EMPLOYMENT TRIBUNALS

Claimant: Ms J Nyarega

Respondent: Methodist Homes

Heard at: London South ET **On:** 5,6,7,8 & 9 August 2024

Before: EJ Rea
Mr A. Peart
Miss N. Murphy

Representation
Claimant: Mr J Savile-Tucker
Ms S. Lam
Respondent: Mr T. Wood

RESERVED JUDGMENT

1. The complaint of being subjected to detriments for making protected disclosures is not well-founded and does not succeed.
2. The complaint of automatic unfair dismissal on the ground of having made protected disclosures is not well-founded and does not succeed.
3. The complaint of unfair dismissal is not well-founded and does not succeed.
4. The complaint of breach of contract in relation to notice pay is not well-founded and does not succeed.
5. The complaint of unauthorised deductions from wages is not well-founded and does not succeed.

REASONS

Background

6. The claimant was employed by the responded from 25 April 2019 until 5 October 2022. The claimant worked at the respondent's Ryelands Care Home.
7. The respondent is an independent charity which provides care, accommodation and support to older people across England and Wales, employing approximately 6,500 colleagues and engaging 3,000 volunteers.
8. Early Conciliation commenced on 19 October 2022 and ended on 21 October 2022. The claim form was presented to the Tribunal on 10 November 2022.

Claims and Issues

9. The claimant presented the following complaints to the Tribunal:
    a. Protected disclosure detriments
    b. Unfair dismissal
    c. Automatic unfair dismissal contrary to s103A
    d. Breach of contract relating to notice pay
    e. Unauthorised deduction from wages in respect of arrears of pay

10. The List of Issues prepared at the Preliminary Hearing was vague in places and did not cover all of the claimant's complaints. The parties provided an amended List of Issues during the course of the proceedings which were accepted by the Tribunal and are appended to this reserved judgment and written reasons.

Procedure, documents and evidence

11. The Tribunal referred to a hearing bundle comprising 484 pages together with a supplementary bundle comprising 42 pages. A further bundle of disputed documents was brought to the hearing but this evidence was never put before the Tribunal and so we disregarded that bundle in its entirety.

12. The Tribunal heard evidence from the claimant and the following witnesses on behalf of the respondent:
    a. Ms Marlene Francis (Deputy Home Manager)
    b. Mr Solomon Ekuase (Home Manager)
    c. Ms Lauren Sparg (Investigation Manager – 1st disciplinary process)
    d. Ms Anne Fenlon (Disciplinary Chair – 1st disciplinary process)
    e. Ms Abiodun Williams (Disciplinary Chair – 3rd disciplinary process)
    f. Ms Mandy Carey (Area Manager and Appeal Chair – 3rd disciplinary process).

The Law

Time Limits

13. Section 48 (3-4) Employment Rights Act 1996 provides as follows:

An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

The concept of a "series of similar acts" in s.48(3) is distinct from the "act extending over a period" (which is a single act). It may not be possible to characterise a case as a case of an act extending over a period within s.48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. s.48(3) is designed to cover such a case. There must be some relevant connection between the acts in the three-month period and those outside it (Arthur v. London Eastern Railway Ltd. [2006] EWCA Civ 1358 at [31]).

In order to determine whether acts are part of a series, some evidence is needed to determine what link, if any, there is between the acts in the three-month period and the acts outside the three-month period. It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged. "Motive" is not a helpful departure from the legislative language according to which the determining factor is whether the act was done "on the ground" that the employee had made a protected disclosure. Depending on the facts, the possibility of a series of apparently disparate acts being shown to be part of a series, or to be similar to one another in a relevant way, by reason of them all being on the ground of a protected disclosure would not be ruled out (Arthur at [35]).

Unfair dismissal

14. Section 98 Employment Rights Act 1996 provides as follows:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling 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.

(2) A reason falls within this subsection if it—

…

(b) relates to the conduct of the employee, or

…

…

(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.

17. An employee who is dismissed shall be regarded…as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure (s.103A Employment Rights Act 1996). It is deliberate that the test for causation in dismissal cases is different from that in detriment cases (Fecitt v. NHS Manchester [2012] IRLR 64). Therefore, the proper test is not whether the disclosure:

(1) Had a "material influence" on dismissal (Fecitt);

(2) Had a "more than trivial impact" on the decision (Secure Care Ltd. v. Mott UKEAT/0122/20);

(3) Was "on the respondent's mind" (Eiger Securities LLP v, Korshunova [2017] IRLR 115). The burden of proof where an automatically unfair dismissal under s.103A is asserted is as follows (Kuzel v. Roche Products Ltd. [2008] ICR 799 at [30]):

"(1) Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent, was not the true reason?

(2) If so, has the employer proved his reason for dismissal?

(3) If not, has the employer disproved the section 103A reason advanced by the Claimant?

(4) If not, dismissal is for the s103A reason.

In answering those questions it follows:

(a) that failure by the Respondent to prove the potentially fair reason relied on does not automatically result in a finding of unfair dismissal under s103A;

(b) however, rejection of the employer's reason coupled with the Claimant having raised a prima facie case that the reason is a section 103A reason entitles the Tribunal to infer that the s103A reason is the true reason for the dismissal, but

(c) it remains open to the Respondent to satisfy the Tribunal that the making of the protected disclosures was not the reason or principal reason for dismissal, even if the real reason as found by the Tribunal is not that advanced by the Respondent;

(d) it is not at any stage for the employee (with qualifying service) to prove the s103A reason.

For employers to be fixed with liability they ought to have some knowledge of what the worker is complaining or expressing concerns about (Nicol v. World Travel and Tourism Council and ors [2024] EAT 42). However, if a person in the hierarchy of responsibility above the employee determined that the employee should be dismissed for a reason, but hid it behind an invented reason which the decision-maker adopted, it is the tribunal's duty to penetrate through the invention rather than to allow it also to infect its own determination. The reason for the dismissal was the hidden reason rather than the invented reason (Royal Mail Ltd. v. Jhuti [2019] UKSC 55).

There is a qualification to that principle in that it only applies where an innocent decision-maker is manipulated into dismissing a whistleblower for an apparently fair reason and is "unaware of the machinations of those motivated by the prohibited reason". It does not apply where the decision-maker is aware of the protected disclosure and thus not deceived into dismissing for an unrelated reason (University Hospital North Tees and Hartlepool NHS Foundation Trust v. Fairhall EAT/0150/20).

What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in

fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further (British Home Stores Ltd. v. Burchell [1980] ICR 303).

The tribunal will bear in the mind the guidance of Iceland Frozen Foods Ltd. v. Jones [1982] IRLR 439:

(1) The starting point should always be s.98(4);

(2) The tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair;

(3) The tribunal must not substitute its decision for that of the employer;

(4) There is a band of reasonable responses within which one employer might reasonably take one view, another quite reasonably take another;

(5) The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

That test applies to the procedure adopted as much as to the decision itself (J Sainsbury plc v. Hitt [2003] ICR 111).

The warnings against substitution were set out in London Ambulance Service NHS Trust v. Small [2009] IRLR 563 at [43]:

It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well

gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal.

The Court of Appeal at [47] of Small suggested an approach of focussing factfinding on the respondent's conduct of a claimant's dismissal, rather than concentrating on the conduct of the claimant and then using findings of fact to (inadvertently) substitute views for the grounds on which the respondent actually formed its belief and acted when it took the decision to dismiss. The tribunal should only use its findings about the conduct of the claimant on the separate issue of whether there was contributory fault on his part.

Protected disclosures

15. A protected disclosure is a qualifying disclosure which is made by a worker to:

(1) Their employer (s.43C Employment Rights Act 1996); and/or

(2) A "prescribed person" (s.43F Employment Rights Act 1996)

The Care Quality Commission is a "prescribed person".

A "qualifying disclosure is":

any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

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

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

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

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

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

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

(s.43B(1) Employment Rights Act 1996).

A worker's disclosure must be a disclosure of information. The ordinary meaning of giving information is "conveying facts" (Cavendish Munro Professional Risks Management Ltd. v. Geduld [2010] ICR 325 at [24]). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in s.43B(1) (Kilraine v.Wandsworth London Borough Council [2018] ICR 1850 at [35]).

In Dobbie v. Paula Felton t/a Feltons Solicitors [2021] IRLR 679, guidance on the public interest test was set out at [27]. The necessary belief is that the disclosure is made in the public interest. The particular reasons why the worker believes that to be so are not of the essence. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it

The test of detriment, namely that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment", must be applied by considering the issue from the point view of the victim. "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought to suffice.

On a complaint relating to s. 47(1), it is for the employer to show the ground on which any act, or deliberate failure to act, was done (s.48(2) Employment Rights Act 1996). It will not necessarily follow, from findings that a complainant has made a protected disclosure, and that they have been subjected to a detriment, alone, that these must by themselves lead to a shifting of the burden. The Tribunal needs to be satisfied that there is a sufficient prima facie case, such that the conduct calls for an explanation (Chatterjee v. Newcastle-upon-Tyne Hospitals NHS Trust EAT/0047/19 at [33]).

Unauthorised deductions from wages

16. The statutory prohibitions on deductions from wages are contained in Part II of the Employment Rights Act 1996 (ERA). The general prohibition on deductions is set out in s.13. A right arises where monies have not been paid which are "properly payable". There must be an actual failure to pay and it must relate to money that is due to the individual.

13.— Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

……..

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Findings of Fact

17. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.
18. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it was not relevant to the issues between the parties.

The meeting between the claimant and Ms Francis on 12 April 2022

19. It is not disputed that a meeting took place between the claimant and Ms Francis on the morning of 12 April 2022. However, the content of the conversation that took place is in dispute. The claimant's case is that she raised a number of concerns with Ms Francis that she relies upon as being protected disclosures. The specific concerns that the claimant says she raised were as follows:

i. Giving personal care to residents as early as 4.30-5.00am in the morning which the claimant felt was abusive;

ii. Abuse of residents' medication;

iii. Night staff members report to work drunk and sometimes tipsy;

iv. No risk assessment done to staff who complain of injury;

v. Nepotism (of relatives and girlfriends);

vi. Not fair when doing the Rota (discriminating/favouritism);

vii. D&V outbreak due to badly cooked food;

viii. Residents eating guinea pig faeces at Brooklands;

20. Ms Francis in her witness evidence maintained that only one issue was brought to her attention by the claimant during this conversation. This was that one of the Senior Care Assistants, Hellen, was regularly sleeping whilst on duty. Ms Francis and Mr Ekuase stated in their evidence that this conversation is what led to them arranging a night shift inspection on 14 April 2022. Mr Ekuase's evidence is that Ms Francis did not tell him about the claimant raising any other concerns during that conversation. Nor did Ms Francis raise any such matters with anyone else within the respondent's management.

21. Ms Francis produced a statement of this conversation with the claimant (p171) which was not contemporaneous but based on some jottings Ms Francis said in cross-examination she had made immediately after the meeting. No written account of this meeting was made by the claimant. On the balance of probabilities, the Tribunal finds that the claimant did not raise the concerns listed (i)-(vii) with Ms Francis on 12 April 2022. If the claimant

had raised these serious concerns, the Tribunal is satisfied Ms Francis would have raised with senior managers and taken appropriate action. The action taken later by the respondent tends to show that this was the established practice within the respondent's management. The Tribunal also considered that the claimant would have followed up on these concerns if raised at that time, notwithstanding her suspension shortly afterwards.

22. It is worth noting that in his cross-examination Mr Ekuase accepted that sometime in mid-March the claimant did raise with him a concern about a diarrhoea and vomiting outbreak. There was not sufficient detail to establish whether this could amount to a protected disclosure and the claimant does not rely on it as such. However, it is possible that the claimant has either consciously or unconsciously embellished on this conversation when recalling her meeting with Ms Francis. Mr Ekuase also stated that there was general gossip amongst the staff about him allegedly employing friends and relatives which the claimant referred to in her investigation meeting on 29 April 2022 (p201).

Claimant's call to the CQC in July 2022

23. The claimant's case is that she repeated the same allegations set out above to the CQC in July 2022 during a telephone call. The claimant made a data subject access request to the CQC which resulted in them disclosing the note of a call she made to them on 26 August 2022. However, no note of a call in July was disclosed in response to that request. The note of the call made on 26 August 2022 does refer to the claimant saying the CQC was already aware of these allegations and the claimant did not want to repeat herself. However, by this point the respondent had already made a notification to the CQC which may be what the claimant was referring to. Even if the claimant did make a call in July 2022 there was no evidence before the Tribunal of this or what was said by her. On the balance of probabilities, the Tribunal is not satisfied the claimant made protected disclosures to the CQC in July 2022.

Conversation between the claimant and Ms Carey

24. It is not in dispute that the claimant did raise a number of concerns with Ms Carey and that these were the same allegations set out above. The claimant's case is that she conveyed them orally to Ms Carey during July 2022. Ms Carey's evidence is that the claimant communicated them during a meeting which took place over Zoom on 3 August 2022. The Tribunal prefers Ms Carey's evidence on this point which accords with the documentary evidence before us.

Detriments

25. The parties agree that all of the alleged detriments happened apart from one. The claimant alleges that during the fact-finding meeting Ms Francis accused the claimant of falsifying the daily log relating to resident PL and subsequently destroying it. Having carefully examined the notes of the fact-finding meeting and considered the evidence given by Ms Francis and the claimant, the Tribunal finds that this did not happen. Ms Francis simply pointed out that the entry in the daily log was incorrect and asked the claimant for an explanation. It is also not correct that Ms Francis accused the claimant of destroying this document. This allegation was raised at a later date by Ms Fenlon, the manager who heard the disciplinary hearing.

Knowledge of the claimant being a whistleblower

26. The claimant alleges that it was generally known within the respondent that she was the whistleblower. The Tribunal is clear that Ms Carey did not breach the claimant's confidentiality by sharing her identity as the whistleblower with anyone. However, it is not in dispute that Mr Ekuase held a staff meeting during which he informed them that serious concerns had been raised and that these had come from a member of the night staff. The claimant's case is that she was known as the type of person to raise matters and that therefore others would have guessed she was the person who had raised these concerns.
27. The evidence before the Tribunal was that there had been general gossip amongst the staff about Mr Ekuase allegedly employing friends and

relatives and so this was unlikely to lead anyone to conclude the claimant must be the whistleblower. However, Mr Ekuase was aware of the claimant raising the concern about a D&V outbreak previously and so this together with other pieces of information may have led him to guess that the claimant was likely to be the whistleblower. Given the close communication between him and Ms Francis, the Tribunal concluded that on the balance of probabilities, both Mr Ekuase and Ms Francis knew or suspected that the claimant was the whistleblower in the immediate days after 3 August 2022.

Credibility of the witnesses

28. Overall, the Tribunal found the evidence given by the respondent's witnesses to be consistent and credible. Although a few inconsistencies were identified in Ms Francis' witness statement she acknowledged these and the Tribunal found her explanations to be reasonable. The fact that Ms Ekuase admitted the claimant had raised a concern with him in mid-March 2022 about a D&V outbreak only added to the impression that his evidence was honest.
29. By contrast, the claimant's evidence was not consistent or credible in some respects. On several occasions, the claimant raised significant allegations for the first time during the course of the hearing. The Tribunal was not persuaded that these could have been omitted in error from her case had they been true. During cross-examination the claimant avoided answering direct questions put to her by the respondent's counsel on a number of occasions. Added to the evidence of the claimant providing inconsistent accounts and being evasive during the disciplinary processes, this painted a picture of the claimant being an unreliable narrator.

Decision

30. Having applied the law to the above findings of fact, the Tribunal has made the following decision.

Time Limit

31. Early Conciliation took place between 19 and 21 October 2022 and the claimant's claim form was submitted to the Tribunal on 11 November 2022, Therefore, the only claim that is potentially out of time as having taken place prior to 20 July 2022 is the first alleged detriment of Solomon Ekuase requesting the claimant to leave the respondent's premises in the middle of the night on 14 April 2022.
32. The respondent's representative sensibly conceded that this was likely to form part of a series of connected acts constituting a continuing course of conduct although this is a matter for the Tribunal to determine. The Tribunal having carefully considered the totality of the claimant's case, is satisfied that this act forms part of a series of connected acts and so is a continuing course of conduct meaning that this allegation is in time.

Protected disclosures

Did the claimant make protected disclosures to Ms Francis on 12 April 2022?

33. The claimant's case is that she had a meeting with Ms Francis on the morning of 12th April 2022 in which she disclosed the following concerns:

i. Giving personal care to residents as early as 4.30-5.00am in the morning which the claimant felt was abusive;

ii. Abuse of residents' medication;

iii. Night staff members report to work drunk and sometimes tipsy;

iv. No risk assessment done to staff who complain of injury;

v. Nepotism (of relatives and girlfriends);

vi. Not fair when doing the Rota (discriminating/favouritism);

vii. D&V outbreak due to badly cooked food;

viii. Residents eating guinea pig faeces at Brooklands;

34. The Tribunal is satisfied that (i), (ii), (iii), (iv), (vii) and (viii) if made would be disclosures of information made with a genuine belief that they

happened and that it was in the public interest to disclose them. They would be qualifying disclosures all made on the ground of endangerment of Health & Safety. The Tribunal concluded that (v) and (vi) do not meet the threshold as no facts were disclosed tending to show any of the prescribed grounds.

35. Ms Francis constitutes a prescribed person in her role as Deputy Home Manager for the respondent meaning that (i), (ii), (iii), (iv), (vii), and (viii) would be protected disclosures. However, the Tribunal has found that the claimant did not make these disclosures to Ms Francis during a meeting on or about 12 April 2022.

Did the claimant make protected disclosures orally to the CQC in July 2022?

36. The Tribunal's conclusions about whether these allegations would amount to qualifying disclosures are the same as already set out above. The CQC is a prescribed person and so those allegations which are qualifying disclosures would be protected disclosures made on the ground of endangerment of Health & Safety if they were made. However, the Tribunal has found that these disclosures were not made by the claimant to the CQC in July 2022.

Did the claimant make protected disclosures to Ms Carey in August 2022?

37. The Tribunal has found that these disclosures were made by the claimant to Ms Carey on 3 August 2022. We have also already found that (i), (ii), (iii), (iv), (vii), and (viii) amount to qualifying disclosures made on the ground of endangerment of Health & Safety. As Ms Carey is a prescribed person in her role as Area Manager for the respondent, they are protected disclosures.

<u>Detriments</u>

38. The claimant alleges that she was subjected to the following acts by the respondent which she relies upon as being detriments:
    a. On 14.04.2022 Solomon Ekuase requested that the claimant leave the premises in the middle of the night;

b. On 21.07.2022 Anne Fenlon confirmed by a letter the decision to issue a final written warning to the claimant;
c. On 09.08.2022 Solomon Ekuase advised that the claimant would be suspended;
d. On 10.08.2022 Solomon Ekuase started the second disciplinary investigation;
e. On 22.08.2022 Marlene Francis initiated the third disciplinary investigation;
f. On 23.08.2022 Marlene Francis alleged that the claimant falsified a document, namely the daily log relating to a resident (PL), and subsequently destroyed it;
g. On 22.09.2022 Abiodun Williams held a disciplinary hearing; and
h. On 28.11.2022 Mandy Carey confirmed that the claimant's appeal is not upheld.

39. As the Tribunal has found that no protected disclosures were made on 12 April 2022 then detriments (a) and (b) cannot succeed. However, for completeness we still considered whether these were detriments.
40. The Tribunal concludes that Mr Ekuase's request that the claimant leave the premises in the middle of the night is capable of being a detriment. However, the Tribunal did not consider it was necessarily unreasonable to ask the claimant to leave the respondent's premises once she had been suspended. We note the respondent did offer several ways to ensure the claimant got home safely as this was in the early hours of the morning but the claimant refused all of these. It is also worth noting that the claimant was permitted to remain for a period of time whilst these methods to get her home were being explored. It was only when these were refused by the claimant and she became argumentative that Mr Ekuase considered it necessary for her to leave without further delay.
41. Even then Mr Ekuase and Ms Francis accompanied the claimant outside and intended to stay with her until her husband arrived, but the claimant insisted they leave her alone. The Tribunal considers that another employer might have decided to let the claimant remain in the staff room overnight or until she could be safely picked up by a family member but there was more than one way to deal with this situation and the respondent's way was not unreasonable. The Tribunal accepts that Mr Ekuase felt the claimant's

continued presence was disruptive and that she could interfere in the investigation if she remained.

42. The Tribunal accepts that the remainder of the alleged acts are all capable of being detriments. It is not in dispute that all of these acts happened apart from (f) which the Tribunal has found did not happen.

Was the claimant subjected to these detriments because she made protected disclosures?

43. The Tribunal has found that the claimant did not make protected disclosures until 3 August 2022. Therefore, she could not have been subjected to detriments (a) and (b) because she had made protected disclosures. Even if protected disclosures were made on 12 April 2022 as alleged, we do not believe on the balance of probabilities that the claimant was subjected to these detriments because of being a whistleblower.
44. In relation to detriment (c) the Tribunal has found that the respondent first raised with the claimant the issue of a renewed DBS check being required in an email on 9 March 2022, chased this up again by email in July and, then had to pursue it more seriously when the claimant failed to reply to those emails (p272). As soon as the required information was provided by the claimant the matter was closed. The Tribunal therefore concludes that the claimant was not subjected to the detriment of being threatened with suspension because she had made protected disclosures. Instead, this came about because the claimant repeatedly failed to deal with the matter even though she fully understood the importance of having an up-to-date DBS check as she had taken steps to renew this herself without informing the respondent.
45. In relation to detriment (d), there were complaints raised by two colleagues (Tina p169 and Richest p170) on 10 April 2022 about the claimant's behaviour towards Richest. Mr Ekuase's evidence is that as the claimant was suspended on 14 April regarding the sleeping on duty allegation these complaints were not progressed at that time. Richest made a further complaint about the claimant on 25 July 2022 which she said in her letter was prompted by seeing that the claimant was coming back to work on the rota. Another colleague, Hellen, also raised a complaint about the claimant on 6 August 2022.

46. The claimant's case is that conflict between staff members had arisen before and was dealt with informally and so it was suspicious these complaints were treated more seriously. Mr Ekuase explained that in 2020 he held an informal mediation meeting with the staff members involved but these concerns had arisen again and were more serious so required a formal process. Mr Ekuase explained he did not raise the allegations on the claimant's first day back from suspension as it would have been unreasonable to not let her settle back in first. The Tribunal accepts this evidence. Although the Tribunal can see why the claimant felt it was unreasonable, and even suspicious, that these issues were being raised in quick succession, the reality is they were issues that existed prior to her making protected disclosures and they were well-founded. The Tribunal concludes that the claimant was not subjected to this detriment because she made protected disclosures.
47. In relation to detriment (e), the Tribunal carefully considered whether the fact Ms Francis knew or suspected that the claimant was the whistleblower, may have motivated her to initiate this investigation. If that was the case it seemed strange that Ms Francis would not have actioned this immediately when she became aware on 11 August of the incorrect entry on the daily record. The Tribunal's finding is that Ms Francis was already aware of the protected disclosures that had been raised to Ms Carey and notified to the CQC by 11 August and would have known or suspected that they had been made by the claimant by then. Nothing of note happened between 11 and 22 Aug that would have changed her opinion. The Tribunal concluded that it was more likely Ms Francis was telling the truth when she stated that she didn't immediately think the error was as serious as it was until she looked at it again. She initiated the investigation on the instructions from Ms Carey and this was the appropriate action to take. The Tribunal concludes that this action was not taken because the claimant had made protected disclosures.
48. In relation to detriment (g), there was no evidence before the Tribunal that Ms Williams knew the claimant had made protected disclosures until the claimant raised this herself during the hearing. Therefore, the decision to hold a disciplinary hearing could not have been made because the claimant was a whistleblower.
49. In relation to detriment (h), it is not in dispute that Ms Carey knew the claimant was a whistleblower as she was the one to who the claimant raised

her concerns on 3 August 2022. Ms Carey took appropriate actions promptly following these disclosures, including ensuring that Mr Ekuase notified the CQC. The Tribunal concludes that Ms Carey's decision to not uphold the claimant's appeal against dismissal was made purely because she did not believe the claimant's grounds of appeal had merit. This was not motivated by the fact the claimant had made protected disclosures.

50. Therefore, the claimant's protected disclosure claims are not well-founded and do not succeed.

Automatic unfair dismissal

What was the principal reason for the claimant's dismissal?

51. Ms Williams says she didn't know the claimant was a whistleblower prior to the disciplinary hearing but the claimant did tell her during the hearing so Ms Williams knew by the time she made the decision to dismiss the claimant. There was no evidence before the Tribunal to suggest this was the principal operating reason on Ms Williams' mind when deciding to dismiss the claimant. The Tribunal is satisfied Ms Williams' evidence was truthful that she did not consider the fact the claimant had raised concerns at all when making the decision to dismiss the claimant. The fact that Ms Williams did not uphold the allegation that the claimant had destroyed the original document further shows she was not out to get the claimant. The claimant's evidence was inconsistent and implausible, jumping from saying she completed the entry by mistake to saying it was all a conspiracy against her. In those circumstances, it was entirely reasonable for Ms Williams to conclude that the claimant had falsified the entry.
52. The claimant submitted in the alternative that this was a case that bears similarities to *Jhuti v Royal Mail* in so far as evidence against the claimant was fabricated by Ms Francis and, Ms Williams unwittingly relied on this in dismissing the claimant. The claimant pointed to inconsistencies in the daily record entry such as the date having been corrected and the surname of the resident being added later. The Tribunal carefully considered this allegation and asked to see the unredacted versions of the daily record entry from 11 August for this resident and the other resident with the same first name.

53. Having reviewed these unredacted documents, the Tribunal is satisfied there is no evidence the daily log was doctored or fabricated by Ms Francis or anyone else. The claimant admitted it is her handwriting on both daily logs for these two residents and, the contents do not back up the suggestion she got the two residents confused and that the surname was added later to wrongly indicate this was an entry for PL rather than the other resident. The claimant did not deny she completed the night check record for resident PL which was 2 hourly checks carried out, she simply said she didn't sign it.
54. On the balance of probabilities, the Tribunal is satisfied this was accurate evidence which had not been tampered with to implicate the claimant. Had there been a plot to incriminate the claimant with tampered evidence, we would expect this to have been completed without the minor discrepancies found on the document and for the original document to not have been lost. We would also expect that Ms Francis would have actioned this without delay. In addition, the circumstances as to how this document was discovered to have an incorrect entry also makes it highly implausible that Ms Francis fabricated or doctored this.
55. The Tribunal therefore concludes that the principal reason for the claimant's dismissal was not the fact she had made protected disclosures.

Unfair dismissal

56. The Tribunal is satisfied that conduct was the reason for the dismissal and this is a potentially fair reason. The respondent did have an honest belief that the claimant committed misconduct. Ms Williams concluded that the claimant's testimony was *"contradictory and confused"*, there was evidence that the entry was in her handwriting and that the claimant was not aware the resident was on social leave because she did not attend the handover meeting. This belief was based on reasonable grounds. As stated above, there was evidence that the claimant had falsified the daily log and the night check record for resident PL and the claimant's testimony was inconsistent.

Did the respondent carry out a reasonable investigation?

57. The Tribunal accepts there were some flaws in the investigation and that in certain respects it could have been more thorough but overall is satisfied it was a reasonable investigation. The Tribunal observed that there was an element of duplication in the disciplinary procedure by having initial fact-finding followed by a formal investigation. However, this was the respondent's normal practice so was not targeted at the claimant and ultimately does not make it an unfair process. There was an investigation by a neutral party and so no unfairness to the claimant. The claimant made the bare assertion about being 'set up' but when Ms Williams questioned her about it the claimant refused to produce any evidence to substantiate this allegation saying "*anyone can do anything*". In those circumstances, the Tribunal concludes it was not unreasonable for the respondent to not follow up this line of enquiry.
58. A number of alleged breaches of procedure were set out in para 58 of the claimant's opening skeleton which we considered in turn.
59. Firstly, the claimant complains that the respondent's disciplinary policy doesn't provide for initial fact-finding. If this was the only investigation carried out, the Tribunal would have concluded this amounted to a procedural error. However, a formal investigation was carried out subsequently by a neutral manager. The respondent's disciplinary policy at p93 does state that a Deputy Manager can conduct the investigation except where they are a potential witness. So, the respondent acted appropriately in appointing another manager to do this.
60. In fact, Ms Francis wasn't technically a witness, that was Celestina, the staff member who first discovered the incorrect entry. Ms Francis did interview Celestina and other members of staff briefly. The main facts were therefore established. We accept it would have been helpful to have established who wrote the correction to the record, confirming the resident PL was on social leave, but at the time it was taken as read and the claimant did not complain about that point. We also accept this may have been helpful but it was not disputed at the time of the investigation when the claimant accepted she wrote it and made a mistake.

61. The claimant not being given the opportunity to make a written statement. The claimant was interviewed at length in a fact-finding meeting and then an investigation meeting. The claimant did not offer to make a written statement at any point. The Tribunal does not accept this made the process unfair.
62. The claimant being given less than 24 hours' notice of the investigation meeting. The claimant was given several opportunities to defend herself against the allegations. There is no requirement in the ACAS Code to give any particular length of notice before an investigation hearing (as opposed to a disciplinary hearing) takes place. An employer may take the view that it is best to get an employee's evidence without delay. Some employers may have given more notice than that but this is not addressed in the respondent's policy and this does not amount to a procedural error.
63. The fact that the claimant was not given a hard copy of the evidence before her formal investigation meeting. During the fact-finding meeting, the claimant appeared to have a clear recollection of the document without needing to see it. The document was then shown to her on camera during her investigation meeting although we accept the claimant may not have been able to view it clearly. The claimant subsequently received the full pack of evidence prior to the disciplinary hearing. However, no new points of defence came out of the claimant having seen the documents. The Tribunal therefore concludes it was not a breach of the respondent's disciplinary policy or the ACAS Code and did not make the dismissal procedurally unfair.
64. Not providing the claimant with the original document. The original document did not exist as someone, potentially the claimant, had removed or destroyed it. The record for the other resident with same first name was looked at. Ms Williams gave evidence that she did examine other records to check it was the claimant's handwriting.

Was dismissal in the range of reasonable responses open to a reasonable employer?

65. Yes. The Tribunal is satisfied that dismissal was in the range of reasonable responses open to a reasonable employer. The allegation that had been upheld was that the claimant had deliberately falsified an entry in the daily log because she had failed to check on this resident during the night shift.

Two hourly checks on residents are required during the night to ensure the safety and well-being of these vulnerable residents. The consequences of failing to do so are clearly life-threatening. The claimant's inconsistent and implausible accounts and failure to acknowledge the seriousness of what had happened meant the respondent could not be confident that something similar would not happen again. No mitigation was offered by the claimant. Ms Williams was clear in her evidence that she would have made the decision to dismiss even without reference to the claimant's disciplinary record. In those circumstances, dismissal was a reasonable outcome open to the respondent. The claimant chose not to appeal against her dismissal.

66. However, even if she had been unfairly dismissed, the Tribunal concludes she would have been fairly dismissed in any event as she was already on a live final written warning.

Breach of contract/notice pay

67. There is sufficient evidence on the balance of probabilities that the claimant committed an act of gross misconduct. She is therefore not entitled to any notice pay.

Unauthorised deduction from wages

68. The claimant's case is that she was promoted to Senior Care Assistant on 1 June 2021 (p138 of the bundle) and should have been paid the hourly rate of £12.88 during every shift she worked from that date until her dismissal. The claimant's skeleton argument claims she was underpaid for every shift worked. However, pay details in the bundle at pages 437-441 show that on some occasions the claimant was paid at that hourly rate but that the majority of the time she was paid at the lower rate applicable for a Care Assistant. The claimant's case is that these higher hourly rate payments were for overtime. However, her contract on page 126 of the bundle is clear that overtime hours were paid at her standard rate of pay.
69. The contract also clearly states that the Claimant was employed as a Senior Care Assistant on a relief basis only with no guaranteed hours. Mr Ekuase in his evidence stated that this meant the claimant would be asked to act up

as Senior Care Assistant when a permanent Senior was on holiday or off sick. This accords with the evidence before the Tribunal.

70. The Tribunal's decision is therefore that no unauthorised deductions were made from the Claimant's wages.

Appendix: Agreed List of Issues

Introduction

1. The claimant has presented the following complaints:
   (1) Detriment (protected disclosures);
   (2) Automatic unfair dismissal (protected disclosures);
   (3) Ordinary unfair dismissal;
   (4) Wrongful dismissal;
   (5) Arrears of pay.

The issues are as follows.

Jurisdiction: time limits

2. Given the date the claim form was presented (10.11.2022) and the dates of early conciliation (19.10.2022 to 21.10.2022), any complaint about any act or omission that took place before 20.07.2022 is potentially out of time, so that the tribunal may not have jurisdiction.

3. Was the detriment complaint made within the time limit in s.48 of the Employment Rights Act 1996? The tribunal will decide:
   (1) Was the claim made to the tribunal within three months (plus early conciliation extension) of each act complained of?
   (2) If not, was any act part of conduct extending over a period? Was the claim made to the tribunal within three months of the last day of that period?
   (3) If not, was there a series of similar acts or failures? Was the claim made to the tribunal within three months of the end of that series?
   (4) If not, was it reasonably practicable for the claim to be made to the tribunal within the time limit?
   (5) If it was not reasonably practicable for the claim to be made to the tribunal within the time limit, was it made within a reasonable period?

4. Was the deduction from wages complaint made within the time limit in s.23 Employment Rights Act 1996? The tribunal will decide:
   (1) Was the claim made to the tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?
   (2) If not, was there a series of deductions and was the complaint made to the tribunal within three months (plus early conciliation) of the last one?
   (3) If not, was it reasonably practicable for the claim to be made to the tribunal within the time limit?
   (4) If it was not reasonably practicable for the claim to be made to the tribunal within the time limit, was it made within a reasonable period?

5. The unfair and wrongful dismissal complaints were in time.

Liability

Wrongful dismissal / notice pay

6. Was the claimant entitled to any notice and if so, what was the claimant's notice period?

7. Was the claimant guilty of gross misconduct? Did the claimant do something so serious that the respondent was entitled to dismiss without notice?

8. What losses did the claimant suffer during the notice period and did the claimant take reasonable steps to mitigate those losses by seeking alternative sources of income?

Unauthorised deductions from wages

9. Did the respondent make unlawful deductions from the claimant's wages by failing to pay the correct hourly rate of pay and if so, how much was deducted?

Protected disclosures

10. Did the claimant make one or more qualifying disclosures as defined in s.43B Employment Rights Act 1996? The tribunal will decide:
    (1) Whether the following incidents occurred:
        (a) On 12.04.2022 the claimant orally disclosed to Marlene Francis the following issues:
            (i) Giving personal care to residents as early as 4.30-5.00am in the morning which the claimant felt was abusive;
            (ii) Abuse of residents' medication;
            (iii) Night staff members report to work drunk and sometimes tipsy;
            (iv) No risk assessment done to staff who complain of injury;
            (v) Nepotism (of relatives and girlfriends);
            (vi) Not fair when doing the Rota (discriminating/favouritism);
            (vii) D&V outbreak due to badly cooked food;
            (viii) Residents eating guinea pig faeces at Brooklands;
        (b) In July 2022 the claimant orally disclosed to the CQC when she repeated those issues;
        (c) In July 2022 the claimant orally disclosed to Mandy Carey when she repeated those issues;
    (2) Were those disclosures of "information"?;
    (3) Did she believe the disclosure of information was made in the public interest?;
    (4) Was that belief reasonable?;
    (5) Did she believe it tended to show that:
        (a) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and/or
        (b) That the health or safety of any individual has been, is being or is likely to be endangered;
    (6) Was that in the reasonable belief of the worker?

11. The respondent accepts that if a disclosure was made it was made to the claimant's employer. The respondent also accepts that the CQC is a prescribed person.

12. Does the Tribunal find as a matter of fact, the following events occurred:
    (1) On 14.04.2022 Solomon Ekuase requested that the claimant leave the premises in the middle of the night;
    (2) On 21.07.2022 Anne Fenlon confirmed by a letter the decision to issue a final written warning to the claimant;
    (3) On 09.08.2022 Solomon Ekuase advised that the claimant would be suspended;
    (4) On 10.08.2022 Solomon Ekuase started the second disciplinary investigation;
    (5) On 22.08.2022 Marlene Francis initiated the third disciplinary investigation;
    (6) On 23.08.2022 Marlene Francis alleged that the claimant falsified a document, namely the daily log relating to a resident (PL), and subsequently destroyed it;
    (7) On 22.09.2022 Abiodun Williams held a disciplinary hearing;
    (8) On 28.11.2022 Mandy Carey confirmed that the claimant's appeal is not upheld?

13. By doing so, did it subject the claimant to detriment?

14. If so, was it done on the ground that she had made the protected disclosure(s) set out above?

Automatic Unfair dismissal

15. What was the reason or principal reason for the claimant's dismissal that she made a protected disclosure?

Unfair dismissal

16. What was the reason or principal reason for the claimant's dismissal if it was not that she made protected disclosures?

17. If it was that she falsified documentation, did that relate to the claimant's conduct under s.98(2)(b) of the Employment Rights Act?

18. If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The tribunal will consider:
    (1) Whether the respondent carried out a reasonable investigation;
    (2) Whether the belief in misconduct was held on reasonable grounds following the investigation;
    (3) Did the respondent adopt a fair procedure?;
    (4) Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer?

Remedy

Detriment

19. What compensation should be awarded to the claimant? The tribunal will decide:
    (1) What financial losses has the detrimental treatment caused the claimant?;
    (2) Has the claimant taken reasonable steps to mitigate their loss?;
    (3) If not, for what period of loss should the claimant be compensated?;
    (4) What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that in Vento damages?;
    (5) Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?;
    (6) Is it just and equitable to award the claimant other compensation?;
    (7) Did the Acas Code of Practice of Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant, and by what proportion up to 25 percent?;
    (8) Was the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the claimant? If so, by what proportion should the claimant's award be decreased?
    (9) Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion up to 25 per cent?

Unfair dismissal

20. The claimant does not wish to be reinstated and/or engaged.

21. What basic award is payable to the claimant?
    (1) How is it to be calculated?
    (2) Was there any conduct of the claimant before dismissal that makes it just and equitable to reduce the basic award? By how much?

22. If there is a compensatory award, how much should it be? The tribunal will decide:
    (1) What financial losses has the dismissal caused the claimant?;
    (2) Has the claimant taken reasonable steps to replace their lost earnings?;
    (3) If not, for what period of loss should the claimant be compensated?;
    (4) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?;
    (5) If so, should the claimant's compensation be reduced? By how much?;
    (6) Did the respondent or claimant unreasonably fail to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures? If so, is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25 per cent?
    (7) Was the dismissal to any extent caused or contributed to by any action of the claimant? If so, by what proportion should the claimant's award be decreased?

EJ Rea

Employment Judge Rea
02 September 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
09 September 2024

William Leah
For the Tribunal Office

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/