Case Number: 2204590/2022

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	Respondent
Ms C Stewart		Foreign Commonwealth and Development Office
HELD AT: London Central		ON: 2-3, 7-10, 13 & 15 May and in Chambers 16-17 & 20 May 2024 and 19 December 2024

BEFORE: Employment Judge Glennie (Chair)
Ms I Sood
Mr D Schofield

Mr G Millar KC and Mr D Hutcheon (counsel) appeared on behalf of the Claimant.

Mr B Collins KC, Mr L Dilaimi (counsel) and Ms E Skinner (counsel) appeared on behalf of the Respondent.

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1) **The complaint of detriment on the ground of making a protected disclosure is well-founded with regard to the withdrawal of the Claimant's SC and DV security clearance.**

2) **The complaint of detriment on the ground of making a protected disclosure with regard to suspending the Claimant is dismissed.**

3) **The complaint of automatic unfair dismissal under s.103A of the Employment Rights Act 1996 is dismissed.**

4) **The complaint of unfair dismissal under s.98 of the Employment Rights Act 1996 is well-founded.**

5) **Remedies for the successful complaints will be determined at a hearing on a date to be fixed.**

REASONS

1) By her claim to the Tribunal presented on 12 July 2022, the Claimant, Ms Stewart, makes the following complaints:

(1) detriments on grounds of making protected disclosures;

(2) automatic unfair dismissal under s.103A of the Employment Rights Act 1996 ("ERA") (protected disclosures);

(3) unfair dismissal under s.98 of the ERA.

2) The Respondent, the Foreign Commonwealth and Development Office (FCDO), resists those complaints.

3) The Tribunal is unanimous in the reasons that follow.

The issues

4) There was an agreed list of issues as follows:

Protected disclosures

5) The Claimant relies on alleged protected disclosures made:

(a) during her interview with Ms Kotecha on 7 December 2021; and

(b) in supplying screen shots of emails to Ms Kotecha in January 2022.

6) In respect of each of those alleged protected disclosures:

(i) Did the Claimant disclose information which she reasonably believed tended to show any of the matters referred to in the ERA s.43B(1)(b) and/or (d) and/or (f)?

(ii) Did the Claimant reasonably believe that any such disclosure was in the public interest for the purposes of ERA s.43B(1)?

(iii) Are the criteria in ERA s.43G satisfied, in particular:

(a) Did the Claimant reasonably believe that any disclosure and any allegations contained in such disclosure were substantially true for the purposes of s.43G(1)(b)?

(b) Was the disclosure not made for personal gain for the purposes of s.43G(1)(c)?

(c) Had the Claimant previously made any disclosure of substantially the same information to the Respondent or to a prescribed person under

s.43F or, alternatively, did she have reasonable grounds to believe that she would be subjected to any detriment or that evidence would be concealed or destroyed if she made such disclosures for the purposes of s.43G(1)(d) and (2)?

(d) Was it reasonable, in all the circumstances of the case, for the Claimant to make the disclosure for the purposes of s.43G(1)(e)?

(iv) Alternatively, are the criteria in ERA s.43H satisfied, in particular:

(a) Did the Claimant reasonably believe that any disclosure and any allegations contained in such disclosure were substantially true for the purposes of s.43H(1)(b)?

(b) Was the disclosure not made for personal gain for the purposes of s.43H(1)(c)?

(c) Was any relevant failure in relation to any qualified disclosure a failure of an exceptionally serious nature for the purposes of s.43H(1)(d)?

(d) Was it reasonable, in all the circumstances of the case, for the Claimant to make the disclosure for the purposes of s.43H(1)(e)?

Detriment on the ground of protected disclosures

7) The Claimant claims in respect of the following detriments, which it is common ground occurred:

(i) her suspension from duty with effect from 1 February 2022; and

(ii) revocation of her SC and DV security clearances on 7 February 2022.

8) Were those actions taken on the ground that the Claimant had made any protected disclosures for the purposes of ERA s.47B?

Unfair dismissal

9) Was the reason (or principal reason) for the Claimant's dismissal that she had made a protected disclosure such that her dismissal was automatically unfair under ERA s.103A?

10) Alternatively, if the Claimant's dismissal was not automatically unfair under ERA s.103A, was it unfair under ERA s.98, in particular:

(i) Was the reason (or if more than one the principal reason) for the Claimant's dismissal a potentially fair reason within s.98(1)(b) and/or (2); in particular was that reason "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" within the meaning of s.98(1)(b).

(ii) If so, in the circumstances, did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant for the purposes of s.98(4)?

Preliminary matters

11) The Tribunal had made orders under r.94 (national security) at preliminary hearings on 19 April and 18 May 2023. Parts of particular documents were to be redacted in the bundle available to the public and evidence about or discussion of the redacted parts of the documents was to take place in private. Those orders were followed in the present hearing. Much the greater part of the hearing was in fact conducted in public.

12) A further preliminary issue arose at the outset of the hearing. Mr Millar KC sought to challenge the redaction of one sentence in para.107 of the Claimant's witness statement. Mr Collins KC maintained that it should remain redacted. The Tribunal found that this sentence was covered by the previous order of Employment Judge Spencer and that the present Tribunal should not attempt to alter that decision.

Evidence and findings of fact

13) The Tribunal heard evidence from the following witnesses (job titles are those that were applicable for those witnesses at the time of the events with which the hearing was concerned):

(i) the Claimant, Ms Stewart, a Senior Governance Advisor;

(ii) Mr Richard Jones, the Claimant's line manager;

(iii) Mr Edward Hobart, Director of Estates Security and Network Directorate within the Respondent;

(iv) Ms Nicola Shepherd, Head of Personnel Security;

(v) Mr Colin Dick, Deputy Director attached to the Human Rights and Rule of Law Department;

(vi) Ms Juliet Chua, Director General Corporate and Finance;

(vii) Ms Rochelle Fisher, Deputy Director for Senior Appointments and Talent; and

(viii) Mr Robert Tinline, Director of Americas and Small Island Developing States.

14) The Tribunal also read the witness statement prepared on behalf of the Claimant by Mr Raphael Marshall. Mr Collins indicated that, while the Respondent did not accept the contents of Mr Marshall's statement, he did

not wish to cross-examine on it as he did not consider that its contents were relevant to the issues that the Tribunal had to decide.

15) There was an agreed bundle of documents, and page numbers that follow in these reasons refer to that bundle.

16) There was in the event little by way of dispute on the facts of the case.

17) The Claimant began work for the Department for International Development in 2015 as a Governance Adviser based in Kabul, Afghanistan. On 26 June 2015, she was interviewed for the purposes of obtaining Developed Vetting (DV) security clearance. The report of the interview, at p.122, recorded that the Claimant identified three occasions on which she had felt uncomfortable about aspects of her work. The record continued as follows:

> **"In all three areas of concern she was meant to be taking the Government line and ultimately did so, but highlighted concerns to senior colleagues. The subject believed risks were managed and felt that the degrees of governance established by Britain were both well thought out and adhered to. Should any ethical issues arise in the future, the subject would follow a similar route and talk issues through with colleagues and senior staff."**

18) The Claimant received Security Check (SC) clearance on 1 September 2015 and DV clearance on 6 November 2015.

19) In September 2020, the Claimant's employment transferred to the Respondent (FCDO) following department reorganisation. In June 2021, the then Foreign Secretary decided that the FCDO should work towards all of its staff having DV clearance.

20) Meanwhile the NATO withdrawal from Afghanistan had commenced. The Government adopted its Afghan Relocations and Assistance Policy, designed to enable citizens of Afghanistan who had worked for or with the UK Government in exposed or meaningful roles to relocate to the UK. An Afghan Crisis Centre was established within the FCDO and the Claimant volunteered to work in this, doing so from 23 August to 8 September 2021. The UK Government evacuation ended on 27 August 2021, after which the role of the Crisis Centre was to provide information to individuals still in Afghanistan.

21) In her witness statement, the Claimant was critical of what she saw as failings within the Crisis Centre and the evacuation process more generally. It is not this Tribunal's role to make any decision about these matters. It is, however, relevant to record that we were satisfied that the Claimant was genuinely concerned about what she experienced and observed.

22) In late August 2021, Mr Marshall, a more junior employee who had also volunteered to work in the Crisis Centre, spoke to the Chair of the Foreign Affairs Committee, Tom Tugendhat MP, about his concerns regarding the evacuation. Mr Marshall subsequently sent around 30 or 40 official

documents to Mr Tugendhat and gave evidence to the Foreign Affairs Committee. Mr Marshall also wrote to and met Sir Philip Barton, the Permanent Under-Secretary of the FCDO, expressing his concerns. Subsequently, Mr Marshall resigned from his employment with the FCDO on 21 September 2021.

23) The Claimant's evidence was that, during the latter months of 2021, she became concerned about the contents of official statements about the evacuation. In para.52 of her witness statement, the Claimant said that the then Prime Minister, Boris Johnson MP, had been quoted as saying:

> **"We've got the overwhelming majority of those to whom we owe that debt out of Afghanistan".**

The Claimant said that she knew this to be untrue and explained why she said this. In para.58, the Claimant quoted statements by Sir Philip Barton, in terms that good progress had been made dealing with all of the correspondence on 9 September 2021 and then, on 24 September 2021, thanking those involved for:

> **"working together to deliver results we should be proud of".**

24) The FCDO instituted a "lessons learned" exercise to discuss the response to the crisis. In an email exchange between 30 November and 7 December 2021, at pp.1230 to 1231, the Claimant was invited to participate in this exercise and declined to do so. In her email, the Claimant said:

> **"I found the experience of working on the Afghan Crisis deeply upsetting - not so much because of what was happening, but because of how unforgivably bad our - FCDO's - management and response was, and the impact this had. I have not yet processed how I feel about this, nor come to terms with how I feel about the organisation as a result, and my continuing to work here. I fear therefore that I might not be ready or able to give constructive input to this exercise - or that doing so would force me to think about things that I am not yet ready to think about, and have a material negative impact on my mental health."**

25) The Claimant added in para.61 of her witness statement and confirmed in her oral evidence, that apart from the matters referred to in her email, she believed that input from staff would not be taken as seriously as it would warrant, saying:

> **"I knew it would be pointless, and I could not take part in a whitewash".**

26) On 7 December 2021, there was press reporting of Mr Marshall's evidence given to the Select Committee. That evidence was critical of the evacuation from Afghanistan, saying in summary that it was chaotic and mismanaged. The Prime Minister, Boris Johnson MP, and the then Foreign Secretary, Dominic Raab MP, both responded to Mr Marshall's evidence. As examples, at p.162, Mr Raab was described as saying that it was inaccurate to describe the system as "dysfunctional" and was quoted as saying:

> **"I don't think in living memory we have seen an operation on that scale and certainly in relation to this one, no other country bar the United States evacuated more."**

He was quoted as saying that Mr Marshall's testimony was "inaccurate". On p.167, a press report stated that a whistle-blower had said that the Foreign Office was instructed to evacuate animals that had been rescued by an organisation named Nowzad, which was a reference to part of Mr Marshall's evidence. Mr Johnson was reported as saying that claims that he intervened in the evacuation of Kabul by prioritising a charity's animals and staff were "complete nonsense".

27) The Claimant's account, which the Tribunal accepted, was that during 7 December 2021 a member of a WhatsApp group of individuals who had worked on the evacuation contacted the Claimant privately. The Claimant stated that this individual said that he knew a journalist, Sima Kotecha of BBC *Newsnight*, who had connections to Afghanistan and was looking for someone who could corroborate Mr Marshall's evidence in order to rebut the allegedly false claims of its inaccuracy. This individual asked the Claimant if she would speak to Ms Kotecha. The Claimant continued that, shortly after this contact, she saw a news clip of Mr Johnson speaking to a reporter in which he said that the FCDO and others had done "an absolutely outstanding job" and that the suggestion that he had himself been involved in the Nowzad decision was "complete nonsense". The Claimant also stated that she read media comments to the effect that Mr Marshall's evidence was that of one person, and a relatively junior official at that, and that it was a case of his word against Mr Raab's.

28) The Claimant then contacted Ms Kotecha, who asked if she could corroborate Mr Marshall's general account. The Claimant said that she could. Ms Kotecha said that, given the "news cycle", she needed this for the *Newsnight* program that evening. At about 3.30 that afternoon, the Claimant gave an anonymous interview to Ms Kotecha. An edited version of this was broadcast on the evening of 7 December 2021 on the *Newsnight* program. The Claimant relied on what she said as her first protected disclosure.

29) There was a transcript of the interview at pp.212 to 215.

30) The transcript began with the *Newsnight* presenters introducing the subject of the Afghan evacuation and stating that the Prime Minister had dismissed the reports made by Mr Marshall. Two clips were played showing Mr Johnson commenting favourably on the evacuation. One of the presenters then continued to summarise Mr Marshall's criticisms of the operation and referred to the particular question as to whether Nowzad's animals were given resources over and above human refugees.

31) Given the reliance that the Claimant places on what she said in this interview, we will set out her comments in full:

"MS KOTECHA: Do you recognise the definition that we have been hearing today from a former civil servant saying it was disorganised, it was dysfunctional, it was slow?

CLAIMANT: There were a lot of people, there was a lot of activity but absolutely no sort of induction, no objectives, no handover, no ability to access the systems often just to find out the very basics, in a very unstructured and chaotic environment.

MS KOTECHA: We have also heard so many stories about emails not being answered, thousands of emails not being answered, not even being looked at.

CLAIMANT: It was certainly the case that when there was parliamentary and public pressure and it was out there that thousands of emails were going unread that that was addressed, but the whole focus then shifted to literally that - to reading the emails. When we did have objectives, it was 'read the emails', so you have dozens of people reading harrowing horrific bits of information and knowing full well that nothing was going to be done with any of it other than a report at the end of the day to say the email had been read.

MS KOTECHA: I mean, one allegation we have heard today is that Dominic Raab, his actions towards this whole crisis, which is what many are calling it, was actually slow.

CLAIMANT: His focus in terms of decisions that I did see being made was on responding to political and high profile media pressure, so I would see very quick responses to some of the high profile kind of cases that were in the press or that questions had been asked about by MPs in the context of a total absence of decisions on the thousands of others who didn't have somebody well connected championing or asking about them as individuals. It seemed to me that the entire operation was to manage the political fallout of what was happening rather than to actually manage the crisis, and that for me was the most upsetting.

MS KOTECHA: I mean, you know, we have heard Ministers say today that it was a very difficult situation that they were dealing with, something that they hadn't seen coming and many people have said, even the military, that the Taliban took over at such a fast pace. Is there an argument that it was difficult to hand and that all of this was a result of the unforeseen circumstances?

CLAIMANT: This is by far the biggest crisis response that I had seen or been involved with. It was a huge challenge. I don't accept the argument that we, well I do accept the Government didn't see it coming. I think we should have seen it coming. The FCDO as an organisation was completely ill-equipped to respond and I think a huge part of that is organisationally in terms of the Department for International Development was abolished and merged into the former Foreign Office and we were incapable of coming together as one organisation to respond.

MS KOTECHA: How would you describe the way Ministers behaved here?

CLAIMANT: I think it is unforgiveable. That is how I would describe it.

MS KOTECHA: And what do you mean by that? I mean, are you saying that lives have been lost because of the way it was handled?

CLAIMANT: I expect that might well be the case. I can certainly say that huge amounts of trauma and suffering were either caused directly because of the way it was handled, most probably lives also lost.

MS KOTECHA: We have heard the Government say that you know they didn't do anything wrong, they say that yes, some decisions were not made quickly enough but on the whole 15,000 people were evacuated.

CLAIMANT: I think that is, was, an incredible achievement and I don't want any of this to take away from what was achieved. I think however a lot of trauma and suffering, certainly most likely worse, was also caused that shouldn't have happened because of the chaos in the bigger system and the political focus on managing reputation and relationships instead of the actual crisis and I think the Government should recognise and accept that because that's the first step in actually learning and addressing things."

32) In para.72 of her witness statement, the Claimant said that she gave the interview anonymously via a WhatsApp video call with her camera turned off and that she asked for her words to be read by an actor. She said that she was given strong assurances of source protection. When asked about this in cross-examination, the Claimant stated that she did not want anyone to find out that it was she who had given the interview. She said:

"I knew that from the organisation's point of view I shouldn't be doing it. I didn't want to be caught. I knew it was not in line with what the organisation wanted."

33) The Tribunal accepted all of the Claimant's evidence about this interview. The Claimant's evidence of her view of the evacuation was consistent with the more limited comments she had made in reply to the invitation to take part in the "lessons learned" exercise and with everything that she has subsequently said about it. The Tribunal found it credible that the Claimant would wish to intervene in order to support Mr Marshall's account when that was being denied by the Prime Minister and the Foreign Secretary, and equally that she would wish to remain anonymous out of concern about the possible consequences if she were to be identified.

34) The Claimant gave further evidence about this interview in paras.75 to 80 of her witness statement, in particular about her state of mind. The Claimant was not challenged about this evidence, and the Tribunal accepted it as credible in the circumstances.

35) The Claimant stated that in her interview there was a focus on information which was already in the public domain, in particular because of the evidence Mr Marshall had given to the Foreign Affairs Committee. The Claimant said that the Government failures to which her disclosures related were matters of very serious public concern and had had life and death consequences for people in Afghanistan. She said that she believed that making her experiences in the Crisis Centre public would be an important step in bringing these failures to light. The Claimant added that she believed that raising her concerns internally was not a meaningful option. She had heard from colleagues that Mr Marshall had resigned from the FCDO in September after, according to news that she had read, he had tried taking his concerns to Sir Philip Barton. The Claimant said, in para.76:

> **"I construed from this that not only had his attempt to raise his concerns internally not had impact, but that he had been made to feel that his position at FCDO was untenable after this. I did not want this to happen to me, and I believed that it would if I took this route."**

The Claimant also stated that raising her concerns internally would not have served to put the information in the public domain, as she believed to be necessary.

36) In para.78, the Claimant stated that Ms Kotecha said that she also believed that giving the interview was necessary in the public interest. The Claimant said that she trusted Ms Kotecha as she was a respected journalist working for a respected and responsible public interest broadcaster (the BBC). The Claimant continued that she knew that the information she disclosed was true because she had personally experienced the relevant events. She said that the information showed that the health and safety of people in Kabul had been recklessly endangered through the crisis response and that she was concerned about people who might be caught up in future international crises. The Claimant said that she believed that information pertaining to these risks to health and safety was being deliberately concealed because the accuracy of Mr Marshall's account was being contested and publicly undermined by the Government. (The Tribunal noted in this connection that the Claimant was not saying that underlying evidence was being concealed, but rather that Mr Marshall's account was being wrongly denied).

37) The Claimant stated that she believed that the FCDO had failed to comply with a legal obligation:

> **"to ensure that procedural requirements imposed on Afghan nationals in the UK's evacuation efforts were not arbitrary or irrational, and that any differences in treatment imposed on such Afghan nationals were not irrational or otherwise unjustifiable. I believed this because my years as a civil servant had instilled in me a basic understanding of the public law obligations of Government."**

The Claimant said that she had no interest in and did not give the interview for any personal gain (there being no suggestion in these proceedings that she did this).

38) On this aspect, the Claimant concluded that she believed that it was reasonable to make the disclosure in all the circumstances. She said that the failures concerned were extremely serious and that the FCDO had not meaningfully acknowledged what (in her view) had gone wrong with the Afghanistan crisis response, nor explained how failings would be addressed in the future. She said that she understood that Mr Marshall's efforts to raise his concerns internally had been ineffective and that he had subsequently felt compelled to resign.

39) The Claimant's identity as the anonymous interviewee remained undetected at this stage. Her evidence was that there continued to be media interest in claims that Nowzad staff and/or animals had been given priority in the evacuation. In paras.86 to 90 of her witness statement, the Claimant said that she was aware that the Afghan staff of Nowzad had been prioritised for evacuation and said that this was despite them not meeting the three policy criteria under which people were meant to be prioritised, namely (a) vulnerability, (b) support for UK objectives in Afghanistan and (c) significance/sensitivity. The Claimant said that she had been copied into emails that she recalled indicating that the normal process had been overruled in relation to Nowzad's staff and that this decision came from the Prime Minister. The Claimant said that she had been aware since 7 December 2021 that the Prime Minister had denied having anything to do with the decision making on the Nowzad evacuation.

40) At some point in the first half of January 2022, Ms Kotecha contacted the Claimant again, stating that she was still bothered by the Afghan withdrawal and that she wanted to present a story on the prioritisation of animals over people. She asked the Claimant if she had anything she would or could share in relation to this. In para.93 of her witness statement, the Claimant stated that she assumed that Ms Kotecha was seeking further evidence of the Prime Minister's involvement in the Nowzad decision and (as the Claimant saw it) his having lied about that. The Claimant stated that her understanding was not that animals had been prioritised over people, but that Nowzad staff had been prioritised over more vulnerable people, as explained above.

41) The Claimant found two emails and called Ms Kotecha about them. The latter asked to see the emails. The Claimant took photographs of the emails on her computer screen and sent the images to Ms Kotecha. There were redacted copies of the emails at p130, both dated "25082021". The title in both cases was "Pen Farthing & dogs - DEF SEC COMMENTS?" (Pen Farthing being the organiser of Nowzad). One email referred to

> **"The need to seek clear guidance from No. 10 ASAP on what they would like us to do".**

The second email stated that Nowzad were in the cohorts approved by Ministers and that:

> **"The FS is seeking a steer from No. 10 on whether to call them forward now".**

42) The Claimant's evidence continued that some hours later Mr Kotecha called her and said that she did not think that the emails indicated that the Prime Minister had prioritised animals over people, to which the Claimant agreed. The Claimant said that she explained that what she thought had actually happened, resulting in animals having been flown out of Kabul, was that the Prime Minister had made a decision that the Afghan staff of Nowzad should be evacuated and that animals could be transported only in the hold of the aircraft, which was unsuitable for people.

43) The Claimant further said to Ms Kotecha that chaos on the ground had meant that the Afghan staff had not been able to board the plane despite having authorisation, resulting in the outcome that a plane had taken off carrying mostly animals and not people. This, she said, meant that there was not a story to be had about animals having been prioritised over people. The Claimant stated that she was surprised that it appeared that Ms Kotecha was not interested in the alternative story about the Prime Minister's involvement in the decision to evacuate the Nowzad staff. The Claimant's view was that his alleged lack of honesty about this had had an impact on vulnerable people who were effectively deprioritised.

44) In para.104 of her witness statement, the Claimant wrote:

> **"I did not share the emails in order to rebut the allegation that animals had been prioritised over people. I shared them because they indicated that the Prime Minister had lied to the media and the British public about having overruled policy designed to save lives. I thought, and still think, that the public interest required this to be known."**

The Claimant continued that she knew that the information she had disclosed orally was true and provided the emails as evidence of this. She said that the information she had disclosed indicated responsibility for decision making that had unduly endangered the health and safety of people facing extreme danger in Kabul and that she believed that information pertaining to this was being deliberately concealed because the Prime Minister had lied about his involvement and no one from within Government had corrected the record. (The Tribunal makes the same observation as above in relation to the distinction between information and evidence.) The Claimant stated that she felt certain that, if she had disclosed the information only to her employer, no action would have been taken as no one in the FCDO was going to contradict the Prime Minister. The Claimant made a similar point about what she understood to be a public law obligation to ensure that decisions on prioritisation of different cohorts of Afghan nationals for evacuation were in line with applicable policy, and again she said that she did not make the disclosure for any personal gain. The Claimant concluded that she believed that her disclosure of the information was absolutely in the public interest and reasonable in all the circumstances.

45) It then occurred that, on 27 January 2022, Ms Kotecha tweeted two images of the emails which showed enough of the Claimant's email address as to enable her to be identified. There followed various communications within the FCDO about the matter.

46) A colleague alerted the Claimant to Ms Kotecha's tweets at some point in the afternoon of 27 January 2022. The Claimant called Ms Kotecha and asked her to take down the tweet, which she did. In her witness statement, the Claimant said that she received a call from someone in Human Resources at about 4pm, telling her that she was about to get a call from Departmental Security and that HR were there to support her. She then received a call from Security, who said that she had to come to London for a security interview. The Claimant said that she was in total shock and absolute panic. She spoke to her line manager, Mr Jones, and to a former line manager, although she could not remember the substance of the conversations with them. In her witness statement, she then went on to deal with the interview with Security, which took place on 31 January 2022.

47) The person in HR who had called the Claimant was Ms Fussey. Although in her witness statement the Claimant moved directly from the one call from Ms Fussey to the Security interview on 31 January 2022, it was evident from a note prepared by Ms Fussey, at pp.472 to 473, that they had several conversations over 27 to 29 January 2022.

48) There was a factual issue arising out of these conversations which was not easy for the Tribunal to resolve given that there was no oral evidence from Ms Fussey, and that the Claimant had said very little about this aspect in her witness statement. This issue was as to whether the Claimant had denied involvement in the emails being provided to Ms Kotecha. Ms Fussey's note said that, when she first spoke to the Claimant on 27 January, the latter was shocked and asked several times for clarification of what had happened. She said that she was scared and that the offer of support from HR was making her more frightened. The note continued that Ms Fussey spoke again to the Claimant later that day and that the latter said she had been going over it in her mind and could not work out how this might have happened.

49) The note for the following day, 28 January, said that the Claimant said, among other things, that she could have blown the whistle at the time and had chosen not to, and felt that she was now being forced down that path. The note continued that, on 29 January 2022, Ms Fussey had told the Claimant that Security had been told that she denied the allegations, to which the Claimant replied that she had not denied them and could not deny them until the investigation opened as she did not know what she was accused of.

50) The issue of the Claimant's alleged denial of involvement was also referred to in an email of 28 January 2022, at p.243, from Ms Shepherd to Mr Hobart, with two other people copied in. Ms Shepherd said that those concerned were part of a "high level response group dealing with this case"

and that Ms Fussey had spoken to the Claimant. The email said that there was to be a meeting with Security on Monday (31 January). The email concluded:

> **"She spoke to Lorraine Fussey again today and made some interesting comments. She also outlined that she was taking legal advice. It is possible that there are further developments over the weekend either in the press or the potential for her to resign. Alternatively, she may try to ride out this issue, she denies any involvement, and speak to us on Monday."**

51) When asked about this aspect in cross-examination, the Claimant said that at the time she was in an incredible state of shock, terrified and traumatised. She said that she was terrified of losing her job. The Claimant said that she did not remember exactly what she meant and that she did not know what had happened. She said that she had been told subsequently that she was accused of having denied involvement in the matter and said that she was never asked. She said that she did not think that she would have said that she did not do anything but that she did not remember what she said. Mr Collins put it to the Claimant that she must have known what she was accused of. The Claimant replied that she knew what she had done, but she did not know what she was being accused of as, she said, there had been no conversation about the content of any allegation against her.

52) Ms Shepherd conducted the Security meeting with the Claimant on 31 January 2023. The Claimant had prepared a statement for the purposes of this meeting which she gave to Ms Shepherd. Among other matters, the Claimant stated that, when Ms Kotecha had first contacted her, she spoke to her because she was traumatised and outraged at the lack of accountability. The Claimant said that she was concerned to see Mr Marshall's evidence being dismissed as coming from just one young and inexperienced civil servant when she, as she stated, knew that he had described the situation accurately. The Claimant wrote:

> **"For this reason, I agreed to give a background interview to Sima Kotecha which disclosed no new information but simply corroborated in general terms the material that was already in the public domain."**

This was the point at which it came to the Respondent's attention that the Claimant had been the anonymous official who had given the interview on *Newsnight*. She revealed this herself in her statement.

53) The Claimant then continued that a few weeks previously Ms Kotecha had contacted her again wanting to highlight a story on prioritising animals over people. The Claimant stated that she told Ms Kotecha that she did not have anything on that and that she did not believe that this had happened intentionally. The Claimant wrote:

> **"She asked me if she could see and, stupidly, I showed her - I sent photos of the two emails I had about Nowzad decisions."**

The Claimant continued that she was in total shock when she was told about Ms Kotecha's tweets, saying:

> **"I do not remember what I said to any of the four people I spoke to then - the actual conversations are a blur to me - but I am told I denied it to at least some of them. I was in shock - I did not understand, knew I hadn't done anything at that point and had not intended to release material to the press. I completely wanted it not to be true."**

She accepted that she had shared photos of the two official sensitive emails which were then tweeted.

54) The Claimant also wrote:

> **"I know what I did is serious, and I think it is right that for civil servants to speak to the media should be only a last resort. Raising concerns internally was not a meaningful option. I knew Raphael Marshall had tried that, and I have experienced a culture in FCDO which silences concerns and ostracises those who raise them."**

She then stated that two senior civil servants had told lies about the matter to the Foreign Affairs Committee.

55) There were notes of the meeting at pp.248 to 257. The discussion covered many aspects similar to those raised in the Claimant's statement. When asked why she had not followed the internal route for raising her concerns, the Claimant said that she felt that since the merger that gave rise to the FCDO she perceived professional risks to those who raised concerns and criticisms. She said that Mr Marshall had followed the proper processes and it did not work for him. Ms Shepherd said that Mr Marshall had not followed the proper process as he had sent information to Mr Tugendhat and subsequently went to the Parliamentary Under-Secretary.

56) Ms Shepherd asked the Claimant whether she thought she was a whistle-blower. The Claimant replied:

> **"The answer is mostly no. I don't feel like one and hadn't chosen to be one. I thought about going to the FAC - that it was in the public interest to know and had decided it was not the right thing to do. I didn't intend to be one, so my answer is no."**

57) Ms Shepherd then referred to the Claimant's 2015 interview for DV clearance, in which she said that if she had conflicts or concerns she would use internal channels to raise them. The Claimant replied that that assurance was for her old organisation, adding that, if it had still been DFID, then she would not have done what she did as she would have felt able to raise it internally, but that this was not the case in the new organisation.

58) The Claimant then said that she stood by everything that she had said but that the experience had changed things and that there was no way that she would want to go through anything like this again. She said "I have learned

my lesson". Ms Shepherd said that she believed that the Claimant thought that she would never do this again but asked rhetorically whether she could trust her to do things differently if the organisation failed to meet her expectations in future. The Claimant acknowledged that and Ms Shepherd said "My role is not about whether or not you should work for the organisation but security risk and the level of information we trust you with".

59) The Tribunal noted that the Claimant did not say at this stage, either in her written statement, or in the interview with Ms Shepherd, anything to the effect that she believed that she had disclosed information that she believed tended to show the endangering of health and safety (as is her present case). She did not mention concern about any prioritising of Nowzad staff over others who might be in greater danger, or about the Prime Minister's role in any such decision. She said that the issue in question was that of "animals before people".

60) The Tribunal considered that what the Claimant said and wrote at the time was the best indication of what she believed at the time of disclosing the screenshots. As a matter of probability, what she believed was that the emails showed that animals had not been prioritised over people, as was being suggested. That was the aspect of the matter in which Ms Kotecha was interested and which had caused her to contact the Claimant again. The Tribunal considered that, if the Claimant had believed at the time that she was disclosing information which showed something different from the true position about the "animals over people" issue, she would have raised this in the meeting with Ms Shepherd. The Tribunal found it likely that the Claimant's stated belief in her evidence that she disclosed the emails because they tended to show that one group of people were being prioritised over others who were at greater risk, and that the Prime Minister had played a role in this, was one that she had come to with hindsight, rather than one she had held at the time.

61) Mr Hobart's evidence, in para.40 of his witness statement, was that he had a meeting with Ms Shepherd, also on 31 January 2022, in which Ms Shepherd had told him that the Claimant had admitted to "leaking on two separate occasions", these being the *Newsnight* interview and providing the emails to Ms Kotecha. Ms Shepherd recommended suspending the Claimant, with which Mr Hobart agreed. In cross-examination, Mr Hobart said that whenever there was a breach such as disclosure of emails, an investigation and a review of security clearance would always be carried out.

62) Still on 31 January 2022, Mr Hobart wrote to the Claimant, at pp.278 to 280, saying:

> **"Following your meeting this morning with Personnel Security Team and our receipt of the two page statement that you handed over, I have concluded that your security clearance should be suspended pending an investigation. I have been guided in reaching this decision by the criteria set down centrally for Government departments in the Cabinet Office's Security Policy Framework and the Civil Service Code."**

The letter continued that the Claimant was suspended from duty at the FCDO as of 31 January 2022 on full pay, and it gave information about health and welfare and counselling resources available to the Claimant.

63) The Tribunal accepted Mr Hobart's evidence about the decision to suspend the Claimant. It was logical for the Claimant to be suspended, in terms of both her job and her security clearance, while the latter was investigated.

64) On 3 February 2022, Ms Shepherd sent a document, a redacted copy of which is at pp.283 to 288, to Mr Hobart in which she recommended withdrawal of the Claimant's SC and DV security clearances. The Tribunal was provided with a substantially unredacted copy of this document in private and further reference is made to this in the Tribunal's private reasons.

65) On 4 February 2022, the Claimant sent to Ms Shepherd an email, at pp.295 to 296, in which she sought to expand on what she had said in the course of the 31 January meeting, and Ms Shepherd forwarded this email to Mr Hobart. Among other things, the Claimant said that she did not mean for the emails to be published and that she should not have shared them with a journalist. She wrote:

> **'But I had decided the issue was not important enough to compel me to act as a whistle-blower; the balance of "wrongs" was not strong enough to require this (i.e., the organisation's wrongdoing was not sufficiently serious and the public interest not sufficiently undermined to outweigh the wrong of failing to follow the Civil Service Code by leaking information). I was foolish and naïve for having shared information with the journalist before making this decision.'**

In cross-examination, the Claimant said that this reflected how she felt at the time, which was "incredibly confused and distressed". In answer to the Employment Judge, the Claimant said that she did not think of herself as a whistle-blower at that time. She said that she gave information to the journalist and then decided not to blow the whistle in the sense of giving evidence to the Foreign Affairs Committee. The Claimant continued in her email saying that she would not do the same thing again and if in future were to feel conflicted by serious wrongdoing would raise it internally. She also maintained that the FCDO had not been open and accountable for the handling of the Afghanistan crisis response and she said that she was by no means the only civil servant who felt unable to raise their concerns internally.

66) On 7 February 2022, at p.302, Mr Hobart wrote to the Claimant informing her that he had decided to withdraw her DV and SC clearances. He said:

> **'I have been guided in reaching this decision by the criteria set down centrally for Government departments in the Cabinet Office's Security Policy Framework, Vetting Decision Framework, which describes a number of vulnerabilities and behaviours that might affect an individual's**

> **ability to maintain a security clearance. In your case, I have significant concerns over aspects of your behaviour relating to the category of "honesty, integrity, judgment and discretion" which I judge raise potential security risks for security clearance at any level.'**

Mr Hobart referred to the right of appeal against the decision and stated that, if the Claimant did not appeal or the appeal was unsuccessful, her case would be referred to HR Directorate to determine whether she could continue to be employed by the FCDO due to her inability to comply with the requirement to hold valid security clearance.

67) The Claimant wrote to Mr Hobart on 15 February 2022, asking for a fuller explanation of the reasons for his decision.

68) Mr Hobart replied, on 23 February 2022 in an email at p.316, in terms that had been approved by the FCDO Head of Security. He wrote as follows:

> **"The concerns put to you in interview on 31 January were in our view sufficient to enable you to understand why clearance might be withdrawn. However, for the avoidance of doubt, the key factors in the decision were that you knowingly circumvented security procedures and made conscious decisions to make unauthorised disclosures of classified (official sensitive) information to a journalist and to participate anonymously in a *Newsnight* interview without seeking the permission of, or declaring your involvement to, the FCDO. You did not follow internal procedures to raise your concerns. This was contrary to a specific assurance given in your previous DV interview, which assurance you suggested on 31 January extended only to DFID rather than to the FCDO or HMG. When initially questioned, you denied any knowledge of how the information reached the public domain. Your behaviour was contrary to the Civil Service Code. It has therefore been concluded that there are significant concerns in respect of your honesty, integrity, judgement and discretion, which are incompatible with holding security clearance at any level."**

69) Part of Mr Hobart's cross-examination about his decision was conducted in public and part in private. In public, Mr Hobart confirmed that he was guided by the Cabinet Office's Personnel Security Policy ("PSP") and the Vetting Decision Framework ("VDF"). There was a redacted copy of the former in the bundle available to the public and there were copies of the unredacted PSP and the VDF in the private bundle made available to the Tribunal.

70) In his evidence in public, Mr Hobart said that the PSP guided him as to procedure and the VDF as to the behaviours relevant to security clearance. When asked about any interplay between whistle-blowing and security considerations, Mr Hobart said:

> **"We try to keep whistleblowing away from security"**
>
> and

> **"I was not looking for information disclosed in the public interest. Security is not a whistle-blowing case."**

He continued:

> **"I am looking to see what had happened. Harm is not a key criterion, we are looking at risk."**

71) When referred to the Claimant's statement for the 31 January meeting at p.246, Mr Hobart said:

> **"I took this into account regarding her state of mind but not as a mitigating factor at all. I am deciding whether we can manage the risk, what their motivations are. I came to the conclusion that there was an ongoing risk of leaks in similar circumstances, where the Claimant did not agree with the actions of the Government."**

When asked about the Claimant's purpose in disclosing the information to Ms Kotecha, Mr Hobart replied:

> **"The exact purpose I don't think was as relevant as the fact that twice she communicated information outside the organisation."**

72) Further aspects of Mr Hobart's evidence, which was given in private, are covered in the Tribunal's private reasons.

73) The Tribunal accepted Mr Hobart's evidence about his reasons for the decision. We noted in particular what he stated were the key factors in the decision in his email of 23 February 2022 and will return to these later in these reasons.

74) Meanwhile, on 8 February 2022, Ms Evans, the Head of HRD Management Advice Service, had sent an email, at pp.307 to 308, to Ms Chua, copied to various people including Mr Hobart and Ms Shepherd. This began:

> **"We need to decide on the most appropriate formal route to follow to deal with the breach of standards by Josie Stewart in sharing information with the BBC. There are two options outlined below."**

The email continued as follows:

> **'<u>Option 1</u> We allow the security clearance appeal to run its course. If it is unsuccessful, or Josie chooses not to appeal, HR would then move to dismiss for "some other substantial reason", i.e., that Josie could no longer work for the FCDO without a minimum of SC clearance. She would have the opportunity to respond to this proposal before a final decision were made. She would be free to apply for other jobs within the Civil Service requiring only a BPSS check.**
>
> **<u>Option 2</u> We could proceed immediately, and in parallel with the security appeal, with a gross misconduct investigation and disciplinary process under exDFID procedures, with the potential for dismissal.**

I recommend Option 1 ...

This route is arguably kinder and not likely to take much longer than a misconduct case. While Josie's responses to ESND so far have not reassured them that she would act differently in future, her case is an emotive one and she would cite a number of mitigating factors. If a Decision Manager concluded that they should stop short of dismissal, and it remained the case that she held no security clearance, we would then have to move to dismiss on security grounds anyway, which could appear vindictive. For either option, Josie will remain suspended with pay until there is an outcome.

We would be able to say virtually nothing to the wider organisation about the outcome of a misconduct case so would be unlikely to act as a deterrent. Option 1 is not risk-free in reputational terms, and the distinction behind the two types of dismissal may be lost on a wider audience, but there is perhaps less media risk from a dismissal based on a contractual requirement than on a disciplinary process. We would propose adhering to the usual press line on staff matters, i.e., that we take these issues seriously but we do not comment on individual cases.

There are no particular financial risks or benefits either way."

75) On 16 February 2022, at p.306, Ms Chua's Chief of Staff replied to Ms Evans indicating that Ms Chua agreed with the proposed course of action.

76) The Claimant appealed against Mr Hobart's decision. Ms Chua was appointed as the Decision Manager for the appeal and Mr Dick as the Appeal Officer. The latter met the Claimant on 14 April 2022, and there are notes of the meeting at pp.361 to 368. These show that early in the meeting the Claimant told Mr Dick that she had received advice from lawyers that the disclosures she had made were protected under the Public Disclosure Act ("PIDA")(sic). When asked about this in cross-examination, Mr Dick said that he did not know what was meant by this. In the course of the meeting, the Claimant repeated that she had not provided new information in the course of the interview but had corroborated what Mr Marshall had already provided. The Claimant repeated her position about whether animals had been prioritised over people and said that she:

"Stupidly shared info with her that showed that. This was obviously stupid, but in a context of me trying to show that that wasn't what had happened."

77) Mr Dick commented that the Claimant had told Ms Shepherd that what she did was wrong and done to some degree in the heat of the moment. He asked:

"Do you still think that sharing unauthorised information is wrong?"

The Claimant replied that her answer was probably:

"Yes, but ..."

She said that she did think that it was wrong and she regretted doing it, but did not think that it was a black and white issue as there was wrong on the organisation's side as well. She said that she still believed that it would have been detrimental to her to push for genuine accountability internally and that she believed that she would not have been taken seriously. The Claimant said that:

> **"If internal avenues don't work, then the media plays a fundamental role in democracy."**

Mr Dick asked the Claimant whether, in the context of speaking to the media, this was a last resort, to which the Claimant said that she did not think that she did the right thing but she was drawing a distinction between what she did and Ms Shepherd's 100 per cent "Never" argument.

78) On 19 April 2022, Mr Dick sent a recommendation to Ms Chua that the appeal be dismissed and that the withdrawal of DV and SC clearance be upheld. A redacted copy of this document appeared at pp.369 to 372 of the public bundle, and again the Tribunal had an unredacted copy in the private documents.

79) Mr Dick stated that he had reviewed the relevant documents and had conducted an appeal hearing with the Claimant. He said that he had been guided by the relevant parts of the VDF. The Tribunal deals with further aspects of Mr Dick's recommendation in its private reasons.

80) Ms Chua's evidence, in para.10 of her witness statement, was that while Mr Dick had recommended removal of the Claimant's security clearance, the decision whether or not to do so was hers. Ms Chua repeated this when taken to a decision letter template prepared by Mr Dick before her decision had been made, at pp.379 to 380. This involved an assumption that the appeal would be unsuccessful. In her evidence given in public, Ms Chua said that it was correct that, if the Claimant had not appealed, she would have lost her job. Part of Ms Chua's evidence in private (but which did not involve anything that needs to be kept private) emphasised this point. Ms Chua agreed with the proposition put by Mr Millar that once it had been established that the Claimant had been "leaking information, that's it", meaning that that was the end of the matter. Ms Chua said that she regarded the Claimant's failure to raise her concerns internally as an important factor and said that individual civil servants could not on their own decide to go to the media: they should raise matters internally.

81) Ms Chua also gave further evidence in private, which is dealt with in the Tribunal's private reasons.

82) Ms Chua provided the Claimant with the outcome of the appeal in a letter of 31 May 2022, at pp.390 to 391. This included the following:

> **"As outlined in Edward Hobart's email of 23 February, the key factors in the decision to withdraw your security clearance were that you deliberately made unauthorised disclosures of classified (official sensitive) information to a journalist and participated anonymously in a *Newsnight* interview without seeking the permission of, or declaring your involvement to, the FCDO. You were aware of the internal processes to raise concerns, but you chose not to use them.**
>
> **I have concluded that the security concerns relating to those behaviours indicate a security vulnerability. A concern identifies a lack of security behaviour, judgment and understanding of the importance of protecting Government assets."**

83) The Tribunal accepted Ms Chua's evidence about the reasons for rejecting the appeal, noting that Ms Chua identified essentially the same key factors as Mr Hobart.

84) Also on 31 May 2022, Ms Evans asked Ms Fisher whether she would be willing to act as Decision Manager in a security clearance dismissal case, describing this as "high profile and sensitive". Ms Fisher accepted the role and, on 22 June 2022, sent a letter to the Claimant, at pp.404 to 405, which included the following:

> **'I have been informed by the Personnel Security Team in ESND that a decision was made to withdraw your DV and SC clearance and that your appeal to Juliet Chua against that decision was unsuccessful.**
>
> **As you will be aware from announcements ... the FCDO made a decision, post-merger, that other than in a small number of exceptional cases all staff would be required to hold DV security clearance. I have checked to see if there are any roles available at G6 (or at SEO/HEO) that do not require a minimum of SC clearance, but there are none, and we therefore propose to dismiss you from the FCDO for "some other substantial reason", which is that there are no roles within FCDO that you can do without DV or at least SC security clearance.**
>
> **Before making a final decision, I would like to invite you to a meeting to discuss this ...'**

85) There was internal correspondence about the availability of roles within the FCDO in which SC or DV clearance might not be required. Ultimately (and after the date of this letter) it was confirmed that there were none.

86) The meeting was arranged for 30 June 2022. On 27 June, Ms Evans sent to Ms Fisher a Briefing Note, at pp.410 to 411, and a Speaking Note, at pp.412 to 413. The Briefing Note covered a number of matters, including the following:

> **"During her appeal against withdrawal of her security clearance, one of the points Josie made was to suggest that her actions constituted protected disclosures (whistle-blowing) and that to withdraw her security clearance because of them was unlawful. That suggestion was considered and rejected by the Security Clearance Appeal Manager.**

> **Again, the purpose of your decision is not to reconsider any aspect of the decision to remove security clearance and you are not in any case in a position to do so, either in terms of the information or authority that you have. If Josie (or her TU rep) seek to raise whistle-blowing issues, I would therefore advise that you make clear that you are not in a position to consider any such allegations, but that your decision will be based solely on whether there are any suitable roles available for Josie to perform without security clearance."**

87) The Speaking Note set out matters such as how to make the relevant introductions at the start of the meeting and how to describe the purpose of the meeting. It proposed that Ms Fisher should say that she had checked whether there were any roles in the FCDO that the Claimant could do without DV or SC security clearance and that the Appointments Team had confirmed that there were none at G6 or lower grades. The fourth bullet point in the Speaking Note read as follows:

> **"This meeting is not to discuss the reasons for the removal of your security clearance, which was a matter for ESND. This meeting is solely to discuss the fact that, without clearance, there is no role within FCDO that you can perform. Before I make a final decision, I would like to give you the opportunity to respond or comment on that."**

88) There then followed a number of questions which it was foreseen that the Claimant might raise, one of which involved making comments about being a whistle-blower. The suggested answer to this was as follows:

> **"FCDO takes any reporting of protected disclosures very seriously and has robust policies in place. I understand that the issue of whether you were a whistle-blower was considered as part of your ESND appeal. I do not have the information or the authority to enable me to reconsider the issue. I can, however, reassure you that my decision will be based solely on whether there are any suitable roles that you could do without security clearance and not on any question about any alleged whistle-blowing."**

89) The Tribunal comments that it was not in fact the case, as incorrectly stated in the Briefing Note quoted in paragraph 86 above, that the issue of whether the Claimant was a whistle-blower had been considered as part of the ESND appeal or process. Ms Chua did not suggest at any point in her evidence that this was the case, and her acceptance of the proposition that if someone was leaking information "that was it" ran counter to that idea. Mr Dick had not considered this either and said that, when the Claimant referred to the Public Disclosure Act or Public Interest Disclosure Act, he did not know what that was.

90) The meeting took place on 6 July 2022, with notes of it being at pp.420 to 422. These showed that early on the Claimant made reference to her acting as a whistle-blower, to which Ms Fisher responded in terms that mirrored those of the Speaking Note on that point. The Claimant's union representative asked if consideration had been given to roles across the Civil Service that did not require security clearance, to which Ms Fisher

replied that the FCDO was the Claimant's employer so the roles that had been looked at were within the FCDO as those were the roles within the organisation's gift. She said that the Claimant was free to apply for jobs across the Civil Service. There was some discussion about whether the Claimant's employer should correctly be regarded as the FCDO or the Civil Service more widely. There was discussion about what the detailed arrangements would be if the Claimant were to be dismissed.

91) In cross-examination, it was put to Ms Fisher that dismissal was a foregone conclusion. She replied that:

"It was a highly likely outcome".

When asked what might have prevented dismissal, Ms Fisher suggested that the Claimant might have resigned first, in which case she would not have been dismissed. Ms Fisher said that it was hard to think of anything that might have made a difference given that the Claimant did not have security clearance. She agreed that there would be no position at any grade.

92) Ms Fisher said that, when she was briefed, she was made aware of the Claimant's disclosures but that these were not part of her remit; and in answer to Mr Schofield, she confirmed that her understanding was that any question of whistle-blowing had been considered at the security clearance appeal.

93) Ms Fisher gave her decision in a letter dated 15 July 2022, at pp.423 to 424. This was that the Claimant's employment should be terminated on the grounds of "some other substantial reason", which was that there were no roles within the FCDO that she could do without DV or at least SC security clearance. The letter referred to the right to appeal.

94) In para.25 of her witness statement, Ms Fisher confirmed the reason for her decision to dismiss the Claimant and gave some further explanation. She said that it had been decided that other than in a small number of exceptional cases all staff would be required to hold DV as well as SC security clearance. There were no roles available at any appropriate grade which did not require DV or at least SC. Ms Fisher said that the Claimant had stated that a colleague had continued working having had their SC and DV security clearances withdrawn. She said that she had consulted Ms Evans about this, who said that this was not correct. Ms Fisher also said that there was a small number of legacy staff who did not hold either security clearance but that these were in highly specialist roles which did not require access to sensitive information.

95) Ms Fisher also said that the Claimant's contract of employment was with the FCDO, which had no control over recruitment by other Government departments and so was not therefore in a position to find or offer employment in other departments. Ms Fisher concluded that she based her decision solely on whether there were any suitable roles that the Claimant

could do without security clearance and not on any question about any alleged whistle-blowing.

96) The Tribunal accepted Ms Fisher's evidence about the reasons for her decision.

97) The Claimant appealed against this decision and Mr Tinline was appointed to hear that appeal. As with Ms Fisher, he was provided with a Briefing Note and a Speaking Note, at pp.431 to 433. The content of these documents was similar to those provided to Ms Fisher, in particular the statement that the issue of whether the Claimant was a whistle-blower had been considered as part of the ESND appeal and could not be reconsidered at this stage was repeated.

98) There were notes of the appeal meeting at pp.467 to 468, this taking place on 9 August 2022. These recorded that the Claimant said that she was challenging the process related to security clearance through an Employment Tribunal and realised that the process was outwith the scope of the present discussion. She said that the FCDO policy on security clearance stated that it applied in all but a small number of exceptional cases and that she felt that hers fell into that category. Secondly, the Claimant's union representative said that he understood that, if FCDO employees failed to obtain DV clearance, or did not wish to apply for this, people would not be dismissed but instead would be helped to find roles in other Government departments.

99) Following the meeting, Mr Tinline made enquiries about alternative employment and was told that the Claimant would have access to the same support that had been offered, or intended to be offered, to other staff within the organisation who could not or would not obtain security clearance.

100) Mr Tinline gave his outcome in a letter dated 12 August 2022, at pp.469 to 470. He referred to the two grounds of appeal: first, that the Claimant should be treated as an exceptional case and, second, that FCDO should have taken steps to find another role within the Civil Service which did not require security clearance. On the first ground, Mr Tinline wrote:

> **"• Your performance record cannot be a factor which can be considered when determining the central issue, namely whether there were any roles that you could do without DV or at least SC security clearance (which there were not)**
>
> **• With regards to your comments about alleged whistle-blowing, I am satisfied that the Decision Manager's decision was based solely on whether there were any suitable roles that you could do without security clearance and not on any question about any alleged whistle-blowing."**

101) On the second ground, Mr Tinline said that he had been informed that it was the consistent practice of the FCDO to expect the individual without DV or SC security clearance to take responsibility for seeking alternative employment within the Civil Service should they wish and that this was

because the FCDO had no control over recruitment by other Government departments. He concluded that he did not uphold the appeal on either ground.

102) Following Mr Tinline's decision to reject her appeal, the Claimant raised a further appeal, as she was entitled to do, to the Security Vetting Appeal Panel ("SVAP"). This is an independent panel chaired by a retired High Court Judge. SVAP recommended that the withdrawal of the Claimant's security clearances should be upheld. The appeal was heard on 28 April 2023 and the decision given on 23 May 2023, all after the claim to this Tribunal was presented.

103) There was some discussion in the present hearing about the significance of the SVAP decision for the matters in issue before this Tribunal. We accepted Mr Collins' submission that SVAP's decisions are not binding on the Tribunal, and that the fact that SVAP reached the conclusion that it did does not mean that the Tribunal must reach the same conclusion. We also accepted Mr Collins' further submission that SVAP has a particular expertise and experience in national security vetting and that we should give its decision due weight.

104) Having said that, the Tribunal also accepted Mr Millar's submission that SVAP and this Tribunal address different questions. This Tribunal is not charged with deciding whether the decision to withdraw the Claimant's DV and SC clearances was correct, or justified, or anything similar, from a security perspective. We have to decide, applying the relevant statutory provisions, whether the withdrawal was a detriment and, if it was, whether it was done on the ground that the Claimant made a protected disclosure or disclosures.

105) The Tribunal therefore noted the SVAP decision, and reminded itself to take care not to enter into any issue about whether the Claimant's security clearance should or should not have been withdrawn, from the security perspective. For this Tribunal's purposes, it is a fact that it was withdrawn, and remained withdrawn following an internal appeal and an appeal to SVAP.

The applicable law and conclusions

106) The Tribunal first considered whether the Claimant had made protected disclosures. The relevant provisions in the Employment Rights Act are as follows:

43A In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B (1)....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)……
(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)……
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e)……
(f) that information tending to show any matter falling within any of the preceding paragraphs has been, or is likely to be, deliberately concealed.

43G (1) A qualifying disclosure is made in accordance with this section if -

(a)……
(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
(c) he does not make the disclosure for purposes of personal gain,
(d) any of the conditions in subsection (2) is met, and
(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are -

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F.
(b) that, in a case where no person is prescribed for the purpose of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
(c)……..

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had in particular to -

(a) the identity of the person to whom the disclosure is made,
(b) the seriousness of the relevant failure,
(c) whether the relevant failure is continuing or is likely to occur in the future,
(d)……...
(e)……...
(f)……....

43H (1) A qualifying disclosure is made in accordance with this section if -

(a)……..

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true.
(c) he does not make the disclosure for purposes of personal gain,
(d) the relevant failure is of an exceptionally serious nature, and
(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

107) The Tribunal first considered the *Newsnight* interview on 7 December 2021. The Tribunal found that, although the Claimant expressed opinions about the issues, including the behaviour of Ministers, there were disclosures of information within the meaning of section 43B(1). Examples of these are the Claimant's statements that there was "no sort of induction, no objectives, no handover, no ability to access the systems....."; that thousands of emails were going unread; and that subsequently emails were read but that nothing was done other than to report that they had been read.

108) The Claimant then relied on s.43B(1)(b), 43B(1)(d) and/or 43B(1)(f). In each instance, the first question is whether the Claimant in fact held the belief that the disclosure tended to show one or more of those elements; the second whether any such belief that she actually held was a reasonable belief; the third whether she in fact believed that the disclosure was made in the public interest; and the fourth, whether any such belief that she actually held was a reasonable belief.

109) In relation to failure to comply with a legal obligation (s.43B(1)(b)), the Tribunal had regard to the observations of His Honour Judge Serota QC in **Blackbay Ventures Limited v Gahir [2014] ICR** that:

"Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation."

110) The Tribunal found that the Claimant had not identified a legal obligation with sufficient clarity to enable it to find that she held the relevant belief. We found that the Claimant's evidence about belief in a public law obligation to act rationally and not in an arbitrary manner was not sufficient. In the course of the interview the Claimant alleged that the evacuation had been disorganised and chaotic; that individual cases had been given priority on the basis of influence exercised on their behalf; and that the focus of the operation was to manage political fallout rather than on the practical management of the exercise. The Tribunal accepted that, if made out, these would be significant political and/or ethical criticisms. We did not, however, consider that they amounted to a breach of an identifiable legal obligation.

111) The Tribunal therefore found that the Claimant did not at the time believe that the disclosures tended to show that there had been a failure to comply with a legal obligation. This finding does not mean that the Tribunal disbelieved the Claimant's evidence to the effect that she held such a belief. It means that, while accepting what the Claimant said about her own state of mind, the Tribunal found that this did not amount to a belief that what she

was saying tended to show that there had been a failure to comply with a legal obligation.

112) Alternatively, if the Tribunal is wrong about this, and the Claimant did have the relevant belief, this was not a reasonable belief. This is for the reason already identified, i.e. that the Claimant has not identified the legal obligation with sufficient clarity for it to be reasonable to believe that what she was saying tended to show that there had been a failure to comply with it.

113) The Tribunal found that, with reference to s.43B(1)(d), the Claimant in fact believed that the disclosures tended to show that the health and safety of an individual (or, rather, individuals) had been, was being or was likely to be endangered. The Claimant believed that individuals who had co-operated with NATO forces were at risk of harm or even death at the hands of the Taliban. Indeed, it was not suggested otherwise on behalf of the Respondent. Any significant failings in the evacuation process were likely to leave individuals exposed to that risk, and therefore to the prospect of their health or safety being endangered.

114) For essentially the same reasons, the Tribunal found that the Claimant's belief in this regard was reasonable.

115) With regards to s.43B(1)(f), the Tribunal paid particular regard to the words of the statute in relation to the deliberate concealing of information. We did not consider that ministerial denials of matters that the Claimant believed to be true amounted to the concealing of information. The Claimant's disclosures did not, for example, involve asserting that Ministers had concealed information about how many requests for help had been made, or by whom. The Ministers had denied Mr Marshall's allegations about the evacuation being chaotic, and had done so in concise terms: Mr Raab had described Mr Marshall's testimony as "inaccurate", while Mr Johnson had characterised part of it as "complete nonsense". The Tribunal found that, while there could be no doubt that (whether rightly or wrongly) Mr Raab and Mr Johnson were disputing what Mr Marshall had said, this did not amount to concealing information.

116) The Tribunal's reasoning on this aspect was similar to that in relation to the issue of failure to comply with a legal obligation. The Tribunal did not disbelieve the Claimant's evidence about her state of mind in this regard, but we found that this did not in fact amount to a belief that information had been deliberately concealed. Alternatively, any such belief was not reasonable.

117) Next, the Tribunal considered whether the Claimant believed that the disclosures were made in the public interest. We found that she did. Mr Marshall's evidence was in the press on September 2021, as were the ministerial denials. The Tribunal found that there was a clear public interest in the way in which the evacuation was proceeding, and whether it was being carried out effectively and fairly. The safety, including the lives, of individuals who had assisted NATO in Afghanistan, was potentially at stake

118) It is true that the Claimant subsequently expressed regret about her actions, but that did not, in the Tribunal's judgment, exclude a belief that she was acting in the public interest at the time that she made the disclosure. At this later stage, the Claimant's activities had been discovered and it was, perhaps, not surprising that she had, and expressed, some feelings of regret about what had happened. Expressing regret after the event did not mean that the Claimant did not believe that she was acting in the public interest when she made the disclosures.

119) Was the Claimant's belief that she made the disclosure in the public interest a reasonable belief? The Tribunal found that it was. The factors identified above in relation to the Claimant's actual belief are also relevant here. Additionally, the situation was a very serious one. The Prime Minister and Foreign Secretary were denying things that the Claimant believed to be true, based on what she had observed in the course of her work. The issue was being presented in public as the word of a junior civil servant (Mr Marshall) against that of the Foreign Secretary.

120) The findings made by the Tribunal in relation to the public interest issue apply to the Claimant's belief under section 43B(1)(d) (health and safety). For the avoidance of doubt, should the Tribunal be wrong in its earlier conclusions about the Claimant's belief in relation to failure to comply with a legal obligation and/or deliberate concealing of information, our conclusion that the Claimant had a reasonable belief that such disclosures were made in the public interest would also be applicable to those disclosures.

121) The Tribunal therefore concluded that the Claimant had made qualifying disclosures under section 43B(1). She then relied on section 43G and/or section 43H for the purposes of establishing that the disclosures amounted to protected disclosures.

122) Under section 43G(1)(b) the first question is whether the Claimant believed that the information disclosed, and any allegation contained in it, were substantially true. The Tribunal found that she did. We have already found above that the Claimant was genuinely concerned about what she observed and experienced while working at the Crisis Centre. She referred to her experiences and her view that the management and response had been "unforgivably bad" when declining to participate in the "lessons learned" exercise. What she said in the *Newsnight* interview was consistent with this, as was the evidence in her witness statement.

123) Was that belief reasonable? In approaching this question, the Tribunal reminded itself that this is not the same as asking whether the evacuation was in fact chaotic or mismanaged. As we have already observed, it is not within our remit to decide that. That being so, the Tribunal accepted that it was correct for the Respondent to take the view that it need not, and indeed should not, cross-examine or call evidence on the merits of the evacuation exercise. It is true that the then Foreign Secretary and Prime Minister had dismissed Mr Marshall's evidence as inaccurate or, in part, nonsense.

Neither of these statements amounted to saying that it was wholly wrong. At no point during the internal processes or the present hearing was it suggested that the Claimant's concerns were wholly misplaced. The Tribunal concluded that her belief that the information disclosed and the allegations contained in it were true, was a reasonable belief. It was based on what she had observed and experienced, and there was no evidence before us to suggest that it was other than reasonable for her to believe what she did.

124) Section 43G(1)(c) requires that the disclosure should not be made for personal gain. It was accepted by the Respondent that it was not.

125) Section 43(1)(d) then requires that any of the three conditions in subsection (2) of section 43G is met. In the circumstances of the present case, paragraph (a) is a condition of a reasonable belief that the worker will be subjected to detriment if she makes a disclosure to her employer. Once again, the first question is whether the Claimant in fact had such a belief. The Tribunal accepted her evidence that she had. The Claimant's account was that she understood that Mr Marshall had raised his concerns internally and subsequently resigned, leading her to infer that he had been put under pressure which caused him to resign. She said that she believed that something similar would happen if she made disclosures internally. The Tribunal found that account to be plausible in the circumstances.

126) The Tribunal then asked itself whether this was a reasonable belief. In addition to the finding that this belief was plausible in itself, the Claimant knew that the Foreign Secretary had publicly disputed Mr Marshall's account, such that (as the Tribunal finds) it was reasonable for her to expect an unfavourable reception were she to make disclosures to similar effect within the FCDO. We therefore found that the Claimant's belief was reasonable.

127) We therefore found that paragraph (a) of subsection (2) was satisfied, which is sufficient for the purposes of that subsection. The same was not the case for paragraph (b), as the ministerial denials of the accuracy of Mr Marshall's account were not sufficient to support a reasonable belief that evidence would be concealed or destroyed if the disclosures were made to the Respondent. Paragraph (c) does not apply in the present case.

128) The final element of section 43G(1) is paragraph (e), which requires that in all the circumstances of the case it is reasonable for the worker to make the disclosure. Subsection (3) then provides a (non-exhaustive) list of matters to which regard should be had when determining this issue. Of these, (d), (e) and (f) are not applicable.

129) Under paragraph (a), the "person" to whom the disclosure was made was the broadcast media, in the form of the BBC. The Tribunal considered that it was reasonable for the Claimant to go to the UK's public service broadcaster when the relevant information and/or allegations had already

been put into the public domain (by Mr Marshall) and government ministers were publicly disputing them.

130) With regard to paragraph (b), the Tribunal considered that the relevant failure was serious as it involved a risk to safety, possibly the lives, of a number of individuals. (In saying that such a risk was involved, the Tribunal is not making any finding about the actual risks to any person, but is taking the subject matter of the disclosures on its own terms).

131) As to whether the relevant failure was continuing or likely to occur in the future under paragraph (c), and with the same proviso as to the Tribunal not making any findings about the substantive facts, we found that it was continuing. This was in the sense that, taking the disclosures on their own terms, individuals remained at risk, and that ministers were continuing to dispute Mr Marshall's account.

132) Paragraphs (d), (e) and (f) are not applicable in the present case.

133) The Tribunal therefore found that section 43G applied to the Newsnight interview. Given this conclusion, it was not necessary to consider section 43H.

134) With regard to the disclosure of the emails, these contained information. The Tribunal has found that the Claimant did not, at the time of making this disclosure have an actual belief that the emails tended to show the endangering of health and safety. The Tribunal also considered, with reference to section 43B(1)(d), that the emails did not contain anything which in fact tended to show that health and safety was being endangered. They showed that Nowzad staff were in the categories approved for evacuation, and that guidance or a steer was being sought from No.10. The Tribunal did not consider that it could reasonably be said that disclosing that one group of people had been approved for evacuation necessarily meant that this had occurred at the expense of another group who otherwise would or should have been approved: there would be limits to those who could be approved. For that reason, if (contrary to the Tribunal's finding) the Claimant had had a belief that the emails tended to show the endangering of health and safety, that would not have been a reasonable belief. This was not, therefore a qualifying disclosure.

135) The Tribunal found that the Claimant had a reasonable belief that she made this disclosure in the public interest, the belief being that it was in the public interest to know that animals had not in fact been prioritised over people. The effect of our decisions about the Claimant's actual belief and the reasonableness of any such belief, if held, however, is that this was not a qualifying disclosure.

136) Section 47B of the Employment Rights Act 1996 includes the following provision with regard to detriment:

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

137) The Claimant relied on the two alleged detriments of her suspension and the revocation of her security clearance. There was no dispute that these actions were taken. There was little argument addressed to the Tribunal on whether these amounted to detriments. The Respondent's written submissions at paragraph 129 seemed somewhat equivocal on the point as regards the suspension: there was no suggestion that withdrawal of DV and SC clearance was not a detriment.

138) Although the authority was not cited to the Tribunal, we had regard to the guidance given by the Employment Appeal Tribunal in **Warburton v Chief Constable of Northamptonshire [2022] EAT 42** in the context of a victimisation claim, that the question is whether treatment is of such a kind that a reasonable worker would or might take the view that, in all the circumstances, it was to their detriment. The Tribunal found that both suspension (in relation to the Claimant's security clearance and her job) and the revocation of her security clearance amounted to treatment of such a kind that a reasonable worker might take the view that it was to their detriment.

139) The test of an act being done "on the ground that" the worker has made a protected disclosure was considered by the Court of Appeal in **Fecitt and others v NHS Manchester [2012] ICR 177**. In paragraphs 43-45 of his judgment, Elias LJ drew a distinction between the causation test of the reason or principal reason in the case of unfair dismissal, and the "on the ground that" test in section 47B, concluding that:

".....the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

140) Applying this test, the Tribunal found that the Claimant was not suspended on the ground that she had made the disclosures. (The Tribunal has referred to disclosures in the plural in case it is wrong about the disclosure of the emails not being a protected disclosure: our conclusions on causation would be the same in that event).

141) The Tribunal has accepted Mr Hobart's evidence that the Claimant was suspended, in terms of both her security clearance and her job, pending investigation of the former. This included the evidence that, whenever a breach such as the "leaking" of emails occurred, there would be an investigation and a review of the individual's security clearance. It was logical that there should be such a review. The Tribunal found that it was unavoidable that the Claimant would be suspended from her job while her security clearance was reviewed, as she was required to have such clearance.

142) The Tribunal therefore concluded that the entire reason for the Claimant being suspended, in both respects, was that her security clearance was being investigated. The fact that she had made a protected disclosure, or disclosures, did not materially influence the decision to suspend her.

143) The Tribunal found the position to be different with regard to the withdrawal of the Claimant's security clearance. The terms of Mr Hobart's email dated 23 February 2022, explaining the decision to withdraw clearance, have been set out above. The explanation gave the key factors in the decision, which included: "....you...made conscious decisions to make unauthorised disclosures of classified (Official Sensitive) information to a journalist and to participate anonymously in a Newsnight interview...."

144) In the Tribunal's judgement, this meant that one "key factor" in the decision to withdraw clearance was that the Claimant had made the disclosures. We have found that one of these was a protected disclosure, while one was not. The effect of these findings is that the making of the one protected disclosure was a more than trivial influence on the decision to withdraw clearance. As stated above, there was no dispute as to the withdrawal amounting to a detriment.

145) The complaint of detriment on the ground of making a protected disclosure is therefore well founded in relation to the withdrawal of security clearance, although not in relation to the suspension.

146) The Tribunal then considered the issues regarding unfair dismissal. In relation to automatic unfair dismissal, section 103A of the Employment Rights Act 1996 provides that:

An employee who is dismissed shall be regarded.....as unfairly dismissed if the reason (or, if more than one, the principal reason) fir the dismissal is that the employee made a protected disclosure.

147) Section 98 of the 1996 Act includes the following:

(1) ....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 within 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.

148) It is established that the reason for a dismissal is the set of facts or circumstances in the mind of the employer which causes them to dismiss the employee: **W Devis & Sons Limited v Atkins [1977] IRLR 314**. In order to make findings about this, it may be necessary to consider the state of mind of persons other than the immediate decision maker: for example, as in **Royal Mail v Jhuti [2020] ICR 731**.

149) On this aspect, Mr Collins submitted that Ms Fisher and Mr Tinline dismissed the Claimant because she did not have security clearance, and there were no roles available with the Respondent which she take up without clearance. Mr Millar submitted Ms Fisher and Mr Tinline had no real freedom when making the decision, because dismissal was unavoidable once the decision to remove clearance had been made.

150) There was, therefore, a question to be determined as to who were the "real" decision makers, whose state of mind had to be considered in order to determine the reason, or principal reason for the dismissal. It was implicit in the Respondent's case that these were Ms Fisher and Mr Tinline, and in the Claimant's case that these were Mr Hobart, Ms Shepherd and Ms Chua. The Tribunal adds that it is not necessarily the case that one party must be right about this, to the exclusion of the other: all or some of these individuals might be the decision makers.

151) In any event, the Tribunal reminded itself at this stage that its task was to determine the sole or principal reason for the dismissal, and that this was not the same as the test in relation to detriment of asking whether the making of the disclosure had had a material influence on the decision.

152) The Tribunal found that the correct description of the reason why the Claimant was dismissed was that her security clearance had been withdrawn, and there was no post open to her in the Respondent's organisation without such clearance. Within that, the Tribunal found that the principal reason was the withdrawal of clearance. The fact that there was no post open to her only came about because of the withdrawal of clearance and was therefore subsidiary to that.

153) In making these findings, the Tribunal took into account both processes, namely the withdrawal of security clearance (involving Mr Hobart, Ms Shepherd and Ms Chua) and the dismissal process (involving Ms Fisher and Mr Tinline). We considered that it would not be realistic to say that one, to the exclusion of the other, was the source of the decision. The security clearance process considered whether to withdraw clearance, without regard to what the consequences of that might be: it was an assessment of risk. That process did not, for example, involve any consideration of whether there might be posts available which did not require clearance. Conversely, the basis of the decision in the dismissal process was the withdrawal of clearance, which Ms Fisher and Mr Tinline had to take as a fact which was not open to any review by them.

154) The Tribunal further concluded that the making of the one protected disclosure was not, in itself, the sole or principal reason for dismissal. It was a part of the principal reason. It was one of two disclosures, the other not being a protected disclosure. There was no evidence to suggest that one was more significant than the other. There were also elements to the decision to withdraw clearance beyond the making of the disclosures: in particular the failure to use internal channels; the perceived risk of future

leaks; and (whether correct or not) the belief that the Claimant had initially denied involvement.

155) The Tribunal would have reached the same conclusion had it decided that either Mr Hobart, Ms Shepherd and Ms Chua together, or Ms Fisher and Mr Tinline together, were the decision makers. In the former case, the making of the protected disclosure would not have been the sole or principal reason for the revocation of security clearance, and so for the dismissal, for the reasons given in paragraph 154 above. In the latter case, the position would have been the same, with the additional point that these individuals had no control over the security clearance decision.

156) Section 103A of the Employment Rights Act provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for the dismissal is that she made a protected disclosure. The Tribunal's findings in the preceding paragraphs mean that this section does not apply.

157) The Tribunal considered, however, that the Respondent's reason for the dismissal fell within the "some other substantial reason" provision in section 98(1)(b). It was therefore necessary for the Tribunal to go on to consider the following further provisions of section 98 of the Employment Rights Act:

(4) 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 reason 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.

158) On the question whether the Respondent acted reasonably or unreasonably, the Tribunal reminded itself that there is often no single answer to what was reasonable in the circumstances, and that there is often a range of reasonable approaches that could have been taken. The question is therefore often seen as being whether the Respondent's actions took them outside the range of reasonable responses.

159) Mr Millar submitted that the Respondent's HR team effectively ran the dismissal process (not the security process), issuing prescriptive instructions "to ensure the process did not allow any consideration of any meaningful point (i.e. anything which might allow C to keep her job)". The Tribunal did not consider it necessary to make any findings about why HR issued the instructions that they did.

160) In the Tribunal's judgement, the central point is the effect of one of these instructions, quoted in paragraph 86 above. The Briefing Note to Ms Fisher

stated that the suggestion that the Claimant's actions constituted protected disclosures had been considered and rejected by Ms Chua. The Tribunal has found that this was not the case, and that in fact Ms Chua had not considered that suggestion. Ms Fisher was told that she was not to consider any such suggestion. The Speaking Note to Ms Fisher contained similar observations. Mr Tinline was provided with similar Briefing and Speaking Notes.

161) The result (whether or not intended) was that at no point in the Respondent's processes was the Claimant's case that she had made protected disclosures and so should be regarded as a "whistleblower" considered by the decision makers.

162) The Tribunal considered that no reasonable employer, acting reasonably, could base a decision to dismiss an employee in the Claimant's position on a process which failed to engage in any way with the case that she was putting forward. This was sufficient to lead the Tribunal to conclude that the dismissal was unfair under section 98.

163) Mr Millar identified further elements which he contended rendered the dismissal unfair. The Tribunal agreed with 2 of these, namely:

(a) There was little real enquiry into whether the Claimant might fill one of the exceptional roles within the FCDO where security clearance was not required.

(b) There was little real enquiry into whether the FCDO could assist the Claimant with seeking a role elsewhere within the Civil Service.

164) With regard to both of the above aspects, Ms Fisher did not go beyond a single, initial enquiry, to which she received an answer about the normal practice or situation. The Tribunal considered that, especially given that this was not a case where dismissal followed a finding of misconduct, but one in which dismissal followed from a loss of security clearance, the reasonable employer would have made more detailed enquiries about both of these aspects.

165) At the invitation of the parties, the Tribunal has not considered any arguments as to matters such as the principle in **Polkey** or contributory conduct. These are to be determined, if arising, at the remedies stage.

EJ Glennie

EMPLOYMENT JUDGE GLENNIE

11 February 2025

Sent to the parties on

18 February 2025

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for Office of the Tribunals