THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Ms P McNeill	**AND**	**NCG Corporation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 6-10 February 2017**

Before: **Employment Judge A M Buchanan (sitting alone)**

Appearances

For the Claimant: In person
For the Respondent: Mr G Vials - Solicitor

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The claim of automatic unfair dismissal by reason of protected disclosure fails and is dismissed.

2. The claim of ordinary unfair dismissal is well founded and the claimant is entitled to a remedy.

REASONS

Preliminary matters

1. By a claim form filed on 7 September 2016 the claimant brought a claim against the respondent for automatic and ordinary unfair dismissal. The claim for automatic unfair dismissal was advanced by reason of the claimant having made a protected disclosure.

The claimant relied on an Early Conciliation Certificate on which Day A was shown as 9 August 2016 and Day B 18 August 2016.

2. By a response filed on 6 October 2016 the respondent denied all liability to the claimant.

3. The matter came before Employment Judge Hunter on 3 November 2016 at a private preliminary hearing for case management and Orders were made. The issues in this matter were summarised and are set out below.

4. At the hearing it became necessary to issue a witness order to secure the attendance of the respondent's witness Robert Kleiser at a time convenient to the Tribunal rather than at the convenience of the witness. Accordingly this witness appeared on 8 February 2017 in answer to a witness order issued on 7 February 2017. At the conclusion of the hearing there was insufficient time to deliberate and announce Judgment. Accordingly I reserved my decision which is now issued with full reasons in order to comply with Rule 62(2) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Witnesses

5. In the course of the hearing I heard from the following witnesses:-

Respondent

5.1 Lynne Elizabeth Griffin ("LG") - Group HR and Organisational Development Director.

5.2 Deni Chambers ("DK") - Director of Creative and Digital Industries.

5.3 Barbara King ("BK") – Vice Principal Corporate Services.

5.4 Robert Paul Stephen Kleiser ("RK") – former Interim Vice Principal.

5.5 Diane Thurston ("DT") – Director of Education Services.

5.6 Jo Powell ("JP") – Director of Finance Planning and Resources.

5.7 Amanda White ("AW") - Director of HR for Newcastle College.

Claimant

5.8 The claimant.

Documents

6. I had before me a bundle of documents extending to some 384 pages. I have made reference in the course of my deliberations to those documents to which I was referred in witness statements or during the course of the hearing. Any reference in this

Judgment to a page number is a reference to the relevant page within the agreed bundle.

The Issues

7. At the start of the hearing issues were agreed with the parties and are now as follows:-

Public interest disclosure claim

7.1 Did the claimant disclose information to the respondent? The claimant asserts that at a meeting with LG on 6 June 2016, she told LG that the respondent college was using public funds to employ the friends and family of appointing officers to posts in circumstances where the appointees were not the best people for the job.

7.2 Did the claimant have a reasonable belief that the information disclosed showed or tended to show that the respondent was in breach of a legal obligation to which it was subject? The claimant asserts that the respondent is under an obligation to adhere to the Joint Audit Code of Practice which requires the auditors to provide assurance to the Skills Funding Agency and the Education Funding Agency that public funds paid as grants have been used with regularity and propriety. Propriety involves the proper use of public funds.

7.3 If so did the claimant reasonably believe that the disclosure was made in the public interest? The claimant asserts that she believed that the disclosure was in the public interest because it was involving the misuse of public funds.

7.4 If so was the disclosure made to the claimant's employer?

Unfair dismissal complaint

7.5 Was the making of any proven protected disclosure the principal reason for the claimant's dismissal?

7.6 Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was a protected disclosure?

7.7 Has the respondent proved its reason for the dismissal, namely redundancy or some other substantial reason?

7.8 If not, does the Tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the dismissal?

7.9 In the event that the protected disclosure was not the reason for the dismissal, has the respondent shown that there was a potentially fair reason for dismissal and, if so, did the respondent act within the band of reasonable responses in treating that reason as sufficient to dismiss? In this case the respondent asserts the reason for dismissal was redundancy and that it acted reasonably in its warning of and consultation with the claimant, in the method of selection of the claimant (namely competitive interview) and in its search for alternative employment for the claimant.

Findings of fact

8. Having considered the evidence both oral and documentary and in particular the way in which evidence was given to me and the cross-examination of the witnesses, I make the following findings of fact on the balance of probabilities:-

8.1 The claimant was born on 13 December 1967. The claimant was appointed to the role of Manager – Operations at Newcastle College ("the College") on 6 May 2013. The claimant was dismissed by the respondent effective from 31 July 2016. The claimant began work in the School of English and Maths in May 2013. In 2014 that school became known as the School of Access to Learning ("the School"). Prior to working in further education, the claimant worked as a teacher of mathematics to A level standard.

8.2 The College is part of a group of colleges controlled by the respondent. There is a chief executive officer of the respondent to whom the various principals of the colleges in the group are accountable. The College is by far the largest college in the group. Its administrative resources are very considerable indeed. The Principal ("the Principal") of the College at all material times was Tony Lewin.

8.3 In April 2014 the claimant was interviewed for the position of Director of the School and came a close second to the person who was appointed, namely Liz Kitson. On 23 July 2014 the claimant met with Liz Kitson and was told that her role within the School had been provisionally selected as redundant. The claimant was subsequently offered the role of Section Manager for Adult and Community Learning within the School. She was not interviewed and did not actually apply for the role but was appointed to it and that was the role which the claimant was undertaking at the time of the events which led to her dismissal. At the time of her dismissal the claimant had some 50 teachers working in her section and she managed a budget in excess of £2 million annually. The claimant's responsibilities included curriculum planning, continuous quality improvement, business planning and performance management. The claimant was responsible for adult ESOL, adult employability, access to higher education and the English and Mathematics programmes for adults including GCSE.

8.4 The respondent has (page 56) a redundancy and redeployment policy ("the Policy") but the Policy is not contractual. The Policy states as a key principle:-

"*Where the substantive duties of the post holder are wholly or mainly the same in the new structure as they were in the old, and where no other staff in the same role are displaced, the member of staff should be appointed to the position in the new structure automatically without competition. Where there are differences in the post as a new role, a competitive selection process will be conducted*".

At section 5 of the Policy the selection method is stated as "*including but not limited to desktop selection, competitive interviews or an assessment meeting*". The Policy states at section 7 that during any consultation period, every effort will be made to seek alternative employment within the organisation.

8.5 The respondent has (page 66A) a disclosure policy ("the Disclosure Policy") which seeks to protect the interests of staff who raise genuine concerns about malpractice in the organisation. At section 2.2 (page 66E) *"staff are encouraged to raise concerns if*

they reasonably believe that an act of malpractice is being committed or is likely to be committed. Prevention is as important as reporting past or ongoing acts". The Disclosure Policy states that concerns may be raised orally or in writing and, if orally, a manager will document the meeting and a copy of the concerns raised should be forwarded to the employee to confirm that facts have been represented as they had been raised and that it is a true and complete understanding of concerns. The Disclosure Policy goes on to record that the manager should immediately inform both their director and the divisional head. The Disclosure Policy continues:-
"*The Divisional Head will notify an appropriate Executive who will determine what further action needs to be taken and inform the Group Chief Executive. The internal notification process provides guidance for executives on routing, managing and reporting concerns. In any cases of significant fraud, suspected fraud or irregularity the Group Chief Executive will inform the chair of the audit committee and where appropriate under the joint audit code of practice, the chief executive of Skills Funding as soon as practicably possible and agree the most appropriate course of action …*".

8.6 The claimant carried out her duties efficiently and there were no performance or disciplinary concerns raised with the claimant at any time during her employment with the respondent.

8.7 A restructure of the College occurred in 2016 following a review of operational practice, financial climate and observations made by the Principal that the College was not operating as efficiently as it could be. The then existing structure of the College was not set up to respond to changes in funding and policy which were affecting the sector at that time particularly with regard to making the most of the respondent's then new degree awarding powers and in preparation for the then imminent changes to technical education proposed by the Sainsbury report. The purpose of the restructure was to create a more coordinated approach to teaching and training across the College.

8.8 In 2016 a business case was produced by the Principal setting out the rationale for the restructure of the College which effectively would achieve a reduction of the annual wage bill of £5 million to £4 million. The rationale for Phase I of that restructure is set out in the business case (page 84). Charts were produced showing the existing departmental structures. The relevant chart for the claimant (page 92C) showed the School being headed by a Director of Access to Learning supported by an Operations Manager and a Quality Manager who in turn were supported by Section Managers. The claimant was one of the Section Managers reporting to the Quality Manager. That role (page 87) was shown as becoming one known as Head of Adult Education in the restructure. It was explained that the restructure was to be done in two phases – phase I and phase II. Phase I would involve managers of the College and would put into place a new management structure and the managers thus appointed would then manage the restructure at Phase II which would involve the majority of the staff of the College. Those affected by Phase I numbered around 94 people and those affected by Phase II numbered around 620 people. Notwithstanding that division, certain members of staff who would be part of the Phase II restructure were allowed to take voluntary redundancy in April and May 2016 before Phase II had got underway. The claimant sat at the lower end of the management team and close in terms of salary to members of staff who would be dealt with as part of the Phase II restructure.

8.9 The claimant attended a presentation (pages 95-114) by the Principal on 14 April 2016 which sought to explain the proposals for the restructure of the College. Together with many members of the management team of the College, the claimant was very shocked not to say upset at the news imparted through that presentation. The presentation was followed by a further presentation by members of the HR team of the College which set out how the restructure was proposed to take effect (pages 114A-114P). It was anticipated that Phase I would complete by 1 August 2016 at the latest and Phase II would start in June 2016 and be complete by November 2016. The claimant was told that all documents relevant to the restructure would be accessible on "*Sharepoint"* and that a 30 day collective consultation period was appropriate and would commence on 12 April 2016. Applications for voluntary redundancy were to be considered. The proposed selection process was said to be under consultation with trade union representatives and a new e-mail address for the Principal know as "*Ask Tony*" was set up in order that staff could communicate directly with the Principal to raise any questions they had in respect of the matter. The HR lead for the School was Ron Smith.

8.10 The claimant received a letter dated 13 April 2016 (pages 115-117) confirming the details of the presentation and that her post was at risk of redundancy. She was invited to a first individual consultation meeting on 14 April 2016 at 3:00pm where she would meet with her Line Manager Liz Kitson and Ron Smith of HR.

8.11 That meeting duly took place on 14 April 2016, immediately after the presentations from the Principal and HR. During that meeting, which lasted no more than 20 minutes, the claimant said very little because she was in a state of shock. She accommodated the wishes of her colleagues to have the meeting take place as quickly as possible in order that that particular box could be ticked. The minutes of that meeting (pages 118-122) show that the claimant took no active part in it. In respect of redeployment or alternative roles, the claimant was advised that all vacancies would be advertised in the usual way and that she would need to apply for any vacancy in the usual way. The notes of the meeting state: *"No primacy will be given as such for these roles and the short-list/interview process will continue as normal, however, let your HR representative know as they can seek out updates regarding the role, can make the recruiting manager aware of the situation and can prevent any other offers being made until the individual has been considered".*

8.12 Members of staff of the College were invited to submit counter proposals in relation to the restructure and a great number were received including one from the claimant (page 123) which was not deemed acceptable by the respondent's managers.

8.13 On 29 April 2016 (page 128) the claimant received an e-mail from the Principal which begins "*Currently we are proposing that as part of the selection process, candidates will have an interview during which we will also be requesting a presentation …".* That e-mail included for the claimant details of the presentation topics on which a ten minute presentation would be required and those topics are set out at page 128A.

8.14 On 3 May 2016 (page 129) the claimant wrote to the Principal under the "*Ask Tony*" e-mail address enquiring in the following terms:-

"*Will members of the interview panel be asked to declare any family relationships/personal relationships/friendships they may have with people they are interviewing? Is there an appeals process if you have evidence that you have not been treated fairly by the person interviewing you because another candidate is an old friend?*"

The Principal replied on the same day to the effect that interviews would be held following protocols already in place and in relation to her second question the claimant was referred to HR.

8.15 A further presentation (page 130) took place by the Principal and HR on 4 May 2016. The claimant was uncertain as to whether or not she attended that presentation but I find that she did. The presentation from the Principal set out the matters which had changed since the previous presentation and noted that 54 counter proposals had been received. The revised structure (page 144) showed that there was to be a Director of Education Services followed by a Head of Adult Education followed by a Head of English and Maths followed by a Head of Education and then a Head of Access to Further Education supported by a 14-16 Support Manager and a Learning and Development Manager. That structure was broadly repeated in other areas.

8.16 On 5 May 2016 (page 147A) the Principal wrote to the staff including the claimant making plain the new structure was to be effective from 1 August 2016 and confirming that nine people had requested voluntary redundancy which had all been accepted. The HR briefing which the claimant attended on 4 May 2016 indicated that the selection process for the positions in the new structure would be by way of an expression of interest form, a supporting document and an interview process including a presentation (page 147i). It was indicated that interviews for the roles in the management structure would be in the second half of May 2016 and that for those applying for multiple roles which were broadly the same would only be interviewed once but there would be additional "*specific questions that will cover technical aspects for each role. The duration of the interview may therefore vary*" – page 147M. The claimant was advised that a presentation had to be prepared lasting no more than 10 minutes with a maximum of eight slides. A revised timetable was provided.

8.17 Between that date and the beginning of the interviews, the job descriptions and person specifications for the new roles within the structure were posted on S*harepoint* and so it was that, having reviewed all the new job descriptions, the claimant came to complete an expression of interest form on 23 May 2016 in which she applied for six positions namely Head of Adult Education, Head of Education, Head of Business, Head of Digital Computers, Head of Access to Further Education and Planning and Resource Manager. In the event the claimant had one interview on 25 May 2016 for the first five positions and a further interview on 8 June 2016 for the Planning and Resource Manager which was a very different position to the other five.

8.18 Having completed the expression of interest form, the claimant received a telephone call at around 2:00pm on 24 May 2016 from a newly appointed Senior Manager DC inviting her to an interview on the following day 25 May 2016 at 10:00am. There was an evidential dispute as to whether DC advised the claimant that the interview was to be for the Head of Digital Computers role only (which was the only role available within the school of which DC was to be the new Head) or all five of the Head

of Curriculum posts. I find that the claimant was initially advised by DC that it would be an interview for the Head of Computers role only but at 4:00pm that same day the claimant received a telephone call from Sharon Stewart of HR confirming that in fact the interview would be for the five Head of Curriculum roles. The claimant was somewhat taken aback but nonetheless went ahead with the interview and that evening prepared the presentation which she would give. Before leaving work that day, the claimant sought advice from Ron Smith and was told that she could either prepare a generic presentation to cover all five roles or concentrate on the role which was her first choice. The claimant duly prepared a presentation for interview the following day (pages 172-183).

8.19 The claimant was interviewed on 25 May 2016 by BK and DC who had then only recently been appointed to her new Director role. The interview was for the five Head of Curriculum positions and the result of the interview was that the claimant was scored 21 points by DC and 26 points by BK (pages 184-191). The process followed was that the claimant made a presentation and was then asked set questions. That process was followed for all candidates applying for all roles.

8.20 On the same day BK and DC interviewed Andy Nicholson for two of the roles for which the claimant had applied and he scored 47 points respectively from each of the two interviewers (pages 191A-191J). Another candidate Sally McMahon was also interviewed by DC and Sandra Wilkinson on 27 May 2016 and she obtained a score of 30 and 31 respectively from the two interviewers (pages 192-209).

8.21 On 27 May 2016 the claimant was advised that she would be interviewed for the post of Planning and Resources Manager (which was the sixth position for which she had applied) on 6 June 2016 – this was subsequently altered to 8 June 2016.

8.22 On 27 May 2016 the claimant and all staff were advised (page 211) that some appointments had already been made and that included Simon Chambers as Head of Art and Design and Katherine Robson as Education Partnerships Manager. It was common knowledge within the College that one of the persons who had sat on the interview panel which had appointed Simon Chambers was his wife DC. In addition it was common gossip within the College that another appointee was engaged in a personal relationship with the Principal.

8.23 The claimant had entertained suspicions for some time that the interviewing and appointment process within the College was not open and transparent but enabled interviewers to appoint favoured candidates and in some cases their family and friends. The claimant was not alone in entertaining these concerns. The claimant wrote an e-mail to the Group HR Director LG on 2 June 2016 which she headed "*Confidential – Whistleblowing request*" (page 214). In that message the claimant indicated that she wished to discuss matters and that she had created a timeline of recent events. That timeline was attached to the email and detailed matters relevant to the claimant's own experience of the then ongoing appointment process. The claimant expressed particular concerns because she had recently met DT the newly appointed Director of Education (to whom the claimant would be responsible) who was not aware that the claimant had applied for posts which would be in DT's reporting structure. Once she had sent the email, the claimant tried to recall it as she was very concerned as to the consequences of making disclosures to LG. In the event she was not successful in recalling the email

but nothing turned on that because LG was away on holiday until 6 June 2016. However, on 3 June 2016 the claimant was advised in a telephone call from RK that she had not been successful for any of the five Head of Curriculum roles for which she had applied and therefore the claimant wrote again to LG stating her wish to meet with her to discuss her concerns.

8.24 When LG returned from holiday on 6 June 2016 she was asked by the HR Director, Joanne White, to see the claimant and LG agreed to do so and met with the claimant that same day. The meeting enabled the claimant to make various alleged disclosures of information to LG including the fact that DC had sat on the panel which had appointed her husband to a position and that nepotism was rife in appointments being made both currently and in the past within the College. I find that the claimant did refer to other matters in the past in respect of an appointment within her department of a lady named Rahini and also another applicant for a post who had been appointed to it without due process. LG took no notes of that meeting in stark contravention of the Disclosure Policy and her stated reason for not doing so before me was her professed belief that the claimant was not raising whistle-blowing concerns to her. As a result of that meeting LG suggested and it was agreed that there should be an HR representative present at the claimant's next interview (then due on 8 June 2016) in order to ensure that the claimant was treated fairly.

8.25 I reject the evidence from LG that she thought that concluded the matter with the claimant and I find that she did discuss the concerns which the claimant had raised with the Principal and I infer that there was concern about the matter. No other person was made aware of the concerns which the claimant had raised.

8.26 On 8 June 2016 the claimant was interviewed by BK and Victoria Hanlon in relation to the Planning and Resources Manager role for which she had applied and was one of four candidates for that position. AW also joined the interview panel and she also marked the claimant in the same way as the other two interviewers. It was agreed that the panel would take the two highest scores as the claimant's mark and in the event BK and Victoria Hanlon scored the claimant higher than AW did and so the mark of AW was disregarded. I find that the claimant was assessed as the least successful of the applicants in terms of marks but that nonetheless she was deemed appointable to the role. However, she was not appointed given that there were only two roles available and the first two higher ranking candidates were offered the positions. I find that subsequently one of those two successful candidates accepted a different post and therefore the third ranking candidate was offered the post and accepted it on a four week trial basis. However, at the end of the trial period, that candidate decided to opt for voluntary redundancy and so the claimant, being appointable, would ordinarily have been offered that position.

8.27 However, I find by the time that situation had developed in June 2016, JP had been seconded to the Finance Department as effective Director and her role included a further review of the staffing requirements in the Finance Department. Over the following month that review took place and JP decided that there was in fact no requirement for a second Planning and Resource Manager position. It was recommended to the senior management team that that post could be removed and that recommendation was accepted. That remained the position at the time of the hearing before me. Thus the one role for which the claimant had been deemed appointable was

removed from the structure of the College and accordingly the claimant was not appointed to it.

8.28 On 13 June 2016 (page 239) the claimant wrote to LG thanking her for arranging for AW to be present at her interview on 8 June 2016 and advising LG that she had not been successful in that application. She went on *"I'm just considering my options at the moment and wanted to thank you for seeing me so quickly last week*". Having received that e-mail LG surprisingly considered that the questions raised by the claimant at her meeting on 6 June 2016 were resolved and she did not respond any further to the claimant.

8.29 On 16 June 2016 the appointments to the various new positions were confirmed by the Principal (pages 240-244) and of the positions for which the claimant had applied two remained vacant namely the Head of Access to Further Education and the Head of Business roles. The claimant was subsequently re-interviewed for those positions.

8.30 The claimant was invited to a second individual consultation meeting in relation to the redundancy process on 17 June 2016 but that was subsequently reorganised for 7 July 2016. The claimant wrote by email to LG to advise her of that position on 16 June 2016 (page 245). In her message the claimant reported that she had heard there was no appointment to the role of head of Access to Further Education because BK wished to appoint someone to fill that role who would only be able to apply once phase II of the process was underway. I accept that the claimant was wrong in that but she believed what she wrote. The message ends: "*I know this must be a very busy time for you, but if you could let me know what options are still open to me I would be grateful".* The claimant received no reply to that message.

8.31 On 1 July 2016 the claimant wrote to Ron Smith of HR making him aware that she had made what she considered to be a protected disclosure to LG before being told that she was not successful in obtaining the Head of Curriculum posts (page 247). In this the claimant was referring to her message to LG on 2 June 2016 which she repeated on 3 June 2016.

8.32 The second consultation meeting took place with the claimant with DC and Ron Smith on 7 July 2016 and was minuted (pages 248-251 with additional notes at pages 252-257). At that meeting the claimant became aware for the first time that the method of appointment to the positions for which she had applied was solely on the basis of the presentation and interview and was not in any way influenced by any objective matters such as qualifications, disciplinary and sickness records and the like. The claimant indicated that she had not received feedback from her unsuccessful interview on 25 May 2016 and requested that feedback. The claimant referred again to the fact that she had raised whistle blowing concerns with LG. I accept that DC did not appreciate the significance of what the claimant was saying on that matter.

8.33 On 15 July 2016 the claimant received a letter from DC (pages 259-260) as a result of the 7 July 2016 meeting confirming that the consultation period had closed and that all the posts for which the claimant had expressed an interest had been either filled by other people or she had been deemed not appointable and that she would leave the organisation on 31 July 2016. The claimant was told she would receive a redundancy payment of £7903.50 and pay in lieu of notice (described as a "damages payment") in

the sum of £9837.75. The claimant's contract of employment entitled her to three months' notice of termination (page 42).

8.34 The claimant immediately appealed that decision by letter of 15 July 2016 (pages 261-262) to AW in which she set out nine grounds of appeal including the fact that she had made a *"declaration of wrongdoing*" and had not been given feedback on the matters raised. The letter raised the issue of the appointment of Simon Chambers to a position by his wife DC and other matters in relation to the interview process in which the claimant had been involved. The claimant asserted that the respondent had not made *"a reasonable attempt at finding suitable alternative work for me*...." The claimant requested in particular that DT should re-interview her for the two of the six roles for which she had applied and which were still then vacant, namely Head of Access to Further Education and Head of Business.

8.35 An appeal was arranged and the claimant met with RK and Ron Smith of HR on 27 July 2016 and the meeting was minuted (pages 270-273). For the first time the claimant was introduced to the concept of being "un-appointable" to the roles and she disputed that she had ever been told previously that she was un-appointable. This is a concept which is not anywhere written down in the interview processes followed by the College. I find that when candidates had been interviewed, the interviewers mark the candidate independently and then consider whether the candidate has in fact met the criteria for the position. With internal candidates the practice adopted (although there is no evidence that this was consistently adopted) was that if a candidate had met the criteria by an answer scoring 3 or more in more than half the questions then they were deemed "appointable". The position adopted for external candidates was that they had to score at least a 3 in all questions before being considered appointable. The claimant was not deemed appointable for any of the Head of Curriculum roles on the basis that she had failed to score 3 or more in the majority of the questions. However, the claimant was deemed appointable in relation to the Finance and Planning role notwithstanding that she had also in that interview failed to meet that requirement. I find that the question of whether or not a candidate was "appointable" was something which was very much the subjective view of those who were interviewing the claimant and something which was open to abuse. At the appeal meeting the claimant raised once again the fact that she had not received any feedback from LG about the matters she had raised with her on 6 June 2016 and which she described in that meeting as "*whistle-blowing".* The notes prepared by the claimant in respect of the appeal meeting and to which she referred at that meeting contain the following entry (page 276): "*I have not received an update from HR regarding my protected disclosure and what is to be done as a result. I have been told that Deni interviewed and appointed her own husband to the role of head of Art and Design and I don't think this is fair….."*

8.36 As a result of the appeal meeting, it was arranged that the claimant would be re-interviewed for the two vacant roles and that interview was in fact organised for 5 August 2016 after the claimant's employment had ended. By that time the two vacant roles had been advertised externally and in the morning of that day the interviewers interviewed the two external candidates and then re-interviewed the claimant in the afternoon. The claimant had not had feedback from BW in relation to her 25 May 2016 interviews and received that feedback at 2:00pm on 5 August 2016 and then went into her re-interview at 3:00pm that same afternoon with DT, RK and Ron Smith of HR. At interview DT awarded the claimant 24 points for the interview for Head of Access to

Further Education role and 23 points for the Head of Business role. RK awarded 23 and 24 points for those respective roles. The claimant was again deemed un-appointable and her answers showed no particular improvement over those given on the previous occasion. When all interviews had been completed in Phase I there were other Head of Curriculum roles which had not been appointed to including the Head of Construction, the Head of Hair and Beauty and the Head of Engineering.

8.37 On 10 August 2016 the claimant was advised that she had not been successful at interview and therefore that brought the process to an end and the matter was confirmed to her by letter of 16 August 2016 (pages 299-230).At the end of the letter of confirmation dated 16 august 2016 RK wrote: "*As a separate but related matter, you advised me that you were still awaiting feedback from Lynne Griffin relating to a whistleblowing matter that you had referred to her. I have not been involved in this matter but will refer this to Lynne so she can resolve the issues you have raised".*

8.38 By then the claimant had indicated an intention to bring proceedings to the Employment Tribunal and had approached ACAS for early conciliation and that process came to an end in the middle of August 2016 whereupon the claimant instituted proceedings. On 26 August 2016 AW wrote (page 301) to the claimant saying that she understood the claimant had not "*received a full response to the concerns raised with Lynne in regards to a declaration*". The claimant was invited to a meeting to discuss the matter. The claimant relied to the effect that she was seeking advice on the matter (page 301). The claimant did not reply further nor was she chased for a reply by AW.

8.39 I find that three senior positions in the management structure were advertised externally and three applicants all from Durham New College (which was the college where the Principal had worked prior to being appointed to principal of the College in 2015) were appointed to those roles. This meant that three people potentially were denied those opportunities within the College itself.

8.40 Shortly after the claimant was made redundant a position became available (page 309) within the College for *"Curriculum Leader – Adult English, Maths and Employability"* which was in Phase II of the redundancy process. However the claimant was at no time offered the opportunity to be considered for that position which was a position which she had previously managed and was one well within her capability and would have meant a reduction of only some £1,000 per annum on her salary at dismissal. Another curriculum leader role in English as a Second Language ("ESOL") also became available when the post holder applied for and obtained voluntary redundancy in Phase II. After the claimant had left the employment of the respondent, a course leader was appointed to that position despite not being at risk of redundancy. That curriculum leader role was a position which the claimant could have fulfilled as she had line managed the post and covered the duties of that post in the past.

8.41 Subsequently a further position for a lecturer in mathematics became available which was advertised externally with a closing date of 15 September 2016 (page 312). The claimant was invited to apply for this role (by which time she had been dismissed and had instituted proceedings before this Tribunal) by email from AW dated 30 September 2016 (page 302). The claimant was asked again by email on 13 October 2016 (page 303) but did not respond. On 20 September 2016 the College advertised 43 vacancies externally – some of which the claimant had the skills knowledge and

experience to carry out but none were made available to the claimant prior to her dismissal. The revised structure of the College in respect of posts available in Phase II of the restructure was concluded during August 2016.

8.42 In her role as HR Manager, AW received complaints from other members of the staff of the College about the process followed in appointing to positions in Phase I of the Restructure. These included complaints about the appointment of a female member of staff said to be involved with the Principal. The number of staff affected in Phase I of the restructure numbered approximately 94 of whom 24 were made compulsorily redundant and others elected for voluntary redundancy. In Phase II the numbers affected were around 624 staff of whom 167 left the organisation. By 7 September 2016 there were at least 34 vacancies available as a result of the Phase II process including the role teaching mathematics referred to at paragraph 8.39 above.

Submissions

9 Claimant

9.1 The claimant filed detailed written representations extending to 5 pages to which she spoke briefly. The submissions are summarised.

9.2 The ability of the claimant to carry out the roles of operational manager and section manager has not been questioned at any time. The events in relation to the claimant's employment in 2014 were not fair but the claimant worked with them. The claimant submitted that she was concerned at the potential for abuse in a system of selection which relied only on interview and a presentation. The claimant asserted her belief that appointments resulting from such a process were a misuse of public funding.

9.3 The claimant detailed her meeting with LG and the disclosures made at that meeting. She submitted that those matters were further collaborated by the notes taken at the appeal meeting with RK on 27 July 2016. The subsequent actions of LG were not appropriate to the serious allegations the claimant had raised with her and her actions were not plausible particularly because LG made no contact with the claimant after 7 June 2016 and did not seek any clarification from the claimant that the interpretation she (LG) had placed on the claimant's email of 7 June 2016 (namely that she was happy with the action taken) was correct. The actions of LG who was head of HR for the whole group of six colleges did not comply with the respondent's whistle blowing policy. LG did not respond to subsequent questions raised by the claimant enquiring if a representative of HR was present at other interviews to ensure fairness.

9.4 It was submitted that the presence of AW at the subsequent meeting with the claimant was to appease her and to make sure the claimant was not appointed to the role for which she was being interviewed. The claimant submitted that by then she had been labelled a trouble maker and someone not appointable by reason of the disclosures which she had made. The absence of any contact between LG and the claimant after the meeting on 6 June 2016 is troubling as is the failure to respond to emails sent to her by the claimant.

9.5 It was submitted that the absence of any response to the disclosures made by the claimant and referred to at subsequent meetings is troubling. The claimant submitted

that her response to LG thanking her for arranging for AW to be present at her consultation meeting was politeness on her part and was not an acceptance that the investigation into the matters she had disclosed was complete. It was submitted that the respondent had provided no evidence that the disclosures of the claimant in respect of nepotism and fraud were ever investigated or that the claimant was told that the respondent did not believe that her beliefs were not true. It was submitted that no one had told the claimant at any time that the investigation into her disclosures was closed and had she been told that was so, she would have challenged it.

9.6 It was submitted that the respondent had the opportunity to affect both future interview and job opportunities for the claimant after the disclosures were made and she was excluded from any phase 2 redundancy jobs as they were not advertised until after she had been made redundant. The claimant was not invited to the first meeting to explain phase 2 of the redundancy process even though she was still employed by the respondent when that meeting took place. The offer of a zero hours contract to teach maths was only made after the claimant had been made redundant. A course leader not at risk of redundancy was “slotted in” to a new post yet the claimant was not even considered for that post. No-one has ever explained to the claimant why her post was removed from the structure despite requests for that information.

9.7 Other people had raised issues about the fairness of the process including the appointment by the Principal of a person he was in a relationship with whilst married and the appointment of three vice and assistant principals who were ex colleagues from a different college.

9.8 There is no evidence that the appeal officer RK approached his task with an open mind. The evidence about conversation in respect of training being provided to the claimant in respect of the role for which she applied in the appeal process is contradictory.

9.9 The witnesses for the respondent have given evidence of an interview system designed to ascertain whether a candidate was “appointable” yet BK stated that the claimant was “appointable” to a role when the scores suggested that she was not. There is a complete lack of consistency from the witnesses of the respondent as to how interviews were conducted.

9.10 It was suggested that there was evidence that appointments were pre-determined in many cases. There was no evidence that after the deadline of 23 May 2016 for expressions of interest that the claimant was able to apply for any other roles.

9.11 The claimant referred to a number of previous decisions without providing any copies of them or seeking to explain their relevance to the issues raised.

9.12 In oral submissions, the claimant stated that it was conceded by the respondent that she had a reasonable belief that the matters disclosed to LG were in the public interest. The appointment process of Simon Chambers was predetermined. He was interviewed by his wife and the fact that she was to carry out interviews could have deterred other people from applying for the post. A wife should not be allowed to interview her husband for a role in any circumstances. It was submitted that it must be questioned why LG did not commission a whistle blowing enquiry after the meeting on 7

June 2016. It was submitted that if the claimant had not raised protected disclosures then she would have been appointed to the curriculum leader role for Employability Education and Maths – there was no reason not to appoint the claimant to that role.

9.13 In making final submissions after those from the respondent had concluded, the claimant asserted that there was no "frenzy" in the Phase II process in the School in which she worked. The question of whether a person was appointable or un-appointable was not something which was ever explained. The concept of being appointable was been made up after the event to allow favoured candidates to be appointable.

Respondent

10.1 On behalf of the respondent Mr Vials filed written submissions extending to 91 paragraphs (14 pages) and supplemented these by oral submissions. The submissions are summarised.
10.2 It was submitted that the first question to consider is whether the claimant made a protected disclosure to LG at the meeting on 6 June 2016. The Tribunal should then consider whether any protected disclosure was the reason for the dismissal and, if not, whether the respondent has proved that the reason for dismissal was redundancy and that it acted reasonably in treating that reason as sufficient to dismiss the claimant.

10.3 Reference was made to **Cavendish Munro** and it was submitted that the claimant had not disclosed information but rather had raised allegations and voiced concerns .An analysis of the relevant correspondence between the claimant and the respondent was carried out and it was submitted that none of the correspondence included information. An analysis of the content of the meeting between the claimant and LG on 6 June 2016 was carried out in which the claimant had asserted that the appointment of Simon Chambers was not appropriate as he was not the best person for the job. It was submitted that no information was provided that any person appointed to a role was not in fact the best person for the role. The claimant accepted that she could not pass comment on the suitability of Simon Chambers for the role to which he was appointed. Reference was made to **Goode** which supports the proposition that expressing an opinion does not attract protections as a protected disclosure. In respect of the question of causation, it was submitted that only LG and the Principal Tony Lewin knew of the disclosures (if that is what they were) in any event.

10.4 It was noted that a worker does not have to prove the facts or allegations disclosed are true: it is for the worker to show a subjective belief in the matters disclosed which the Tribunal finds objectively reasonable. Rumours, unfounded suspicions, uncorroborated allegations and the like are not enough to establish a reasonable belief.

10.5 The claimant will only be automatically unfairly dismissed if the reason for her dismissal or if more than one the principal reason for the dismissal was the making of the protected disclosure. If the making of the protected disclosure was a subsidiary reason for the dismissal then the claim will not be made out. The Tribunal needs to determine the decision making process in the mind of the dismissing officer - in this case those who scored the claimant in her redundancy interviews. The respondent asserts that the alleged protected disclosure had nothing to do with the claimant's dismissal as it never formed part of the conscious or subconscious reasoning of those involved in the selection. Neither DC nor BK knew much of the claimant prior to her

interview. There is no evidence that they had any axe to grind against her at all - least of all for making a protected disclosure. It was submitted that the only plausible explanation for dismissal was redundancy following a poor performance at interview and poor presentations – the claimant having accepted in evidence that her presentations were poor.

10.6 The respondent undertook a wholesale restructure of the college at Newcastle. The process involved over 700 staff and it is inconceivable and fanciful to suggest that the process was instigated or motivated by the claimant's protected disclosure or a wish to see her employment terminated. The disclosure on 6 June 2016 was at a point in time when the claimant had been deemed "un-appointable" and therefore at risk of redundancy. Only LG and Tony Lewin knew of the alleged protected disclosures and all the witnesses of the respondent who were involved in handling the redundancy process in which the claimant was involved confirmed on oath that they were not influenced by any third party when assessing the claimant and knew nothing of alleged protected disclosures. The tribunal s not obliged to draw inferences and should not do so.

10.7 It was submitted that the definition of redundancy was applicable to the situation in May/June/July 2016 and that that was the reason the claimant was dismissed. The college was to be restructured to respond to changes in funding and policy and the restructure was to create a more coordinated approach to teaching and training across the college. The claimant accepted in evidence that her then current role was being removed and combined with 2 other roles and her role did not remain the same in the new structure. The new role was effectively a promotion and carried with it a higher rate of pay and grade. If fewer employees are needed to do work of a particular kind there is a redundancy situation – **McCrea –v- Cullen and Davison Limited 1988 IRLR 30 NICA**. The claimant has complained that she has not been shown the economic justification for what the respondent did – there is no need for the respondent to do so – **Polyflor Limited –v- Old EAT 0483/2002**.

10.8 In order to act reasonably, the respondent should warn and consult in relation to redundancy, adopt a fair basis to select for redundancy and consider suitable alternative employment for those affected. It was submitted that the approach taken to warn and consult about the restructure and the steps taken to take on board comments received was reasonable. The claimant stated that she did not attend the presentations on either 4 or 5 May 2016 but when pressed conceded she may have been present but could not recall the presentation. It was submitted that that was inconceivable.

10.9 It was submitted that in respect of the basis for selection, a tribunal may not substitute selection criteria it would have chosen: it can only interfere when what the respondent has done is something which no reasonable employer would have done. It was submitted relying on **Morgan –v- Welsh Rugby Union 2011 IRLR 376** that an employer is entitled to undertake a competitive interview process and appoint the candidate it considers best for the role even if this is based on its subjective view. It was submitted that the authority of **Samsung Electronics UK) Limited –v- Monte-Cruz 2012 EAT 039/11** showed that assessments carried out in good faith were not to be second guessed by an tribunal. In this case those assessing the claimant had done so in good faith and if there were any flaws, they were not egregious and the claimant cannot complain about them.

10.10 It was submitted that the appearance of an alternative role after an employee is made redundant does not affect the fairness of the redundancy process. The respondent was entitled to determine that there were strong business reasons for adopting a two stage approach tom the restructure. The respondent sought to mitigate the effect of redundancies.

10.11 In oral submissions, the Tribunal was urged to note that the scores allotted to the claimant in the process were comparable both before and after the alleged disclosure on 6 June 2016. There is no evidence to show or even to infer that any protected disclosure made by the claimant was the principal reason for dismissal. It was reasonable for the respondent to divide the restructure into two phases for to do otherwise would have been unmanageable. The phase II restructure process was not complete until September 2016. The respondent concluded that bumping candidates in phase II by those in phase I was not felt to be appropriate – that was a reasonable decision. In any event the dealings in phase II became more complex than had been anticipated. It was not reasonable to have waited for phase II to complete before terminating the claimant's contract for redundancy in phase I. The claimant was not a good historian and if there is conflict in the evidence then the witnesses of the respondent should be preferred.

The Law

Protected Disclosure Dismissal Claim - Section 103A of the 1996 Act

11.1 I have reminded myself of the detailed provisions set out in Part IVA of the 1996 Act in relation to protected disclosures.

11.2 In particular I have reminded myself of the provisions of section 43B (1) of the 1996 Act which reads:-

"(1) In this part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, (is made in the public interest and) tends to show one or more of the following -

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of an individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged; or

(f) that information tending to show any matter falling within any one the preceding paragraphs has been or is likely to be deliberately concealed".

11.3 The definition of a qualifying disclosure breaks down into several elements which the Tribunal must consider in turn.

Disclosure

11.4 I have reminded myself of the decision in **Cavendish Munro Professional Risks Management Limited - Geduld 2010 IRLR 37 ("Cavendish Munroe")** and the guidance from Slade J to the effect that there is a distinction to be drawn between "information" being provided and an "allegation" being made. The latter will not qualify as a disclosure for the purposes of section 43(B)(1). I note the distinction between these two concepts has been diluted somewhat by the decision in **Kilraine -v- London Borough of Wandsworth 2016 IRLR** 422 and I must be careful not to be too easily seduced into asking whether the alleged disclosure was one or the other given that they are often intertwined. I remind myself that simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information. I note that a communication - whether written or oral - which conveys facts and makes an allegation can amount to a qualifying disclosure.

Reasonable Belief

11.5 In **Darnton v University of Surrey** and **Babula v Waltham Forest College 2007 ICR 1026** it was confirmed that the worker making the disclosure does not have to be correct in the assertion he makes. His belief must be reasonable. In Babula, Wall LJ said:-

"... I agree with the EAT in Darnton that a belief may be reasonably held and yet be wrong... if a whistle blower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided that his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable neither (i) the fact that the belief turns out to be wrong - nor (ii) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence - is in my judgment sufficient of itself to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute... An employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the subsections in the 1996 Act section 43B(1)(a) to (f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith".
I remind myself that the requirement for a disclosure to be in good faith is no longer a liability issue but something to be considered when assessing any remedy which might be due.

11.6 I have reminded myself that any disclosure which in the reasonable belief of the employee making it tends to show that a breach of legal obligation has occurred (or is occurring or is likely to occur) amounts to a qualifying disclosure. It is necessary for the employee to identify the particular legal obligation which is alleged to have been breached. In **Fincham v HM Prison Service ("Fincham")** EAT0925/01 and 0991/01 Elias J observed: *"There must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the worker is*

relying." In this regard the EAT was clearly referring to the provisions of section 43B(1)b of the 1996 Act. I have noted the criticism by the EAT in **Fincham** of the decision of the Employment Tribunal in that case that a statement made by the claimant to the effect *"I am under pressure and stress"* did not amount to a statement that the claimant's health and safety was being or at least was likely to be endangered and so did fall within the provisions of section 43B(1)d of the 1996 Act.

I have reminded myself of the decision of the EAT in **Goode –v- Marks and Spencer plc UKEAT/0042/09** wherein Wilkie J stated the judgment of the EAT at paragraph 38 to be:

"…the Tribunal was entitled to conclude that an expression of opinion about that proposal could not amount to the conveying of information which, even if contextualised by reference to the document of 11 July, could form the basis of any reasonable belief such as would make it a qualifying disclosure."

Automatic unfair dismissal

11.7 I remind myself of the provisions of section 103A of the 1996 Act which read:-

"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".

11.8 I note the decision in **Kuzel v Roche Products Limited [2007] IRLR 309** where the following guidance is given by Judge Peter Clark in respect of the burden of proof:-

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

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

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

11.9 I remind myself that once a qualifying disclosure is established, it is necessary to consider whether it has become protected disclosure by reference to sections 43C-43H of the 1996 Act. It is not in dispute in this case that the claimant made the alleged disclosure to her employer and that the provisions of section 43C of the 1996 Act are engaged.
11.10 I remind myself that there is no requirement of reasonableness in relation to this claim. If the reason for dismissal is that the claimant made a protected disclosure then the dismissal is unfair without further enquiry.

Claim for Ordinary Unfair Dismissal Sections 94-98 (inclusive) Employment Rights Act 1996 ("the 1996 Act")

11.11 I have reminded myself of the definition of redundancy found in section 139 of the 1996 Act:

"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to--
(a) the fact that his employer has ceased or intends to cease--
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(b) the fact that the requirements of that business--
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish".

11.12 I have reminded myself of the provisions of section 98 of the 1996 Act which read:

"*98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –*
(a) the reason (or if more than one the principal reason) for the dismissal, and
(b) that it is either a reason falling in subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) The reason falls within this subsection if it – …
(c) is that the employee was redundant
(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
(b) shall be determined in accordance with equity and the substantial merits of the case".

11.13 I have reminded myself of the words of Judge Clark in **Safeways Stores plc –v- Burrell 1997 IRLR 200 ("Burrell")** and in so doing I have noted that section 139 of the 1996 Act is the provision which has replaced section 81 to which reference is made:

"Free of authority, we understand the statutory framework of s.81 (2)(b) to involve a three-stage process:
(1) was the employee dismissed? If so,
(2) 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? If so,
(3) was the dismissal of the employee (the applicant before the industrial tribunal) caused wholly or mainly by the state of affairs identified at stage 2 above?"

11.14 I have further noted the guidance given by Lord Irvine of Lairg in **Murray –v- Foyle Meats 1999 ICR 827 ("Murray")** on the meaning of "redundancy":

"*My Lords, the language of paragraph (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the Tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter. This conclusion is in accordance with the analysis of the statutory provisions by Judge Peter Clark in Safeway Stores Plc. v. Burrell 1997 IRLR 200 and I need to say no more than that I entirely agree with his admirably clear reasoning and conclusions".*

11.15 I have reminded myself of the decision in **Contract Bottling Limited –v- Cave and McNaughton UKEAT/0525/12/DM** and the guidance of Judge Richardson on the so called two stage test set out in **Murray** (above):

*Applying the two-stage test laid down in **Murray**, the first question for the Tribunal was whether there was a diminution in the requirements of the business for employees to carry out work of a particular kind. As a general rule, employers who are considering redundancies tend to look individually at the different kinds of work they have within the business: it is then easy to see that there is a diminution in the requirement of the business for employees to carry out work of a particular kind. But it no doubt sometimes occurs that there is a diminution in the requirements of the business for employees to carry out work of several kinds. Such a state of affairs is capable of satisfying the first stage in the **Murray** approach*

11.16 I have also had regard to the decision in **Morgan –v- The Welsh Rugby Union 2011 IRLR 276 ("Morgan")** and the words of Judge Richardson:

"To our mind a Tribunal considering this question must apply section 98(4) of the 1996 Act. No further proposition of law is required. A Tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A Tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A Tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made

capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under section 98(4). …A great deal turned, both before the Tribunal and in this appeal, on the question whether the Respondent, having produced a job description with a person specification, was bound to adhere to it precisely. In our judgment the Tribunal by a majority plainly proceeded on the view that the Respondent was not bound to adhere to the job description slavishly or precisely. In our judgment the Tribunal committed no error of law in that respect.
If the appointment of a new manager had been external, an employer would not have been bound by its job description or person specification…. If a candidate had emerged, perhaps from a recruitment process, who was outstanding but who did not meet some aspect of the person specification, the employer would still have been entitled to appoint that candidate. In one sense, this may have seemed unfair to other candidates who did meet the person specification; but it would not follow that the decision by the employer was unreasonable. Indeed where the appointment is at a high level, it is in our experience not unusual for the interview process to be two-way; a good candidate may suggest changes to the job description and may demonstrate that some aspect of the person specification is unnecessary….When making an internal appointment, we do not think there is any rule requiring an employer to adhere to the job description or person specification. To our mind the employer was entitled to interview internal candidates even if they did not precisely meet the job description; and it was entitled to appoint a candidate who did not precisely meet the person specification. It was, in other words, entitled at the end of the process, including the interview, to appoint a candidate which it considered able to fulfil the role. We do not, therefore, see any error of law in the approach of the Tribunal to this matter; and we do not consider the approach of the majority to be perverse….Nor do we consider that the Tribunal erred in law in its approach to the process which the Respondent followed. The Tribunal accepted that it was regrettable that there was no person with specific coaching experience on the panel; but as the Tribunal said, the committee was an extremely senior committee with experience of making key senior appointments….The Tribunal accepted that it would have been better if the interviewing panel had followed the intended process more strictly, but after a careful review it considered that the interviewing process was objective and fair. We, like the Tribunal, are critical of the panel's failure to mark the candidates in accordance with the original plan; but we think this is a matter for the Tribunal to take into account in its assessment under section 98(4), and we are satisfied that the Tribunal did so.

11.17 I have reminded myself of the decision of Underhill J in the EAT in **Samsung Electronics (UK) Limited –v- Monte –D'Cruz 2012 UKEAT/.0039/11** (**"Samsung**") and the following guidance:
"*We have no problem with the proposition that it is good practice for interviewers to discuss with one another before an interview the approach to be followed. It may well be sensible, as part of that process, for them to discuss what they understand by any specified assessment criteria. Likewise we can accept that it may be a good idea for interviewers to discuss in advance what would be "good" answers to the questions asked, as suggested in para. 109, though there will be limits to the extent to which such discussion can provide a complete uniformity of approach (even assuming that to be desirable). In a perfect world it may perhaps also be ideal, to pick up the point made in para. 109, be ideal for all questions and answers to be recorded in full - though we doubt whether the ideal is attainable in practice. But we cannot accept that failure to*

take these various steps will, of itself, render the interview decision - and still less any eventual dismissal - unfair, any more than the failings of process which were found in Morgan did. The fairness of a decision to dismiss in cases of this kind cannot depend on whether the minutiae of good interview practice are observed. In the present case, an arguable case of unfairness would only have been raised if it had been found, on the basis of proper evidence, that the failures in process identified had led to some serious substantial unfairness to the Claimant".

11.18 I have reminded myself of the words of Lord Bridge in **Polkey –v- AE Dayton Services Limited 1988 ICR 142 ("Polkey")**

"In the case of redundancy, the employer will not normally act 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 his own organisation".

11.19 I have reminded myself of the guidance on the meaning of consultation provided by Glidewell LJ in **R-v- British Coal Corporation ex parte Price 1994 IRLR 72 ("Price"):**
"It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant*, reported, as far as I know, only at [1988] Crown Office Digest p.19, when he said:*

'Fair consultation means:
(a) consultation when the proposals are still at a formative stage;
(b) adequate information on which to respond;
(c) adequate time in which to respond;
(d) conscientious consideration by an authority of the response to consultation.'
Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".

11.20 I have considered the difference between a redundancy situation and a reorganisation of a business. I note that it is sometimes difficult to differentiate the two situations. I note the EAT stated in **Corus and Regal Hotels plc –v- Wilkinson 0102/03:** "E*ach case involving consideration of the question whether a business reorganisation has resulted in a redundancy situation must be decided on its own particular facts. The mere fact of reorganisation is not in itself conclusive of redundancy, or, conversely, of an absence of redundancy".* It is crucial to consider whether a reorganisation entails a reduction in the number of employees doing work of a particular kind as opposed to the redistribution of the same work amongst different employees whose numbers remain the same.

Conclusions

Protected disclosure

12.1 I have considered whether the claimant made a protected disclosure to the respondent: this means first considering whether there was a qualifying disclosure and if so, whether that qualifying disclosure became a protected disclosure. The first matter I have considered is whether the claimant disclosed information to the respondent in the meeting with LG on 6 June 2016. In dealing with this matter I have in particular given consideration to the evidence of the claimant and that from LG. I found the claimant a more compelling witness than LG. The claimant gave a clear account of that meeting and evidence from LG was less clear. I am satisfied that the two emails sent by the claimant to LG on 2 and 3 June 2016 did refer to "whistleblowing" in the title to the messages and in such circumstances I find it extraordinary that LG kept no notes of the meeting. The absence of any note was contrary to LG's normal practice of keeping notes of any meeting she attends and over and above that the Disclosure Policy makes a particular requirement for a note of the meeting to be made and agreed. I am bound to wonder why there is no note available. I prefer the evidence of the claimant as to what was said at the meeting on 6 June 2016. I am satisfied that at that meeting the claimant gave information to LG to the effect that DC had been one of the two members of the interviewing panel which had appointed the husband of DC to a senior management role in the Phase I restructure. That was information and in fact the respondent accepts that it was correct information. I refer to my findings at paragraph 8.24 above and I conclude that in addition to the information in respect of DC, the claimant also gave information that nepotism was rife within the College in relation to the appointments and she used as examples appointments which had been made in a redundancy exercise in 2014. I have assessed what was disclosed at that meeting and I conclude that information in the sense defined in **Cavendish Munro** was disclosed by the claimant to LG. I have reminded myself again of the importance not to be too easily seduced into making artificial distinctions between information and allegations as set out in **Kilraine**. The claimant gave information to LG on 6 June 2016 as required by section 43B(1) of the1996 Act.

12.2 I have considered whether the claimant had a reasonable belief that what she disclosed tended to show that the respondent had failed to comply with an obligation to which it was subject. In this regard I have borne in mind the guidance in **Fincham** which requires the claimant at least to have identified in broad terms the legal obligation which she considered the respondent was in breach of. I am satisfied that in her conversation with LG the claimant made it plain that in her belief the respondent was failing to fulfil its duty to ensure that the public funds of which it was the custodian were being properly dealt with. I note in particular and accept what the claimant says at paragraph 66 of her witness statement*: "…..we discussed that public money was being spent without accountability*". That was sufficient in my judgment to identify the legal obligation.

12.3 I have considered whether the claimant subjectively believed that the respondent had failed to comply with its legal obligation. I am satisfied that she did. The claimant had thought long and hard before giving the information. She had written to LG in the previous week and then sought to recall that e-mail because of the seriousness of the step which she understood she was taking. I am satisfied that the claimant discussed

the matters she was to disclose to LG with her colleagues on the morning of 6 June 2016 and received encouragement to press ahead with her disclosure of information. I have referred again to paragraph 102 of the claimant's witness statement. I am satisfied that she had a subjective belief that the information she disclosed to LG tended to show the respondent was failing in its duty to deal with public funds with regularity and propriety.

12.4 I have considered whether that subjective belief was reasonable. I have no hesitation in concluding that the belief of the claimant was reasonable and that viewed objectively it was a reasonable belief. The claimant had seen the spouse of an applicant sit on an appointment panel and appoint him to a relatively senior role within the College. The claimant reported other allegations of what she saw as nepotism in the appointment process. The claimant saw that as being in breach of a legal obligation to ensure public funds were properly managed and I conclude that that belief was reasonably held. I find it quite extraordinary that an organisation of the size of the respondent dealing with a redundancy process should ever contemplate allowing a spouse to sit on an appointment panel where her spouse was an applicant whether the spouse was the only candidate for the post or not. I find it equally extraordinary that officers of the College of the seniority of LG and DC should come to this Tribunal and seek to argue that there was nothing wrong in that process. It was argued before me that it was in order for DC to have been one of the two interviewers on the panel because her husband was the only candidate for the post and because the process was overseen by the Principal. That argument flies in the face of the principle that regularity and propriety in dealing with public funds should not only be observed but be seen to be observed. It was an argument which demonstrated at best remarkable naivety in those advancing it. In acting as it did the respondent opened itself to severe criticism and invited disclosures of the type made to it by the claimant. In those circumstances I conclude without any difficulty that the belief of the claimant that the respondent was in breach of a legal obligation was reasonably held.

12.5 I have considered whether the claimant reasonably believed that the information she was disclosing was in the public interest. I am satisfied she did believe that and I am satisfied that her belief was objectively reasonable. It is clearly in the interest of the public to be made aware of alleged misapplication of public funds. Therefore I conclude the claimant made a qualifying disclosure to the respondent on 6 June 2016.

12.6 I have considered whether the manner in which the claimant disclosed the information was in a way which rendered the qualifying disclosure a protected disclosure as defined in Part IVA of the 1996 Act. In this case there was no dispute that section 43C of the 1996 Act applied and that the claimant disclosed the information to her employer through LG.

12.7 In those circumstances I conclude that the information conveyed by the claimant to LG on 6 June 2016 was a protected disclosure.

The reason for dismissal

12.8 Having concluded that the claimant made a protected disclosure I have moved on to consider the reason the claimant was dismissed. I remind myself that the claimant

had over two years' service with the respondent and that the burden of proof to establish the reason for dismissal lies at all times with the respondent.

12.9 The respondent asserts that the reason the claimant was dismissed was redundancy. I am satisfied that a redundancy situation as defined in section 139 of the 1996 Act subsisted in the College at the time of the claimant's dismissal. I have no hesitation in reaching that conclusion. The College was subject to financial constraint and the restructure effectively was forced on it in order to meet new financial targets. The restructure was to save approximately 20% of staffing costs. The restructure was announced in April 2016 and occupied the time of the senior managers of the College from that time throughout the rest of the period whilst the claimant remained employed at the College and indeed beyond. In her evidence and indeed in her submissions, the claimant sought to argue that there was no redundancy situation in respect of her duties. She referred to a decision of Phillips J in Elliott –v- University Computing Co 1977 at paragraph 20 of the witness statement. The claimant referred in her written submission to other authorities which predated the clarification of the meaning of redundancy. The test for redundancy was clarified in **Burrell** and **Murray** in 1997 and 1999 respectively. First I have to consider whether the claimant was dismissed – clearly she was. Secondly whether the requirements of the respondent for employees to carry out work of a particular kind had diminished or were expected to diminish. Again I can answer that question affirmatively and without difficulty. The third question is whether the dismissal was caused wholly or mainly by that reduction.

12.10 Thus I must consider what was the reason for the claimant's dismissal? Was it the redundancy situation or was it, as the claimant asserted, the fact of her making the protected disclosure? I have considered the guidance in **Kuzel** and considered whether the claimant has raised some evidence that the making of the protected disclosure was the reason for her dismissal.

12.11 I am satisfied that the claimant has raised some evidence to support that contention. There are several factors which lead me to this conclusion. First, I have noted the concerns expressed by the claimant in relation to what she saw as nepotism and irregularities in the appointment process in 2016 and in particular the e-mail which she wrote to the Principal using the "*Ask Tony*" process (paragraph 8.12 above) which referred obliquely to the matters which she ultimately disclosed on 6 June 2016. Secondly, I am satisfied that LG reported what the claimant had told her on 6 June 2016 to the Principal and together they agreed to ask JW to sit in on the interview of the claimant on 8 June 2016. Thirdly, LG took no notes whatever of her meeting with the claimant on 6 June 2016 which was contrary to her general practice and she appears to have paid no regard whatever to the fact that the claimant's email message to her referred to whistle-blowing which should have alerted any HR officer (let alone one of the seniority and experience of LG) to the potential applicability of the Disclosure Policy. Fourthly, LG asserts that she did not think what the claimant disclosed to her on 6 June 2016 was anything other than her concerns about her own situation. I accept that the meeting on 6 June 2016 did consider such matters but LG accepted that the claimant raised the issue of nepotism in the appointment process and that alone should have been sufficient without more to have caused LG to sit up and take notice. Fifthly LG did not make any contact with the claimant after the meeting on 6 June 2016 and in particular did not reply to the claimant's email of 13 June 2016 and I am bound to wonder why? Sixthly, the claimant was only offered a further meeting with LG to discuss

her concerns once she had been dismissed and only after the claimant raised matters again in her appeal hearing. Seventhly, I accept the claimant's evidence that there were concerns voiced by other members of staff about the appointment process and that AW had had complaints made to her by other staff members about appointments made in apparent breach of open competition. Eighthly, the process by which candidates were considered "appointable" was not applied consistently by those interviewing and the process of interviewers reporting back each evening to the Principal to report on interview outcomes in meetings which were not minuted in any way opened the opportunity for manipulation of the process. Finally, the claimant would have been offered the role in the Finance Department for which she had applied but for a decision taken to remove that post from the structure completely. All that and more leads me to conclude that the claimant has raised sufficient evidence to make me look to the respondent again to establish on the balance of probabilities that redundancy was indeed the reason for the dismissal of the claimant. I have taken some time to conclude my decision in this matter because I have given lengthy and anxious consideration to this question.

12.12 I have considered whether as a result of the raising of the protected disclosure it was engineered that the claimant should not be appointed to any of the positions which she had applied for. I conclude there are insurmountable difficulties to reaching that conclusion. First the restructure process had started many weeks prior to the making of the protected disclosure. The way the restructure process was to be handled had been explained by the Principal in April 2016 and had been the subject of detailed consultation both collectively and individually. Secondly, before the disclosure was made the claimant had already been interviewed on 25 May 2016 and been deemed not appointable to any of the five roles for which she was interviewed on that day. Thirdly if it was the case that the claimant was deliberately kept from any appointment by reason of her disclosure, then that would have involved several other people deliberately marking the claimant down in interviews which followed 6 June 2016 and effectively impinging their integrity and honesty. I have assessed the evidence of those who interviewed the claimant after 6 June 2016 and I am satisfied that they approached their duties in assessing the claimant at interview and in dealing with her appeal in an entirely fair and unbiased fashion and that they were not even aware of the protected disclosure let alone influenced by it. I had clear evidence from DC that at the interview on 7 July 2017 there was reference in only a vague way to protected disclosure and that she attached no significance to it: I accept that evidence. I have evidence from BK that the first she heard anything about protected disclosures was two weeks before the hearing in front of me and I accept her evidence.

12.13 I have given particular consideration to the question of the Planning and Finance Officer role for which the claimant had applied. The claimant was deemed appointable to that position and when unexpectedly it became vacant a decision was taken that there was no need for the position at all. On the face of it that is suspicious. Accordingly I have paid particular attention to the evidence of JP who explained the circumstances in which a decision was taken that that post was not required. I have assessed that evidence as reliable and credible. JP was a new albeit interim Director of Finance who viewed matters afresh and saw no need for the role which had unexpectedly been vacated. I accept that that was so and that what appears at first glance to be very suspicious is actually not so when fully considered.

12.14 The claimant was made aware of the redundancy situation weeks before she made a protected disclosure and indeed she was interviewed and scored at interview before the disclosure was made. In fact I accept that it was the fact that she was told that she had not succeeded at those first rounds of interviews in May 2016 which was the factor which led her to seek a meeting on 6 June 2016 with LG.

12.15 Having taken account of all those matters and given detailed consideration to all the claimant raised as set out above, I conclude on balance of probabilities that the respondent has proved that the reason for the dismissal of the claimant was redundancy. The claimant raised matters which cast doubt on that stated reason but, after careful and detailed analysis, those matters are displaced and the respondent has established that the reason for dismissal was redundancy and not the making of the protected disclosure on 6 June 2016.

12.16 In those circumstances the claim of automatic unfair dismissal advanced pursuant to section 103A of the 1996 Act fails and is dismissed. The reason for dismissal was redundancy. That is a potentially fair reason pursuant to section 98(2) of the 1996 Act and therefore I move on to consider the claim of ordinary unfair dismissal and in particular the provisions of section 98(4) of the 1996 Act.

Ordinary unfair dismissal claim

12.17 I remind myself again that in considering the provisions of section 98(4) of the 1996 Act, I must not substitute my view as to what should or should not have occurred. I must judge the actions of the respondent from the stand-point of the hypothetical reasonable employer and I can only categorise the dismissal as unfair if the respondent acted in a manner in which no reasonable employer would have acted. I note that there is no burden of proof resting on either party in dealing with the questions to which section 98(4) of the 1996 Act gives rise but rather the burden lies neutrally between them.

12.18 The claimant made various criticisms of the process which was used by the respondent in this matter and I have considered each of them. The principal matters of criticisms raised by the claimant were first her assertion that the role in the new structure of Head of Adult Education was 84% the same as her then existing post and that she should have been slotted into that role without interview, secondly that the process adopted by the respondent took no account qualifications, appraisals, sickness and disciplinary records or other objective evidence, thirdly that the interview process was entirely subjective and that she was much better qualified for a role than her colleague Sally McMahon who was appointed to it, fourthly that she was given inadequate notice of her interview for five roles on 25 May 2016 and only received feed-back from it shortly before the re-interview on 10 August 2016 and after she had been made redundant and dismissed, sixthly that there had been no explanation of the concept of a candidate being “appointable” to a role or of the part of the process which involved interviewers meeting with the Principal each evening and discussing the outcomes from interviews and seventhly that inadequate steps were taken to find alternative employment for her.

12.19 The respondent dealt with the redundancy selection by way of a process of competitive interview. It determined to deal with the restructure in two phases and the

claimant found herself in Phase 1. I am satisfied that the consultation both individually and collectively in relation to the process was reasonable and that the process of competitive interview for posts was a reasonable way of dealing with the restructure. I have considered the authorities of **Morgan** and **Samsung** above in reaching this conclusion. It is not for me to decide how to manage the business of the respondent. I have to assess whether the process which the respondent carried out in interviewing and deciding who should be appointed to the positions in the restructured organisation was reasonable. I am satisfied that in regards to warning and consultation and in relation to interviews that a reasonable process was conducted.

12.20 The claimant made much criticism of those who interviewed her and in particular of the marks she was awarded in the various interviews she attended. It is not my role to second guess the outcome of those interviews. I must assess whether those who interviewed the claimant did so in good faith and reasonably. I have considered the marks awarded to the claimant and the evidence from the interviewers of the rationale for those marks and I accept that evidence. The claimant herself accepted that her interview on 25 May 2016 was not a good one from her perspective and the marks awarded reflect that position. By contract there were other candidates who were marked much higher and having read the assessment sheets completed by the interviewers, I am satisfied that there was ample basis demonstrated for the disparity in the marks awarded. I conclude that the interview process of the claimant was reasonable. I accept that the process was not perfect. Feed-back from the 25 May 2016 interview was late and notice of it could and should have been longer but that is not in my judgment sufficient to render the process unfair. The process adopted fell within the band of a reasonable process.

12.21 I have considered the criticism levelled by the claimant in respect of the failure to slot her into the role of Head of Adult Education. I accept the respondent's analysis to the effect that that was not the case. I accept the evidence from LG and DC and others that the new Head of Curriculum roles were a step twice removed from the role of Section Manager which the claimant had carried out. I accept that the new role carried with it more management and strategic responsibility than did the claimant's old role and that the role was not in fact 84% similar. Even if that is wrong, I do not categorise the decision taken by the respondent to require those roles to be appointed after competitive interview to be an unreasonable position given the importance of those roles in the new structure and the different degree of responsibility involved. Some employers might have slotted in – some might not. I can only strike down the dismissal on that ground if no reasonable employer would have decided on interview and I do not decide that that is so.

12.22 There were certain aspects of the interview process which were less than satisfactory. There was clear confusion between those dealing with the interviews over the concept of whether a candidate was "appointable". Some interviewers gave clear evidence as to the fact that they considered whether candidates were appointable and others had not heard of that concept. The process which followed at the end of each day of interviewers assembling in the office of the Principal and reporting back as to the successful candidates and to some extent making decision as to who should and should not be appointed was a process which potentially lacked objectivity and could have rendered the process unreasonable. I have considered those two aspects of the process with particular care and I am satisfied that neither of them were of sufficient

concern to render what was a robust process unfair. I am satisfied that the claimant was properly interviewed for the positions which she sought and that the criticisms she levels of that process whilst not without some merit are not sufficient to render the process unreasonable.

Alternative employment

12.23 However I conclude that in seeking out alternative employment for the claimant the respondent acted outside the band of a reasonable employer and acted as no reasonable employer would have acted of the size and administrative resources of the respondent.

12.24 The claimant was dismissed with effect from 31 July 2016. She was entitled to three months' notice but was not allowed to work that notice but was paid in lieu. It was only clarified to her on her last working day on 29 July 2016 that in fact she was to leave that day despite the fact that she was then still to be re-interviewed for two roles as had been agreed by RK at the appeal hearing on 27 July 2016 and indeed that further interview only took place on 5 August 2016. The claimant's appeal against dismissal only concluded on 10 August 2016 with the letter dismissing the appeal from RK. Thus the claimant was removed from the respondent organisation before the interview process to which she was subject was complete and no reasonable employer would have acted in that way.

12.25 I conclude that the result of that haste on the part of the respondent impacts the search for alternative employment for the claimant. The steps taken by the respondent in relation to the search for alternative employment for the claimant were not reasonable. The Policy of the respondent states that the respondent will make every effort to find alternative employment for the claimant but the respondent in the circumstances of this case failed to do so and thus acted as no reasonable employer would have acted.

12.26 The claimant found herself dealt with in Phase 1 of the restructure. The claimant was not a senior manager and found herself on the cusp of Phase I and Phase II. I accept that the respondent acted reasonably in deciding to manage the process in two phases but no reasonable employer would fail to consider for those employees made redundant in Phase I the possibility of a role becoming available in Phase II which could be suitable alternative employment. All the more so when, as was the case with the claimant, she was close in the overall structure to posts being dealt with in Phase II and found herself still in employment when the posts in Phase II were being considered and becoming available. The rationale for those posts not being considered for the claimant was stated by AW to be that when the claimant was dismissed the posts in Phase II which covered all teaching and support roles were not "*available or foreseeable"* and when AW accepted that it was fair to suggest that based on the interview outcomes *"a teaching role would have represented the Claimant's best opportunity of being appointed to a role in the new structure".* (Witness statement paragraphs 32 and 33).

12.27 I do not accept that the roles in Phase II were neither available nor foreseeable when the claimant was dismissed. By that time several of the claimant's colleagues for whom she was responsible had either been slotted into roles in Phase II or had applications for voluntary redundancy accepted. The consultation in respect of Phase II

was well under way and was clearly expected to be completed well within the three month notice period of the claimant. In such circumstances there was no reason why consideration could not have been given to postponing the claimant's date of termination until the end of the notice period in order that she could have remained in employment and been available to apply for suitable roles in Phase II rather than having to have such matters drawn to her attention after she had left employment. No reasonable employer would have failed to explore that possibility with the claimant particularly when at the date of the termination of her employment, her appeal process in respect of Phase I had not completed its course.

12.28 The claimant was in fact offered the opportunity to apply for a lecturer in mathematics role after her dismissal by reason of her referring to it in correspondence with AW. That was clearly a role which the claimant could have applied for given her qualifications and previous experience. Within a short period after her dismissal and well within her notice period, two curriculum leader roles became available which again were within the capability and experience of the claimant. The respondent failed through any of its officers to consider these possibilities for the claimant despite the fact that such posts were foreseeable at the time of the claimant's dismissal. In failing to give those matters consideration, the respondent acted as no reasonable employer would have acted.

12.29 It is my judgment that no reasonable employer of the size and administrative resources of the respondent would have acted as the respondent did in respect of the search for alternative employment. The respondent failed to make every effort to find such employment and breached its own policy. No consideration was given by any officer to the particular circumstances of the claimant's case. To render a dismissal for redundancy fair there must be a proper and fair and reasonable search for alternative employment. Several positions which might have been open to the claimant in Phase II were simply closed off from her and no consideration was given by the respondent to allowing the claimant to work her notice period and thereby remain in employment and have the opportunity to be considered for a Phase II position as an existing employee. That failure and the speed with which the claimant's employment was terminated in my Judgment renders the process followed by the respondent unreasonable and renders the dismissal of the claimant unfair.

Remedy

12.30 Accordingly I propose to list a remedy hearing. At that hearing it will be necessary to consider the chance the claimant would have applied for a suitable phase II position and then the chance of her being appointed to it. That is a classic **Polkey** type assessment which will need to be carried out at a remedy hearing. A telephone private preliminary hearing will be arranged to discuss arrangements for the remedy hearing.

Final comments

12.31 I have already made comment that I found it extraordinary that the respondent should allow an interview process to be conducted whereby a spouse sat on an appointment panel in which her spouse was a candidate. It seems to me that the

respondent would be well advised to consider an alteration to its rules in order to ensure that such a situation does not occur again.

12.32 I have concluded that the reason for the dismissal of the claimant was not the protected disclosure but failures of the kind I have identified in dealing with what I have concluded were protected disclosures could potentially have led the respondent into difficulty. Had there been a claim before the Tribunal of detriment on the grounds of protected disclosure, then such failings would have been factored into the test on causation which is considerably less rigorous that that applicable to the claim under section 103A of the 1996 Act. It seems to me that the respondent would be well advised to ensure that there is no similar failure in the future and in a case of any potential disclosure to ensure that the terms of the Disclosure Policy are followed.

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 28 April 2017

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JUDGMENT SENT TO THE PARTIES ON

2 May 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL