information disclosed tends to show that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure has in fact occurred, is occurring, or is likely to occur. In other words, the worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable — rather, the worker must

establish only a reasonable belief that the information tended to show the relevant failure.

101. This point was considered by the EAT in *Soh v Imperial College of Science, Technology and Medicine EAT 0350/14*. It was explained that there is a distinction between saying, 'I believe X is true' and 'I believe that this information tends to show X is true.' As long as the claimant reasonably believed that the information provided tends to show a state of affairs identified in section 43B(1) ERA, the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny.

102. The wording of S.43B(1) indicates that some account is to be taken of the worker's individual circumstances when deciding whether his or her belief was reasonable. The statutory language is cast in terms of 'the reasonable belief of the worker making the disclosure' not 'the belief of a reasonable worker.'

103. Thus, the focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. However, this is not to say that the test is entirely subjective — S.43B(1) requires a reasonable belief of the worker making the disclosure, not a genuine belief. This introduces a requirement that there should be some objective basis for the worker's belief. This was confirmed by the EAT in *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, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe.

104. If the claimant reasonably believed that the information tends to show a relevant failure, there can be a qualifying disclosure of information even if

they were later proved wrong. This was stressed by the EAT in *Darnton v University of Surrey 2003 ICR 615*. The EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made, not on the facts as subsequently found by the Tribunal. This case was cited with approval by the Court of Appeal in *Babula v Waltham Forest College 2007 ICR 1026*, when it made clear that a worker will still be able to avail him or herself of the statutory protection even if he or she was in fact mistaken as to the existence of, for example, any criminal offence or legal obligation on which the disclosure was based. Where the legal position is something of a grey area, a worker might reasonably take the view that there has been a breach.

105. In *Kilraine v London Borough of Wandsworth 2018 ICR 1850*, the Court of Appeal held that 'information' in the context of S.43B can cover statements which might also be characterised as allegations - 'information' and 'allegation' are not mutually exclusive categories of communication. The key principle is that, to amount to a disclosure of information for the purposes of S.43B the disclosure must convey facts.

106. In relation to a purported disclosure under S.43B(1)(d), as with the other categories of relevant failure, a worker will be expected to have provided sufficient details in the disclosure of the nature of the perceived threat to health and safety. However, this duty does not appear to be too onerous. In *Fincham v HM Prison Service EAT 0925/01*, for example, the employee perceived herself to be the subject of a campaign of racial harassment. She wrote a letter to her employer containing the statement: '*I feel under constant pressure and stress awaiting the next incident*.' Although an employment Tribunal held that this was not sufficient to amount to a qualifying disclosure, the EAT thought otherwise. It said: '*We found it impossible to see how a statement that says in terms "I am under pressure and stress" is anything other than a statement that [the employee's] health and safety is being or at least is likely to be endangered… [That] is not a*

matter which can take its gloss from the particular context in which the statement is made.'

107. In *Palmer and anor v London Borough of Waltham Forest ET Case No.3203582/*13 the employment Tribunal considered whether a worker was required to identify 'a specific risk or a specific person or a specific timescale of risk' but held that, in its view, that would be a gloss on S.43B(1)(d), which refers to the health and safety of 'any' individual. There is no requirement that to attract the protection of the statutory scheme, disclosures must be made in good faith. However, S.49(6A) of the ERA 1996, gives the Tribunal the power to reduce compensation in successful claims under S.103A by up to 25% where 'it appears to the Tribunal that the protected disclosure was not made in good faith'. The leading case on good faith (in a slightly different context under earlier whistleblowing legislation) is *Street v Derbyshire Unemployed Workers' Centre 2005 ICR 97* where the Court of Appeal equated 'good faith' with acting with honest motives. It was held that where the predominant reason that a worker made a disclosure was to advance a grudge, or to advance some other ulterior motive, then he or she would not make the disclosure in good faith.

108. In *Kuzel v Roche Products Ltd [2008] ICR 799*, the Court of Appeal considered the operation of the burden of proof as regards the reason for the dismissal in an unfair dismissal case brought by reference to both section 98 and section 103A. Mummery LJ envisaged that the Tribunal will decide first whether it accepts the reason for the dismissal advanced by the employer before turning, if it does not find that reason to be proved, to consider whether the reason was the making of the protected disclosure.

a. In his judgment Lord Justice Mummery also rejected the contention that the burden of proof was on the claimant to prove that the making of protected disclosures was the reason for dismissal. However, Mummery LJ agreed with the EAT that, once a Tribunal has rejected the reason for dismissal advanced by the employer, it is not bound to accept the reason

put forward by the claimant. He proposed a three-stage approach to S.103A claims: a. First, the employee must produce some evidence to suggest that his or her dismissal was for the principal reason that he or she had made a protected disclosure, rather than the potentially fair reason advanced by the employer. This is not a question of placing the burden of proof on the employee, merely requiring the employee to challenge the evidence produced by the employer and to produce some evidence of a different reason;

b. Second, having heard the evidence of both sides, it will then be for the employment Tribunal to consider the evidence as a whole and to make findings of primary fact based on direct evidence or reasonable inferences;

c. Third and finally, the Tribunal must decide what was the reason or principal reason for the dismissal on the basis that it was for the employer to show what the reason was. If the employer does not show to the Tribunal's satisfaction that it was its asserted reason, then it is open to the Tribunal to find that the reason was as asserted by the employee. However, this is not to say that the Tribunal must accept the employee's reason. That may often be the outcome in practice, but it is not necessarily so.

109. The Tribunal bears in mind that 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 of automatically unfair dismissal advanced by the employee.

110. Whistle-blower protection is analogous to the victimisation provisions in antidiscrimination legislation, in that both seek to prohibit action taken on the ground of a protected act. This has led courts and Tribunals considering claims under S.103A to refer to the substantial body of case law concerning causation under the victimisation provisions in what is now the Equality Act 2010 (EqA) for guidance. In *Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL*, a claim concerning victimisation contrary to the former Race Relations Act 1976, Lord Nicholls stated that the causation

exercise for Tribunals is not legal but factual. A Tribunal should ask: 'Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason?' This approach was expressly approved in the context of S.103A by the EAT in *Trustees of Mama East African Women's Group v Dobson EAT 0220/05*.

111. The question of whether the making of the disclosure was the reason (or principal reason) for the dismissal is distinct from the question of whether the disclosure was protected under the statutory scheme — *Croydon Health Services NHS Trust v Beatt 2017 ICR 1240, CA*. The former question requires '*an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss*.' The latter, however, is '*a matter for objective determination by a Tribunal*' and '*the beliefs of the decision-taker are irrelevant to it*.' Furthermore, as Lord Justice Elias confirmed in *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*, the causation test for automatically unfair dismissal under S. 103A is stricter than that for unlawful detriment under S.47B — the latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas S.103A requires the disclosure to be the primary motivation for a dismissal. Thus, if the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under S.103A will not be made out.

112. Lord Denning MR in *Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA* held that the principal reason for the dismissal is the reason that operated on the employer's mind at the time of the dismissal, it is the: '*set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*'. Lord Justice Underhill adopted this approach in *Croydon Health Services NHS Trust v Beatt 2017 ICR 1240, CA*, stating that 'the "reason" for a dismissal connotes the factor or factors

operating on the mind of the decision-maker which cause them to take the decision — or, as it is sometimes put, what "motivates" them to do so'.

113. More recently, however, that the Supreme Court in *Royal Mail Group Ltd v Jhuti 2019 UKSC 55,* held that, in enacting S.103A, Parliament clearly intended to provide that, where the real reason for dismissal was that the employee had made a protected disclosure, the automatic consequence should be a finding of unfair dismissal. On this basis, the court held that where the real reason for the dismissal is hidden from the decision-maker behind an invented reason, it is the Tribunal's duty to look behind the invention rather than to allow it also to infect its own determination. Provided that the invented reason belongs to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker. What must be borne in mind is that a 'Jhuti' case will be exceptional. Jhuti was most recently considered in Kong v Gulf International Bank Ltd EAT30 2020-000357 (10 September 2021).

114. In the earlier case of *University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall UKEAT/0150/20* (30 June 2021, unreported) His Honour Judge Tayler in the EAT pointed out that, important as the development was in Jhuti, in allowing a Tribunal to look beyond the mental processes of the dismissing manager in a case where there was another manager acting as an 'éminence grise' in the background procuring the dismissal (e.g. because of whistleblowing) by misleading the dismissing manager, that development operates as an exception. The rule remains that normally one looks at the motivation of the dismissing individual or body.

115. That approach was further emphasised in the decision of His Honour Judge Auerbach in the EAT in *Kong*. The claimant was head of financial audit at the bank. A Draft report by her raised concerns about the adequacy of a particular audit. It was accepted that this was a protected disclosure. The

Head of Legal became involved and disagreed with this assessment. After a fraught conversation and email the latter formed the view that the claimant was impugning her integrity. She complained to HR, saying that she could not see how she could work further with the claimant. The Head of HR and the CEO decided that the claimant had to be dismissed, which was done. The claimant claimed whistleblowing detriment (based on actions by the Head of Legal) but this was out of time. Her action for ordinary unfair dismissal (in time) succeeded but a second action, for whistleblowing automatically unfair dismissal, was rejected. This was because the Tribunal held that the reason for dismissal by the senior management was her treatment of the Head of Legal and handling of the whole matter. She appealed, arguing that, under Jhuti, the Tribunal should have looked beyond the reasoning of the dismissing managers and considered the involvement of the Head of Legal (who, she argued, had been motivated by the protected disclosure). The EAT rejected this argument, holding that this was not a Jhuti case (see 30 [72]).

116. Finally coming on to the Tribunal's findings on detriments, s.47B of the Act says:

"A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker had made a protected disclosure."

117. The case of London Borough of Harrow v Knight 2003 IRLR 140 EAT set out the correct approach to apply under section 47B(1) and section 47B(1A) which is:

• the Claimant must have made a protected disclosure and

• they must have suffered a detriment

• the employer/worker/agent must have subjected the Claimant to that detriment by some act/deliberate failure to act and

• the act or deliberate failure to act must be done on the ground that the Claimant made a protected disclosure.

118. As far as detriment is concerned the Tribunal took account of the Court of Appeal decision in the case of *Ministry of Defence v Jermiah 1980 ICR 13* where the court said that: "*Detriment meant simply putting under a disadvantage and that a detriment exists if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment. What matters is that compared with other workers, hypothetical or real, the complainant has shown to have suffered a disadvantage of some kind. Someone who is treated no differently than other workers even if the reason for an employer's treatment is perceived to arise from or be connected to the act of making a protected disclosure will find it difficult to show that he or she has suffered a detriment*."

119. Thus, a 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace.

120. The assessment of whether a reasonable worker would take the view that the action taken was in all the circumstances to his detriment must be viewed from the perspective of the worker (*Shamoon v Chief Constable of the RUC 2003 ICR 337 HL*). For example, there did not necessarily have to be any physical or economic consequences for there to be a detriment. An unjustified sense of grievance cannot amount to a detriment: see also *Shamoon*.

121. Examples of detriment can include suspension, disciplinary action, moving the

whistle blower as in the case of *Merrigan v University of Gloucester ET 1401412/10* and *Keresztes v Interserve FS (UK) Ltd ET 2200281/16*. It can also include being subjected to performance management as in the case of *Chief Constable of West Yorkshire Police v B and anor EAT 0306/15*.

122. The Tribunal must deal with the test of causation in the following order:

■was the worker subjected to a detriment by the employer/ worker/ agent?
■Was the worker subjected to a detriment because they made a protected disclosure?

123. This is what section 48 of the ERA 1996 says:

"48 Complaints to employment tribunals

(1) An employee may present a complaint to an [employment tribunal] that he has been subjected to a detriment in contravention of section 43M, 44(1), 45, 46, 47, 47A, 47C(1), 47E, 47F or 47G.

…

(1A)A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B

…

(2) On a complaint under subsection (1), (1XA), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(5) In this section and section 49 any reference to the employer [includes—

[(a) where] a person complains that he has been subjected to a detriment in

contravention of section 47A, the principal (within the meaning of section 63A(3));

(b) in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent]."

124. The necessary link between a protected disclosure and any detriment relied upon is established if the former was a material influence upon the latter: see *Fecitt v NHS Manchester [2012] ICR 372 CA*.

125. Section 123 of the ERA provides that a compensatory award shall be: "*such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the*

employer". The objective of the award is "*to compensate, and compensate fully, but not to award a bonus*": (see *Norton Tool v Tewson [1972] ICR 501, per Sir John Donaldson at 504*).

Parties' Submissions

126. Parties made detailed written and oral submissions which the Tribunal found to be informative. The Tribunal read both parties' representative's submissions and referred to the authorities cited therein. References are made to essential aspects of the submissions and authorities with reference to the issues to be determined in this judgment, although the Tribunal considered the totality of the submissions and authorities from the parties.

127. Parties referred the Tribunal to previous cases that have been decided which the Tribunal found to be informative including but not limited to the following:

No	Case name	Citation
1	*Hindle v Percival Boats Ltd*	*[1969] 1 All ER 836*
2	*Chapman and others v Goonvean & Rostowrack China Clay Ltd*	*[1973] 2 All ER 1063*
3	*Moon v Homeworthy Furniture (Northern) Ltd*	*[1976] IRLR 298*
4	*Williams v Compair Maxim Ltd*	*[1982] IRLR 83*
5	*Stacey v Babcock Power Limited*	*[1986] ICR 22*
6	*Dyke v Hereford and Worcester County Council*	*[1989] ICR 800*
7	*Taymech v Ryan*	*UKEAT/663/94*
8	*R v British Coal Corp and SoS for Trade and Industry, ex p Price*	*[1994] IRLR 72*
9	*Rowell v Hubbard Group Services Limited*	*[1995] IRLR 195*
10	*Hendy Banks City Print Limited v Fairbrother and others*	*UKEAT/0691/04/TM*

11	*W Brewin and Co v Marvin*	*UKEAT/0074/09 (EAT)*
12	*Cavendish Munro Professional Risks Management Ltd v Gedul*	*UKEAT/0195/09*
13	*Dabson v Cover & Sons*	*UKEAT/0374/10*
14	*Lovell v Northampton College*	*ET 1201910/10*
15	*Nicholls v Rockwell Automation*	*UKEAT/0540/11*
16	*Watkins v Crouch (t/a Temple Bird Solicitors)*	*[2011] IRLR 382*
17	*Fecitt and ors v NHS Manchester (PCAW intervening)*	*[2011] ICR 476 (CA)*
18	*Capita Hartshed Limited v Bayard*	*[2012] ICR 1256*
19	*Swinburne and Jackson LLP v Simpson*	*UKEAT/0551/12*
20	*Stephenson College v Jackson*	*UKEAT 0045/13*
21	*Soh v Imperial College of Science, Technology and Medicine*	*EAT 0350/14*
22	*Newbound v Thames Water Utilities Limited*	*[2015] IRLR 734*
23	*Kilraine v London Borough of Wandsworth*	*[2018] EWCA Civ 1436*
24	*Williams v Michelle Brown*	*UKEAT/0044/19*
25	*Gallacher v Abellio Scotrail Limited*	*UKEATS/0027/19*
26	*Simpson v Cantor Fitzgerald*	*[2021] ICR 695*

Discussion and decision

128. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Detriment

129. In the list of issues at paragraph (6) (viii) of the Case Management Order dated 19 October 2020 the alleged detriment is set out as follows:

"(viii) Was the claimant subjected to a detriment because he made protected disclosures? The detriment relied on is being kept on enforced and

unnecessary leave of absence."

130. The Tribunal found as a fact that the claimant's suspension on paid leave of absence occurred. He was placed on paid suspension for a period of 4 weeks from 25 November 2019, as confirmed in the letter to him dated 22 November 2019.

131. The Tribunal accepted that being placed on a leave of absence could amount to a detriment. However the detriment relied on by the claimant was being kept on enforced and unnecessary leave of absence.

132. The Tribunal accepted that the claimant was placed on enforced leave of absence. The period of leave was not agreed with the claimant, and the respondent suspended the claimant.

133. However, the Tribunal did not accept that the claimant being placed on a leave of absence in the circumstances was not necessary. There was a chain of events following which the respondent concluded that the claimant should be placed on leave. This included the fact that the claimant was asked to consider his position, his redundancy and to seek advice (including in relation to a possible resolution). The Tribunal noted that in paragraph 30 of Mr Lewis's witness statement that the claimant was said be in an emotional state during the meeting in which he was informed of his suspension, there were concerns that if he returned to work he may seek to ascertain the identity of staff members who made complaints and approach them in circumstances where they had already expressed being fearful of him. The Tribunal found that this was a credible explanation of the reasons why the claimant was placed on paid suspension.

134. It is not uncommon for employer's to place an employee paid on leave in these circumstances. Once again, it was not said that placing the claimant on paid leave itself was a detriment. The decision to place the claimant on paid leave by the respondent was made before any qualifying disclosures were made.

135. There was no evidence that the respondent conducted any review of the claimant's paid leave and the decision to keep him on paid leave. The Tribunal did not consider this to be unreasonable or unfair given the period upon which the claimant was on paid suspension. The claimant did not request his suspension to be reviewed. The Tribunal were unable to accept that the claimant 'being kept on enforced' leave amounted to a detriment given the circumstances.

136. Although only Qualifying Disclosure 1 and Qualifying Disclosure 2 were referred to on the agreed list of issues, the Tribunal also considered whether Qualifying Disclosure 3 was a further qualifying disclosure. The Tribunal found that all the claimant's disclosures namely Qualifying Disclosure 1, Qualifying Disclosure 2, and Qualifying Disclosure 3 (set out above in its findings of fact) were qualifying disclosures under s.43B(1)(b) and (d) for the following reasons. They were disclosures of information regarding a failure to comply with the respondent's legal obligations in the form of its duty regarding patient clinical safety and that the health and safety of patients was being or was likely to be endangered as a result of cancelling appointments. However the Tribunal did not accept that these matters were being or were likely to be deliberately concealed by the respondent and the claimant's evidence relating to the alleged concealment was not clear. There was no evidence of any actual or likely concealment by the respondent before the Tribunal.

137. The claimant had a reasonable belief that the disclosures he made tended to show a breach of the respondent's legal obligations and health and safety obligations.

138. The claimant had a reasonable belief that the disclosures were being made by him in the public interest as he believed that patient safety was being compromised. That group of people concerned was sufficiently wide to support the claimant's reasonable belief that the disclosures were made in the public interest.

139. The respondent's submissions state that the claimant's complaints were made after the claimant had been put at risk of redundancy and did not show a realistic danger to anyone's health and safety or that respondent was in breach of

a legal obligation or was likely to be. The respondent's submissions also state that the claimant could not reasonably have believed his disclosures were made in the public interest and that these were opportunistic complaints in which the claimant was seeking to stop his own redundancy and/or set up a whistleblowing claim to bring before the Tribunal. The claimant made the complaints after he was provisionally selected for redundancy, and he was suspended by the respondent on 22 November 2019 (with effect from 25 November 2019). There was no evidential basis to show that the claimant made his disclosures in an attempt to stop his redundancy or that he was seeking to set up a whistle blowing claim. His belief that the situation was not safe for his patients was communicated to Dr. Takaya in the telephone conversation on 24 November 2019 and Mr Lewis in the third meeting which took place on 22 November 2019, and it was clear that the interests of his patients substantially motivated him to make the disclosures.

140. Paragraph 6(iii) of the list of issues states that the claimant relies on his letters to the GMC and CQC on 28 and 30 November 2019, respectively in terms of making his protected disclosures. Clearly, the Tribunal were unable to find that those disclosures were disclosures to the claimant's employer under s.43C(1)(a) or (b) as neither the CQC nor the GMC were the claimant's employer nor did those organisations have legal responsibility in relation to the failures that the claimant complained of (the claimant did not assert anything other than the fact that any responsibility for the alleged failures by the respondent lay solely with the respondent).

141. The Tribunal considered whether the disclosures made by the claimant were made to prescribed persons under section 43F of the ERA 1996. The respondent accepted that the GMC and CQC are both prescribed persons

under section 43F of the ERA 1996 (regulations were made by the Secretary of State prescribing both the GMC and CQC under the *Public Interest Disclosure (Prescribed Persons) order 2014, Schedule 1*). As the disclosures were made to a person falling within s.43F of the ERA 1996 there is an additional requirement for the claimant to show that he believes the information and the allegation contained within it are substantially true. This is a higher standard than is required under s. 43B of the ERA 1996 and the respondent submits that the disclosures relied upon by the claimant fail at this hurdle.

142. The claimant submits that the distinction between (i) beliefs around what the information tends to show on the one hand and (ii) belief in the relevant failure on the other, is also important in analysing s. 43F. The claimant's submissions state that the claimant needs to have a reasonable belief that the information he disclosed is true, not that the underlying failure happened.

143. The Tribunal did not find the parties' submissions were clear in terms of the test to be applied under section 43F save that the parties' agreed that the GMC and the CQC were prescribed persons. The Tribunal having considered all the evidence, were able to conclude that the claimant believed that the information he disclosed at the material time was '*substantially true*.' Additionally the Tribunal considered that the respondent did not provide the claimant with any information, assurances, or substantial assurances that his patient safety concerns had been addressed during the course of his employment. There was no evidence of any handover having taken place in relation to the claimant's patients. In those circumstances the Tribunal concluded that the claimant reasonably believed that his disclosures were substantially true.

144. In any event the Tribunal found that the protected disclosures were made to Dr. Wada, Mr. Mitsuoka, Ms. Kato, Dr. Takaya, and Dr. Kodani by way of an email dated 02 December 2019, which included copies of the claimant's earlier letters that were sent to the GMC and CQC. The Tribunal considered this letter in context. The Tribunal were satisfied that there were disclosures

made in the letter dated 02 December 2019 to the claimant's employer under s.43C(1)(a).

145. There was some indication that a settlement may be possible with the claimant prior to making him redundant. Indeed Dr. Kodani was offered and accepted a settlement agreement with the respondent. The claimant was offered a package and he was asked to consider this during a 4-week period where he would remain on paid suspension. There was no evidence before the Tribunal that the claimant considered this package, made any counter proposals or that the respondent explored this with him further. There was no evidence to show that the failure to progress this matter on the part of the respondent was on the ground of the claimant's protected disclosures. The Tribunal considered why the 4-week window was not permitted to run its course. The Tribunal did not find that the reason for this was on the ground of the claimant's protected disclosures, and in any event this matter was not raised in the list of issues requiring to be determined.

146. It was not clear why the disclosures were not made to the respondent in writing at an earlier stage prior to 02 December 2019. The claimant indicated that he sought to raise his concerns with Dr. Takaya and his concerns were not addressed.

147. The claimant's submissions suggested that the claimant first attempted to raise these complaints with Dr. Takaya on 22 November 2019 and that having received no comfort from him, the claimant told the Tribunal that he consulted the *Speak up to Guardian Policy* before deciding to make the reports to the GMC and the CQC. This is not consistent with paragraph 96 of the claimant's witness statement in which he says that in accordance with the respondent's *Speak up to Guardian Policy* he initially called Dr. Kodani and then Dr. Takaya on 24 November 2019. The claimant did not consider that it was necessary to write to the respondent directly until 02 December 2019.

148. Even if the Tribunal had found that keeping the claimant on a period of paid leave was a detriment, the Tribunal could find no causal link between the protected disclosures made by the claimant and the respondent keeping the claimant on paid leave. There was no evidence of any acts and/or omissions by the respondent which would suggest that the claimant was treated differently after he made any protected disclosures. The protected disclosures the claimant relied on were made after the claimant was placed on paid leave of absence and no review of this decision took place by the respondent. The Tribunal did not accept that the respondent would seek to disadvantage the claimant by failing to lift the claimant's suspension because of those qualifying disclosures and there was no evidence to support this allegation.

149. The Tribunal rejected the claimant's submission that if the intention to dismiss the claimant came later than 02 December 2019, then maintaining the claimant's suspension became entirely unnecessary at that point. The Tribunal found that there was no review of the claimant's suspension. In any event, there was no evidence to show that any decision not to bring the claimant back into work was on the ground of the claimant's protected disclosures. Furthermore, the Tribunal concluded that the reasons for the claimant's suspension were multi factorial (the decision to suspend the claimant pre-dated the claimant's protected disclosures) and there was no evidence that these reasons ceased to exist prior to the claimant's dismissal.

150. The claim involving allegations of detriment must therefore fail and be dismissed.

Dismissal – s 103A ERA 1996

151. Having considered all the evidence before it, the Tribunal was persuaded that the reason for the claimant's dismissal was his redundancy. The claimant raised his concerns as set out in paragraph 136 above in relation to patient safety during the consultation process, albeit these were raised after his suspension and after the respondent had provisionally selected the claimant for redundancy. The Tribunal was not persuaded that the qualifying

disclosures made by the claimant were the reason or the principal reason for his dismissal because of those considerations and in light of the findings of fact set out above. Moreover, having considered the reasons advanced by the respondent for the claimant's dismissal, the Tribunal was persuaded that the reason for the claimant's dismissal was the claimant's redundancy. In their evidence before the Tribunal, the respondent's witnesses were adamant that the claimant's protected disclosures were not the reason or principal reason he was dismissed. The reason advanced were the claimant's role being redundant and the Tribunal accepted the respondent's evidence in this respect. Having accepted this evidence, the Tribunal were satisfied that the qualifying disclosures made by the claimant played no part whatsoever in relation to the respondent's decision to dismiss the claimant.

152. The Tribunal considered the fact that the respondent had stated that the claimant would be on suspension for a period of 4 weeks from 25 November 2019, however, the 4-week period was not concluded, and the claimant's employment ended on 11 December 2019. The Tribunal also considered the lack of response to the claimant's email of 02 December 2019, and all the other circumstances. The Tribunal did not accept that the reason or the principal reason for termination of the claimant's employment in these circumstances were the protected disclosures made by the claimant.

Unfair dismissal

153. The Tribunal referred to s98 ERA 1996, which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(1) and (2) of the ERA 1996. If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair. This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

154. The Tribunal referred to the definition of redundancy in s139(1) of the ERA 1996. That states that an employee is dismissed by reason of redundancy

if the dismissal is wholly or mainly attributable to the fact that their employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

155. The Tribunal considered the matters set out in *Safeway Stores plc v Burrell (above)*. The claimant was dismissed by the respondent, so the first element was satisfied.

156. It is also clear that the respondent had determined that it required to cut costs and that this would done by reducing wage costs. A conclusion was reached that the respondent's team of general doctors could operate with two less doctors. The requirement for employees to carry out work of a particular kind was accordingly expected to cease or diminish. The second test was, therefore, also satisfied.

157. The claimant submits that the Brexit vote took place in 2016 and that the respondent has pointed to no clear evidence that that caused a diminution in the UK Japanese population; the claimant also submitted that the only statistics that the Tribunal was referred to was those showing a population increase between 2016 and the date of the claimant's dismissal. The Tribunal was also referred to other evidence including newspaper articles provided by the respondent supporting the respondent's business case. The respondent submitted that the ONS figures showed that the number of Japanese people living in the UK has reduced significantly from approximately 41,000 to 24,000 since the Brexit vote took place.

158. We must not look behind the employer's decision or require it to justify how or why the diminished requirement has arisen provided that it was genuinely the reason for dismissal: *Moon v Homeworthy Furniture (Northern) Ltd [1976] IRLR 298*.

159. It was the respondent's case that a redundancy situation had arisen on the facts of this case as a result of the anticipated fall in business caused by Brexit. The respondent referred to the UK's Brexit decision on 23 June 2016 and the expectation that there will be a downturn in business in its letter dated 14 November 2019 which was sent to the claimant. The claimant accepted that there was a need for the respondent to downsize its business due to Brexit. He agreed with the 'business judgment' of the respondent during his call with Dr. Kodani on 24 November 2019 and he stated he understood the negative impact of Brexit on the respondent at the meeting on 18 November 2019. The Tribunal accepted that the second test was therefore satisfied.

160. In relation to the final point, the Tribunal was satisfied that the claimant's dismissal was wholly caused by the fact that the respondent determined that, to reduce costs, the number of staff conducting work as a general doctor would require to be reduced. The Tribunal were accordingly satisfied that the claimant's dismissal occurred because of a genuine redundancy situation. The Tribunal were also satisfied that the claimant was dismissed solely due to redundancy.

161. The Tribunal then considered s98(4) of the ERA 1996. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee.

162. This should be determined in accordance with equity and the substantial merits of the case. The guidance given in cases such as *Iceland Frozen Foods Limited v Jones [1982] IRLR 439* that the Tribunal must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent was considered.

163. In considering whether the respondent in this case acted reasonably in treating redundancy as a sufficient reason for dismissing the claimant, the Tribunal had regard to the guidance laid down in *Polkey* in relation to whether the respondent acted reasonably in treating redundancy as sufficient reason for dismissal. Taking each factor in turn, the following conclusions were reached.

Pool of employees

164. The respondent chose to include eleven staff (all of whom were general doctors) in one pool and it was proposed to reduce the team of general doctors to nine employees. The list of issues erroneously refers to there being eleven doctors and the claimant in addition to the eleven doctors.

165. It was the respondent's decision to include workers who were general doctors within the claimant's pool. The claimant submitted that no enquiry was made in relation to the hours worked by the doctors, various side functions of any doctors, the doctors' specialisms were not considered, and the claimant being the only doctor who could work with non-Japanese patients, all of which were not factored into the respondent's decision in terms of the pool. The respondent's position was that these matters were not good reasons to leave the claimant out of the selection pool.

166. The Tribunal considered that it was not outside of the range of reasonable responses to include the claimant in the pool. It is clear from the Organisation Chart that all of the GPs were included in the pool. This is a an entirely reasonable pool for a redundancy exercise of this nature.

167. However the respondent's solicitor told the claimant during the meeting on 21 November 2019 that the pool was decided according to English law, and that '*you select people with the same job title in the same pool*.' The respondent's position meant that there was little or no room for an effective consultation to take place in relation to the redundancy pool.

168. The respondent determined that eleven doctors would be included in the pool, and that two doctors would be made redundant. It was never made clear whether the two doctors will be two out of eleven of the doctors in the pool or two full time equivalent doctors. This matter could have been explored further and clarified if consultation in relation to the proposed redundancies and the selection pool had been conducted with employees including the claimant.

Consultation

169. The respondent held meetings with employees including on 18 and 21 November 2019 with a view to conducting consultation. Due to the number of employees at risk of redundancy (11) it was not necessary to appoint employee representatives.

170. The respondent conducted some consultation with employees and limited consultation documents were prepared and shared with employees. The claimant was provided with a list of the selection criteria and his scores in relation to these.

171. The summary of the complaints that appeared in the Bundle was not provided to the claimant until 5 November 2020, having been prepared on 18 October 2020. These were based on the manuscript notes and Ms. Bramich's recollections. The claimant's representative points out that the contents of the summary have very little basis either in the manuscript notes or in Mr. Lewis's notes disclosed the week before trial, a copy of which appears in the Hearing Bundle. It is not clear why this was not provided to the claimant during the redundancy process, to enable the claimant to be consulted and to comment in relation to their content. The Tribunal considered that this was an important part of natural justice and a fair process.

172. There was little consultation on the pool and the selection criteria, and the respondent did not furnish the claimant with any or any sufficient details of the same to enable a genuine consultation to take place and his views to be considered. There were no detailed definitions provided in relation to the selection criteria. Some of the selection criteria were not entirely clear, for example, "no complaints by staff members" and "no complaints by patients" could either refer to the number of complaints received, or no complaints being received. Had a

reasonable level of consultation been conducted, these matters could have been clarified and indeed addressed.

173. In relation to teamwork, the claimant were not provided with any sufficient or reasonable particulars of the complaints which were relied on from his peers.

174. The details provided in relation to patient complaints to the claimant were not clear and he was not furnished with sufficient particulars to enable him to challenge or to question these.

175. The respondent did not make sufficient use of the appraisal material that it had in its possession or control.

176. Despite the claimant raising his concern in writing on 02 December 2019, there was no or no sufficient consultation on Dr. Kashima (and his intention to leave the respondent's employ and any impact this would have on the redundancy process or whether the claimant's redundancy could have been avoided).

177. The Tribunal was not provided with any evidence to show that there was any consultation in terms of how redundancies could be avoided either at the outset of the decision to make redundancies or at any other time during the redundancy process.

178. The claimant's redundancy was confirmed by a letter sent to him on 11 December 2019. In view of the claimant's unanswered enquiries, the respondent should have granted a short extension of the consultation period to enable a proper and reasonable consultation to take place in relation to matters such as Dr. Kashima's employment ending, the selection criteria and the information that the respondent was relying on. The respondent's approach to consultation given all the circumstances was therefore outside the band of reasonable responses.

Selection criteria and its application

179. In relation to the method of selection and the selection criteria used, the Tribunal found that these were fair and objective.

180. The selection criteria were provided to employees, including the claimant in a letter dated 14 November 2019.

181. There were no substantive concerns raised by the claimant during the redundancy process in relation to any belief that the criteria used were not fair and objective.

182. Each member of the pool was scored against the same eight criteria that was listed in that letter.

183. There was insufficient clarity in terms of who determined the claimant's scores. It was also not clear whether the claimant received any or any adequate feedback from the person who conducted his scoring. There was no evidence that the claimant challenged or had any real opportunity to challenge his scores in any detail at the consultation meeting.

184. At the consultation meeting on 18 November 2019 the claimant asked how the scoring was conducted and he was told it was Dr. Wada's decision who was being advised by Mr. Mitsuoka on the commercial side, whereas Ms. Kato would provide data and information, and Mr. Lewis would check whether the scores were supported by the data. He said the HR documents including the results of the appraisals would be used. The Tribunal was told by the respondent's witnesses that in fact the respondent relied on information which was not included in the appraisals (information which was not provided to the claimant during the redundancy process).

185. During the 18 November 2019 meeting, the claimant asked about whether the scores would be weighted. The claimant was told that there will be no weighting. No explanation or reasoning was provided to the claimant in relation to this matter.

186. Apart from teamwork, staff complaints and patient complaints, the claimant scored full marks in relation to the remaining five criteria. The Tribunal noted that disciplinary records was included as one of the eight criteria, but the respondent conceded that it did not have any disciplinary records and all employees scored maximum marks in respect of this.

187. The claimant challenged his score in relation to patient complaints, staff complaints and teamwork.

188. The claimant had an appraisal which provided assessment of the claimant's teamwork (in his recent appraisal he scored three out of five). This was used in conjunction with notes that were made by Mr. Lewis in relation to certain incidents. Mr. Lewis accepted that he should have obtained more details about the incidents. Mr. Lewis stated that he would not use this again in a future redundancy exercise.

189. The claimant asked for evidence in relation to the respondent's scoring on teamwork and he was told that in due course if he instructed a lawyer, this would be provided. It was not clear on basis the respondent expected the claimant to instruct a lawyer and the Tribunal did not consider that any reasonable employer would have responded to the claimant's request in this manner.

190. In terms of staff complaints, one point was deducted for each complaint that was received in relation to an employee. None of the complaints were produced to the claimant prior to his redundancy. The summary of complaints that the Tribunal were referred to was not provided to him until 05 November 2020. The claimant disputed the complaints during the Tribunal hearing, although he was not able to dispute these fairly during the redundancy process as he was not furnished with any or any sufficient particulars. These complaints were not referred to on the claimant's appraisal.

191. The claimant also contends that the scoring in relation to the number of patient complaints was not conducted fairly. The respondent made no attempt during the redundancy process to advise the claimant what type of complaints would be taken into account, and any threshold in relation to seriousness. The respondent did not put the complaints and particulars in respect of these to the claimant (it is not clear why this did not take place given that the respondent kept records of complaints), the claimant was not given an opportunity to comment on the complaints, and therefore the respondent was not able to give consideration to the claimant's position in relation to the complaints made against him and what impact (if any) this should have had in relation to his scores. Although the respondent followed

the same process for each employee, as the claimant appeared to have received more complaints, the failure to give the claimant an opportunity to comment on the complaints recorded against him, had a more protracted impact on the claimant. Dr. Otsu in comparison by way of example worked only half a day per week, so he could not be expected to receive the same number of complaints and the impact of this on him may indeed be fairly minimal. The absence of any appeal meant that the claimant did not have any opportunity to challenge his scores or their reasonableness at a later stage in the process.

192. It is the respondent's case that Dr. Wada personally reviewed the Complaints File for the period from November 2017 to October 2019 and there were just four patient complaints contained within it (3 against Dr. Koh and one against Dr. Takaya). There was a further complaint against Dr. Kodani which was not contained in the Complaints File for the reasons set out at paragraph 12 of Dr. Wada's Supplementary Witness Statement bringing the total complaints in the relevant period up to five. The respondent states that each of those five complaints were considered in allocating scores to doctors, and that Dr. Takaya and Dr. Kodani lost a mark for each complaint against them, and Dr. Koh lost three points because there were three complaints against him. The respondent notes that even if all of the incidents raised by Ms. Yazaki (paragraph nine of her witness statement) were valid ones which were sufficiently serious it would not have influenced the outcome of the process.

193. The claimant states that that Ms. Yazaki saw additional complaints in minutes that were circulated internally and the fact that these complaints may not have been in any Complaints File is testament to the respondent's confused position on record keeping. The Tribunal considered the nature of Ms. Yazaki's role and the fact that she was not present in the meetings in question.

194. The Tribunal accepted that the scoring criteria was objective, but the Tribunal did not accept that the process put into place considered as a whole was fair and reasonable and it was not open to a reasonable employer to use and apply the respondent's selection criteria in this manner.

195. Thus, the Tribunal found that the scoring process was not within the band of reasonable responses. The Tribunal had in its mind that its task is not to subject the marking system to microscopic analysis or to check that the system properly operated but the Tribunal must satisfy itself that a fair system was in operation (paragraph 25 of *E-Zec Medical Transport*). The Tribunal was not satisfied that a fair system was operated in the circumstances.

Availability of any suitable alternative employment

196. There were no redeployment opportunities for the claimant within the respondent's organisation. The claimant's submissions do not refer to any employment that he contended was suitable and available at the material time within the respondent's business. The respondent contends in its submissions that no new doctors have been appointed at the respondent since the claimant's dismissal.

197. Dr. Kashima's role (who was a part time doctor and a paediatrician) was vacant and the respondent started to recruit into this role on 04 February 2020. The Tribunal considered that the claimant did not have a speciality in paediatrics. In any event the paediatrics advert was not placed until after the claimant was made redundant. The role was also part time, and the claimant did not inform the respondent that he was willing to work on a part time basis.

198. Although, there was no attempt to discuss with the claimant why he could not be offered or why he could not apply for any other role, such as any paediatric role with the respondent, the Tribunal considered that the claimant did not have a speciality in this area.

199. The claimant did not contend that there was any specific role available in the UK or abroad that was suitable alternative employment that should have been considered by the respondent.

200. There were accordingly no steps which the respondent ought reasonably to have taken to avoid or minimise redundancy by redeployment within its own organisation.

Consideration of range of reasonable responses and fair procedure

201. The Tribunal did not conclude that the respondent's situation was that "exceptional case" (*Polkey v AE Dayton Services Limited [above]* considered) for the respondent to have reasonably concluded that fulfilling its consultation obligations fully would be utterly useless or futile.

202. Based on the evidence from the claimant and the respondent's witnesses, the Tribunal found that the respondent did not even apply its mind to the question of conducting consultation that was reasonably required. The respondent did not produce any contemporaneous documents or other evidence to show that it had considered consulting its staff in relation to the pool itself, the selection criteria, and the information it would provide to staff as part of the redundancy process reasonably and properly but had decided against that, because it had concluded that it would be a futile exercise. Therefore, the Tribunal concluded that the respondent could not have reasonably concluded that consultation would be futile.

203. It did not matter how the Tribunal, or another hypothetical reasonable employer would have conducted itself in that situation. The test was whether in the circumstances the respondent's decision to dismiss the claimant without full and reasonable consultation falls within or outside the so-called range of reasonable responses. If it falls within, the dismissal is fair, if it falls outside - it is unfair. In those circumstances it did fall outside the range of reasonable responses because, although the respondent was mindful of the likely significantly reduced demand for its services, it still had to reasonably consider the impact that dismissal would have on its staff. Even if the consultation process would have been unlikely to have changed the ultimate outcome, it was outside the range of reasonable responses to dismiss the claimant without giving him a reasonable opportunity to be consulted and to express his views and make suggestions. The respondent did not give reasonable or proper consideration to the impact of its decision on the claimant and his employment and the claimant's dismissal was accordingly unfair.

204. The Tribunal considered that the respondent's failure to consult in relation to the pool, selection criteria, and failure to provide the required information to the claimant in relation to teamwork, patient complaints and staff complaints was

contrary to the requirements of natural justice and meant that the claimant did not have a reasonable opportunity to challenge the basis of the respondent's decision to make him redundant. The Tribunal were satisfied that no reasonable employer would have failed to provide the claimant with information relating to patient and staff complaints (and teamwork), and to consult him on the pool and the selection criteria. The Tribunal considered the ACAS Guidance which requires that employers consult in relation to these matters meaningfully and that employers keep written evidence accordingly. The respondent also showed insufficient regard for its obligations to keep records during the redundancy process, including but not limited to records relating to its scoring process, the redundancy pool and key decisions that were made in relation to the selection criteria and the claimant's scores against the criteria.

205. The claimant's representative states that procedure is fundamental to the fairness of a dismissal. Choudhury P's dicta at [20] in the recent case of *Gallacher v Abellio Scotrail Limited (2020) UKEATS/0027/19 (4 Feb 2020) (EAT)* are entirely apposite:

'Such procedures, including giving the employee an opportunity to make representations before dismissal and to appeal against any dismissal, are fundamental to notions of natural justice and fairness and it would be an unusual and rare case where an employee would be acting within the band of reasonable responses in dispensing with such procedures altogether.'

and that there is no good reason why there could or should not have been an appeal. The claimant also submits that the respondent's explanations for holding no appeal do not come anywhere close to justifying the lack of an appeal and in particular, Mr. Mitsuoka could have conducted the initial process with an appeal to Dr. Wada or vice-versa. The respondent submitted in oral submissions that the respondent was a small organisation, no one else could have conducted the appeal except for a costly external consultant who would have had no knowledge of the respondent's organisation and that the failure to offer an appeal was only one factor to be considered in terms of the overall determination of fairness by the Tribunal.

206. In light of the above and considering all the circumstances, the Tribunal concluded that the failure to provide the claimant with a right of appeal was unreasonable and rendered the claimant's dismissal unfair. The Tribunal considered the process followed as a whole and the ACAS Guidance which states that it is good practice to offer employees the chance to appeal if they feel they were selected unfairly for redundancy. The Tribunal were satisfied that no reasonable employer would have declined to provide the claimant with an opportunity to appeal against the decision to make him redundant in all the circumstances. The Tribunal also considered that a right of appeal may have provided the respondent with an opportunity to address the shortfalls and inherent unfairness in terms of the redundancy process that was followed, and indeed, a forum within which the claimant could have vented his dissatisfaction with the decision to dismiss him.

Remedy

207. It was agreed at the outset of the hearing that remedy will be decided at a separate hearing in the event that the claimant's claims were successful. The Tribunal therefore did not hear any argument on the question of remedy, and that matter will therefore be restored before the Tribunal. The Tribunal determines that it is necessary to list this case for a remedy hearing by CVP with a time estimate of 1-day (to include reading time, evidence, submissions, and judgment if appropriate) before the same Tribunal on the first open date on or after 1 February 2022. The Tribunal directs that **by not later than 12 noon on 19 January 2022** the parties shall:

207.1 Notify the Tribunal of their dates of availability for a 1-day remedy hearing to be listed between February – June 2022.

207.2 Notify the Tribunal if the time estimate of 1-day is not likely to be adequate for the just disposal of matters relating to remedy and (if so advised) their time estimate(s).

207.3 Send to the Tribunal a draft timetable to be agreed if at all possible to ensure that the remedy hearing can be concluded within the time estimate.

208. The Tribunal further directs that **by not later than 4pm on 24 January 2022** the parties shall:

208.1 Send any additional documents to the Tribunal relating to remedy in an agreed bundle in electronic form and three paper copies (such documents including but not limited to any updated Schedule of Loss and mitigation documents).

208.2 Send any witness statement relating to remedy to the Tribunal and to each other at the same time in electronic form and three paper copies.

Conclusion

209. The claimant's claim that the respondent has unfairly dismissed the claimant succeeds and the issue of remedy shall be determined at a 1-day CVP hearing for the reasons set out above. The claimant's claims made pursuant to section 103A of the ERA 1996 and for detriment on the ground of having made protected disclosures are dismissed.

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Employment Judge B Beyzade

Dated: 14 January 2022

Sent to the parties on:

14/01/2022..

For the Tribunal Office