EMPLOYMENT TRIBUNALS

Claimant: Mrs K Keighley

Respondent: Alzheimer's Society

HELD AT: Leeds **ON:** 13 to 16, 20 and 21 November 2017

BEFORE: Employment Judge J M Wade

REPRESENTATION:

Claimant: In person
Respondent: Ms H Keogh (counsel)

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 21 November 2017, the written record of which was sent to the parties on 22 November 2017. A written request for written reasons was received from the Claimant on 29 November 2017. The reasons below, corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: "In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues". For convenience the terms of the Judgment given on 21 November 2017 are repeated below:

JUDGMENT

1 The claimant's complaint of unfair dismissal is not well founded and is dismissed: the claimant made protected disclosures; the principal reason for her dismissal was **not** the making of those disclosures.

2 The respondent's application for costs pursuant to Rule 76 is dismissed.

REASONS

Introduction and complaints before the Tribunal

1. This was a complaint of unfair dismissal relying on sections 111 and 103A of the Employment Rights Act 1996 ("the Act"). The Claimant's case was that the principal reason for her dismissal was the making of protected disclosures by her, commonly referred to as a "whistle blowing" dismissal. The words in her claim form paragraph 36 read: "I believe my contract was not renewed because I had raised safeguarding concerns". (She did not have the required service to bring an "ordinary" unfair dismissal complaint and therefore had to prove that principal reason on the balance of probabilities).

2. The Claimant had also presented a claim for notice pay which was dismissed by an Employment Judge on an earlier occasion on withdrawal. The Claimant raised that with me, in her submissions document prepared for the beginning of these proceedings, but I indicated that it was already subject to a Judgment, and not something that I could determine in this Hearing. I provided information about how that Judgment could be challenged.

3. The safeguarding concerns to be discussed in these proceedings were very private matters concerning service users and their families and others. The Respondent applied for and was granted anonymisation orders in relation to those service users and families, and the staff not directly involved in these matters. It was also ordered that the parts of this hearing which related to service users would be heard in private, which is a very rarely granted order, but justified in this case.

4. The effects of the Claimant's depression, anxiety and medication, alongside the complexity of the chain of events that we have been discussing, and the difficulties for a litigant in person without legal advice, has meant that the risk of identifying material being discussed and raised was a real and present risk at all times during this hearing.

5. For that reason I did not consider it in the interests of justice to lift the privacy of the hearing at any stage. The entirety of this hearing has been conducted in private. It is almost always in the interests of justice in this jurisdiction that final hearings are held in public, but on this occasion and for the exceptional reasons above, that has not happened.

6. My summary decision from today will be a matter of public record. It will identify the Claimant and it will identify the Respondent, because the anonymisation does not attach to either of the parties. Of course, if the parties request that my reasons are typed, they will be anonymised to comply with the Orders, as appropriate, but otherwise will also become a matter of public record.

Undisputed chain of events

7. The Claimant was engaged on a fixed term contract of employment by the Respondent in October 2015. That was extended to expire on 30 September 2016 and again to expire in mid October 2016 for reasons which will become apparent.

8. The claimant's role, as of 2016, was that of a "community support worker" and she supported vulnerable service users in the community on outings and other activities. It was part of her role to report any concerns in relation to those service

users, including where they were at risk of harm, whatever the nature of that harm, be it physical, mental or emotional harm. In May of 2016 the Claimant's manager Ms Dean was absent from work and never returned. Unknown to the Claimant, she had been suspended for failing to deal with safeguarding concerns on a matter unconnected to the Claimant.

9. The claimant was told by Mr White, a senior manager in Leeds in July or August of 2016, that he could extend her contract again, or he could make it permanent and that he wanted to make it permanent and would in all likelihood do so. By 8 September 2016 he had changed his position, and indicated that in making the position permanent, which was his wish, the post would have to be advertised and the Claimant could apply if she wanted to, or words to that effect.

10. That change in position was difficult for the Claimant to understand. She made a very strong written application for the post. Three out of seven applicants were shortlisted as candidates for interview (including the Claimant), but she was not successful in obtaining either of the two advertised posts and her fixed term contract expired without being renewed.

11. Also undisputed is that between January 2016 and August 2016 the Claimant had made at least three protected disclosures within the meaning of sections 43A to C of the Act. They were admitted to be such by the Respondent. The information provided was about risks to, and vulnerability of, various service users in her care.

12. The Claimant relied on this undisputed chain of events in supporting her belief that the principal reason for her dismissal was the making of disclosures.

Disputed matters and issues

13. The claimant asserted that eleven discussions, or incidents, amounted to protected disclosures within the meaning of the Act. Eight were therefore in dispute.

14. In addition there were a great deal of disputed allegations upon which she relied as founding her belief that there was, in effect, a collective wish for her to lose her job, held by those the Claimant said were "the decision makers".

15. That wish was implied to be held by Mr White, a senior manager, the Claimant's direct line manager, Ms Byrne, and Mrs Reith, a co-worker in the Armley Grange Day Centre. At the start of this hearing those decision makers were widened to include Ms Malcolmson, who conducted a "Total Quality Review" of the Armley Grange services, and as a result, had some interaction with the Claimant. The Claimant said that the principal reason for her dismissal was the making of the disclosures (both accepted and disputed) at large.

16. The single broad issue for the Tribunal was: what was the principal reason for dismissal? Was it, as the Claimant said, her making of disclosures, or was it, as the Respondent said, her performance at interview in the selection process.

Conduct of this hearing

17. I want to say a word about the conduct of this hearing. The Claimant has been assisted each day by different volunteers from the BPP Law School, typically one volunteer taking a note, and one acting as a page turner at the witness table, or for moral support when the claimant was asking questions of the Respondent's witnesses.

18. The context for that arrangement included that the exchange of witness statements had been delayed in this case due to the Claimant's mental ill health, which was evidenced by a letter from her doctor.

19. The Claimant also asked for a limitation on the Respondent's witnesses being in the hearing when she was giving her evidence, and that they gave their evidence one by one during the course of the proceedings. That request too, was supported by medical evidence.

20. The Claimant is and was suffering from anxiety and depression, and she is subject to medication for that. She did not apply for a postponement of this hearing, but she did on occasions become upset by the evidence or by my interventions, and matters have proceeded at a pace necessary to accommodate her conduct of her own case.

21. There were also various measures put in place to put the parties on an equal footing, in circumstances where the Claimant was a litigant in person, and without legal representation, with mental ill health, and conducting matters in a non native language.

22. Ms Keogh had produced a chronology from the different papers submitted by the Claimant at various points in the case, which identified allegations as well as undisputed matters. Ms Keogh drew to my attention allegations that needed to be discussed or put, and if the Claimant had not put the relevant allegations, the Tribunal put them.

23. The Tribunal has copied additional documents for the parties on virtually every day of the hearing, for both the Claimant, and at times the Respondent, at times because that was more expedient than establishing to the Claimant that the Tribunal already had those documents in its bundle.

24. There was also an agreement from the Respondent that Ms Malcolmson would be heard, for the reasons I have explained, namely a late explanation from the Claimant of the way in which she put her case (expanded from Ms Malcolmson allegedly "telling her off about a particular matter" to Ms Malcolmson allegedly having some influence in the loss of her job or decision not to appoint her).

25. As matters unfolded in the case there have been adjustments to the timetable and the Respondent has co-operated with that throughout. Its witnesses have been heard out of order, without objection that that was not conducive to its case, but in the order that suited the overriding objective and the timetable.

26. It is a considerable challenge for a party without legal representation in a case of this kind to access a fair hearing, but the Tribunal has its duty to put people on an equal footing, and in that it has been assisted by Ms Keogh throughout. She has done all that an advocate reasonably could to assist the Tribunal in delivering a fair hearing, and has walked the line between managing her professional duties to her client and to the Tribunal with great skill.

<u>The Law</u>

27. I went first to Sections 94 and 95 of the Act, the first of which contains the right not be unfairly dismissed. Section 103A identifies dismissal by reason of protected disclosure as an automatic unfair dismissal. Section 95 defines a "dismissal", and in particular section 95(1)(b) deals with the situation in this case, namely a fixed term expiring without being renewed: it prescribes that such a situation is a dismissal. Ms

Keogh also provided the Tribunal and the claimant with a short composite document containing Sections 43A to C and Section 103A of the Act. I do not repeat them here.

28. I have also applied in this case the principles clarified in a very recent case of the Court of Appeal, which has been of great assistance: Royal Mail Ltd v Jhuti [2017] EWCA Civ 1632, delivered on 20 October 2017.

29. I have also been referred to Blackbay Ventures Ltd V Gahir 2014 ICR 747 as containing the relevant framework for deciding whether or not protected disclosures have been made, and the inherent unlikelihood of dismissal for making protected disclosures when it is in the nature of a job role to do just that (paragraph 107).

30. As to whether protected disclosures were made, the respondent did not argue that the Claimant did not hold a reasonable belief that information tended to show the circumstances set out in 43B(b) or (d) was being provided, or that she did not reasonably believe that she provided it in the public interest, and she was not cross examined on that basis. The Respondent did challenge whether "information" was provided in respect of two allegations, and otherwise its resistance to a finding being made was on the basis that it had no knowledge, or that it disputed the claimant's factual case: see the Respondent's schedule of disclosures.

Evidence

31. This case has been evidentially difficult. Disclosure of documentation has continued necessarily through the hearing. Some documents were disclosed very late on both sides. The Respondent was very late serving its witness statements. It has emerged in their evidence that the witnesses were not asked to consider their evidence until the original deadline for exchange was fast approaching.

32. As a result of the late service of the Respondent's witness evidence the Claimant had much less time than she would otherwise have had to consider that. That was one reason why I permitted further evidence to be adduced in the course of the hearing. There was no application for a postponement. I permitted both the Claimant and the Respondent adduce further evidence, including a statement and evidence from Ms Malcolmson.

33. The Claimant's statement was very lengthy. The Respondent's statements were very short. On balance I do not consider that there is evidence that the Claimant could reasonably have gathered, had she had the Respondent's statements earlier, which could cogently have affected my findings of fact, given the wealth of documentary and other material before the Tribunal (nor were there questions that could reasonably have been put, which were not put by the Claimant herself or by the Tribunal or her behalf).

34. In my judgment there were clear reasons for the Respondent not discussing evidence with its witnesses earlier, or serving its witness statements on time. They included that the Respondent had raised a compelling limitation defence in these proceedings (that the Claimant was too late in presenting her case). That issue was not determined until 14 July 2017. The proceedings were commenced in March. It was also clear from the file and my costs Judgment that the respondent had made an open offer to dispose of these proceedings, which was not withdrawn, but nor was it accepted by the Claimant.

35. Consequently, I do not draw any inferences against the respondent because of the late presentation of witness statements, nor do I draw any inferences against

either party from gaps in disclosure, not least because we have had a wealth of original material here during the course of the hearing for inspection by all. It is not unusual for parties, where one is not legally represented, to have great difficulty in navigating a disclosure process prior to a hearing commencing.

36. Mr White was also asked about these disclosure and preparation matters. I have concluded that it was the volume of questions raised by the Claimant, and the nature of the disclosure involved, which gave rise to the difficulties. There was no deliberate attempt, in my judgment, by anyone to conceal documents or records in this case.

37. As to my assessment of the witnesses live evidence during the cross examination process, which is one of the fact finding tools used by the Tribunal to reach its conclusions, I consider that on some matters the Respondent's witnesses were prepared, that is, they had given thought to the issues in the case. However, much of their evidence, particularly in answer to some of my questions, struck me as unprepared and entirely genuine.

38. I considered that the Claimant's demeanour and presentation to the Tribunal was that of a person with a very strong conviction that she was telling the truth as she saw it, and doing her best to do so. That is not to say that her evidence was reliable on all matters.

39. As important as the witnesses from whom I did hear, is one from whom I did not hear: Ms Dean, the Claimant's initial line manager. She was suspended because of concerns about her handling of safeguarding concerns reported to her. Two of the allegations of making disclosures that the Claimant makes, and many of the factual allegations concern her dealing with Ms Dean. There was not necessarily documentary material to assist in Ms Dean's absence. I have therefore taken into account that lack of balance in the evidence, and potential injustice to a party who is not present, and cannot be asked about matters, in reaching my conclusions of fact.

40. As to documentation, I have had the Claimant's bundle and the Respondent's bundle (the parties could not reach agreement and as the Claimant had prepared her case by reference to her paginated bundle, the Tribunal worked from both where appropriate to put the parties on an equal footing). Nevertheless there was a good deal of duplication, with around eight hundred or so pages of documentary evidence in the case.

41. Of significance to my fact finding has been the Claimant's "work diary" in which she typically wrote daily notes at work to assist her, and particularly to assist her in completing the service user's notes when she was back at the Respondent's premises, which was the Respondent's procedure.

42. The existence of that diary was well understood during the disclosure process and relevant extracts from it were disclosed to the Respondent (the Claimant had bought the diary for her work, and it had remained in her possession when her employment ended). The Respondent also had the opportunity to inspect the original of that diary during this hearing.

43. Unknown to both the Respondent and the Tribunal until this hearing, the Claimant also kept a personal diary into which, on her evidence, she recorded personal or upsetting matters. Extracts from that diary had not been part of the disclosure process, but the Claimant sought to rely on entries from it. In some instances I gave permission for those additional extracts to be admitted.

44. The Tribunal was also able to see relevant service users' original records (the Claimant challenged authenticity of one of those records).

45. There were bundle errors from which the Claimant sought to infer bad faith or improper motive on the part of the Respondent, but which having undergone the further disclosure and inspection process that has occurred during the course of the hearing, it is clear that they were simply that, errors.

46. That said, it is not surprising that those hitherto unexplained errors, or on occasions explained in correspondence, simply served to add to the Claimant's belief that there had been some skulduggery or conspiracy on the Respondent's part.

47. In the light of all these evidential difficulties, I have given myself a full direction about making findings of fact. It includes my assessment of the witnesses, the relevance of chronological and contemporaneous documentation, the need to assess what is inherently more likely than not, the consistency and coherence of answers in evidence when compared with contemporaneous documentation and a number of other matters. I have weighed all those in the mix and reached conclusions about both the disputed disclosures and the disputed facts. These conclusions should be read alongside the undisputed chronology within the Respondent's chronology.

<u>Discussion and conclusions on disputed matters</u>

48. The Claimant's original written contract of employment contained a stipulation that the contractual terms were those set out in the written document, and that oral and other representations did not form part of that contract. The Claimant's evidence about what Ms Dean and others said to her about her contract before she entered into it, and afterwards, are not matters of great consequence in assessing what was likely to have happened or not with regard to her contract. The long and the short of it was that the Claimant was issued with a fixed term contract, she signed that fixed term contract, and she understood very well that it was such a limited term contract, and indeed that was a source of insecurity for her, and something which she wished to change.

49. Ms Dean herself may very well have been unclear about the contractual matters but nevertheless the society's written contract was very clear. It was initially for a fixed term beginning on 19 October 2015. It was extended to expire on 14 October 2016 by two documented extensions. The Claimant signed the second of those on 14 September 2016. That was after she had been told that the permanent community support worker position would have to be subject to a competitive process.

50. The Claimant clearly made a protected disclosure about the sleeping arrangements of service user 1 and her son on 6 January 2016 in a supervision meeting with Ms Dean. Ms Dean did not report that further after that supervision meeting.

51. I also accept that on 19 January the Claimant informed Ms Dean about personal care concerns in relation to service user 1, and on 23 March that she informed Ms Dean of housing and other concerns about service user 2. It was the Claimant's job to pass on such concerns and in my judgment she did so diligently, as best as she was able on a number of occasions. There is no reason to consider it

unlikely that she would not have done so on these occasions in the light of her notes and detailed presentation of her case.

52. I also note that at some time between January and March 2016, Ms Dean arranged for the Claimant's contract to be extended: there was no apparent disadvantage to the Claimant as a result of these disclosures, or discouragement of her from raising such matters by Ms Dean at that time.

53. I also accept that the Claimant told Ms Byrne of concerns in relation to service user 2 on 21 March 2016 (that is before she told Ms Dean). At the time Ms Byrne was Ms Dean's deputy. It is not surprising that she cannot remember this conversation from that time, or given the events that have unfolded, that she has persuaded herself it did not take place. This was also a protected disclosure.

54. I also consider that the Claimant did talk to Ms Byrne on 9 May 2016 about both service user 2 and housing concerns, but not in the level of detail that would indicate that she reasonably believed that housing fraud was being perpetrated by a member of service user 2's family (which was her allegation). For that reason I have not held that the 9 May conversation amounted to a protected disclosure within the meaning of the Act, albeit a conversation took place.

55. The 9 May allegation is an example of the Claimant's contemporaneous work diary note being a reliable summary of a work related conversation (which does not mention housing fraud); but similarly I accept that Ms Byrne would have been likely to recall a suggestion of fraud or financial abuse at that time, even though it was before the subsequent events involving Ms Dean's suspension, which in my judgment, has affected the lense through which the relevant witnesses now perceive these events.

56. As to the alleged 28/29 June disclosures, the relevant context was that Ms Byrne, who had by then taken over from the suspended Ms Dean, asked the Claimant to come in to the Armley Grange premises to see Ms Brierley, her boss. Ms Brierley effectively "told the Claimant off" to use the Claimant's characterisation, or perhaps more fairly, gave her some direction on what was and what was not an acceptable entry in the day centre day book, which was used by staff to write handover information to each other.

57. The reason for Ms Byrne requesting that of course, and the reason why it does not impact on my conclusion about dismissal at all, was perfectly straightforward. Ms Byrne had taken fair exception to a comment which she reasonably perceived as undermining of her in that diary. It had nothing to do with the protected disclosures. There was an explanation to be given, the Claimant gave it to Ms Brierley when she saw her, that was accepted, and there was nothing more to be said about it.

58. Significantly though, I do not accept that in the Claimant's account of that conversation with Ms Brierley on 28 or 29 June at page 55 of the bundle, and in her witness evidence, is a reflection of the discussion that was held.

59. The account on page 55 was provided some ten months or more after a meeting about which there was virtually no contemporaneous documentation, save for brief notes in the Claimant's work diary, which do not reflect page 55. Ms Brierley took no notes, but was clear in her evidence that the extensive information and matters that the Claimant said were discussed concerning service users 1, 2 and 4, Ms Brierley said had not been discussed.

60. I bear in mind that Ms Brierley, by this point, had instigated the suspension of Ms Dean more than a month before, precisely because of concerns that the latter had not acted on safeguarding concerns raised with her by others in relation to two service users unconnected to the Claimant. Ms Brierley herself brought the issue to light and engaged in putting those matters right through the investigation that followed.

61. Ms Brierley could not of course tell the Claimant about that, nor could she tell other staff: she was concerned to maintain Ms Dean's privacy, such that even Ms Byrne did not know until these proceedings of the suspension, and she had had to step into Ms Dean's responsibilities.

62. I also bear in mind that it was Ms Brierley who assisted in the reporting of concerns about service user 5's whereabouts on 24 May, which she had found out about on 31 May. On the day (the 24th) there had been perceived a real risk to that service user raised by the Claimant, which was addressed by the Respondent at the time, but it was Ms Brierley who took steps to make sure that the longer term risk and concern was reported properly and could then be addressed.

63. Taking these matters into account it is inconceivable (and certainly inherently unlikely) that if the Claimant had mentioned to Ms Brierley on or around 28 or 29 June a disclosure about service user 1 and sleeping arrangements, about service user 2 and financial abuse, and a failure to carry out an assessment in relation to service user 4, Ms Brierley would not have actioned those matters as prescribed by the Respondent, in the way that she had done in relation to service user 5. It is simply not likely that the relevant information was provided to Ms Brierley, whatever the Claimant has persuaded herself of in relation to the detail of discussion.

64. The Claimant did discuss service user 4 with Ms Brierley on that occasion in this context. Service user 4 was someone with whom the Claimant had recently been asked to work. In that context Ms Brierley gave her information about activities, but nothing in that conversation was a protected disclosure about service user 4 by the Claimant.

65. I also consider that there was some discussion of the Claimant's contract in that conversation and that the Claimant relayed her concern about the forth coming expiry date of her contract due in September. In rejecting the Claimant's account of the contents of that conversation, I note that in her key for these proceedings the Claimant identifies service user 4 by reference to a particular dance style, whereas in her evidence she attempted to distance herself from the discussion being about potential dance related activities, when Ms Brierley's evidence was that that was exactly what they had discussed.

66. Ms Brierley's oral evidence became overwhelmingly compelling about that matter to the Tribunal in comparison with the Claimant's own note. It was a discussion about service user 4, and possible activities for that service user, and that is exactly what the Claimant wrote down.

67. It may well be that the Claimant at around that time also had calls from an agency, and it may well be that she made some note of that on the same page of her work diary as she made notes of the Brierley conversation, but those the notes as recorded in her diary do not reflect the allegations at page 55 and she is mistaken in her evidence about that in my judgment.

68. That is all the more likely in the context of what happened next. There were meetings held on 5 and 6 July with the Claimant. The way in which those meetings arose, and the fact that Ms Brierley then arranged for further safeguarding disclosures and processes concerning service user 1, both internal and external to take place, is not suggestive of an earlier conversation some few days before in which that and further serious allegations were alleged to have been made.

69. Ms Brierley was herself absent on sick leave from around 11 or 12 July until early October and she had no further involvement with the Claimant.

70. Also part of the Claimant's factual case on dismissal (but not related to the making of disclosures), on 8 July 2016 the Claimant met Ms Malcolmson for the first time at a team meeting where there were a number of people present. I accept that the Claimant may well have mentioned her contract to Ms Malcolmson, because the Claimant was worried about and an in reality given Ms Dean's absence, would talk to anyone about it whom she felt could give her the reassurance she wanted.

71. Nevertheless, I also accepted Ms Malcolmson's oral evidence that she had no role in the Claimant's contract renewal extension or whether or not permanent positions could be secured. It was not in her remit at all. Her remit was the total quality review ("TQR"). She had no influence at all over line management or operational decisions about staffing, save for pointing out good (and bad) practice.

72. A further discussion of service user 1 is not in dispute on 26 July between Ms Byrne and the Claimant. It was an ordinary supervision meeting.

73. I do not accept that in that meeting Ms Byrne threatened the Claimant with a stick, either in a jokey way or otherwise, not least because of the Claimant's own lack of diary entry in relation to that, and that she had further meetings and had not raised this allegation with anybody. I do not hold that there were further protected disclosures in this meeting: the Claimant asked for an update and Ms Byrne discussed matters with her in a friendly way. The information from January about Service User 1 provided by the Claimant, was not added to such as to amount to a new disclosure.

74. The Claimant's ninth alleged disclosure was concerning bruises she had seen on Service User 5, which she alleged she reported to Mrs Reith.

75. On this I accept the Claimant's evidence that she remembers speaking to Mrs Reith by telephone. I do not consider the rota indicating Mrs Reith was not likely to have been present to take the call to be determinative of the matter, nor Mrs Reith's evidence about the timings of the particular service user bus runs. They are, to some extent, circumstantial matters. It is absolutely clear from telephone records that the Claimant made a first phone call of very short duration to Armley Grange and then made a second one of much longer duration. I accept her evidence that given what she had seen that morning (bruises on Service User 5) and given her state of mind and her concern about service users generally, it is absolutely certain that she would reported that to whomever she spoke.

76. I have asked myself whether it is more likely than not that the Claimant is mistaken about the identity of the person to whom she spoke, or that Mrs Reith cannot remember the telephone call. I have discounted that either of them are telling deliberate untruths to the Tribunal about it, having heard them both questioned at length. I weigh in the mix of course the length of time after which these events were

said to have happened, that is August 2016 before Mrs Reith was even spoken to about these events to prepare her witness statement.

77. On balance, given the Claimant's contemporaneous note at the time that "Mrs Reith already knew about it" or words to that effect, and that she knew that matters were being addressed and were in hand in relation to that service user, I consider Mrs Reith is mistaken in her recollection. The Claimant did provide what she reasonably believed at the time was new information suggesting that a service user had been harmed, or her health and safety was endangered, and she believed that it was her duty in the public interest to report it. This amounted to a protected disclosure. That is not altered by the fact that Mrs Reith already knew of the bruises, procedures had been followed, and the matter was in hand.

78. (My conclusion about the ninth protected disclosure, for the avoidance of doubt, does not include a conclusion that the Claimant was right when she alleged that the entries in Service User 5's record not been made at the time by Mrs Reith. The Tribunal was able to inspect the original record and Mrs Reith answered questions about it. The nature of the Claimant's allegation was such that the member of staff completing the subsequent record, deliberately or for some unknown and unknowing reason, left a gap in the notes such that Mrs Reith could come along and fill it at a later date. The basis of the Claimant's allegation was that she had gone to inspect the record on occasions over the next two weeks and Mrs Reith's record "was not there" and must have been inserted later. The nature of the manuscript notes is that they are made on close lined paper, allowing for date and content and signature entries. It is simply inherently unlikely when examining the full record that anyone did or would leave such a gap. The Claimant may have looked at the wrong page or there may be any other number of likely explanations for her being mistaken in her observations later. I have concluded that Mrs Reith's entry was made at the time and that is entirely consistent with the unprepared oral evidence I heard from more than one witness about the chain of events following reporting of Service User 5's fall.)

79. As to the meeting with Ms Malcolmson for the purposes of the TQR, also on 2 August, the Claimant discussed service users 2, 3, 4 and 5 in depth, such that there were new protected disclosures. Ms Malcolmson had concerns about the Claimant's note taking and that serious matters might be lost by the particular style of note taking. Ms Malcolmson drew that to the Claimant's attention.

80. Again I accept the Claimant's perception that she was being "told off" in relation to her note taking by Ms Malcolmson. I will deal with the Claimant's general perception of criticism in relation to a number of matters in due course. Nevertheless, the nature of that meeting was not in any way suggestive of decision making or influence by Ms Malcolmson on the Claimant's subsequent contractual arrangements. It was simply Ms Malcolmson doing her job in the TQR, without having any remit to get involved in how members of staff were engaged or let go, or otherwise organised.

81. Helen Byrne then had a meeting with the Claimant about her notes, to pick up on Ms Malcolmson's advice, on 22 August. I completely the Claimant's characterisation of that meeting as Ms Byrne throwing files about the room, or that Ms Byrne displayed a great deal of anger towards the Claimant in relation to the files and the notes.

82. I accept Ms Byrne's evidence. There was a file review. There were files present in the room. An agency manager was also present in that meeting. There was a robust discussion of the need to raise concerns about safeguarding with a manager immediately, and to come later to the recording, because otherwise there is clear opportunity for delay and for matters to be missed, as they had been in the past. I accept Ms Byrne may well have been robust about this because there was a TQR ongoing and she knew that things had to change in order for these matters to be better addressed. However, I reject the Claimant's case that Ms Byrne was, in effect, victimising the Claimant because she had made protected disclosures. It was the reverse of that. Ms Byrne wanted the Claimant to raise matters clearly with her as and when they arose.

83. To summarise to this point in the chronology, on my findings, the Claimant has established seven out of eleven protected disclosures having been made. Three were to Ms Dean at an early stage before her suspension. I did not hear from Ms Dean.

84. On the Claimant's return from holiday on 5 September, there were the usual staff meetings and allocation of service users to staff. There was upset from the Claimant in relation to the intervention in a conversation with Ms Byrne by another colleague, and Ms Byrne dealt with that and was supportive of the Claimant. I pause here to note that to Mr White, in a conversation recorded by the Claimant, she described Ms Byrne as "very nice", and in my judgment that was her genuine perception at the time, and it explains why she might take her a birthday present (which she did). It is also consistent with my assessment of Ms Byrne as a witness, in both demeanour and candour.

85. Also in early September there was an annual survey, or questionnaire completed by service users. Albeit anonymous, Ms Byrne saw Service User 5's questionnaire in which she had said she did not want to work with the Claimant. Ms Byrne told the Claimant that Service User 5 was not needing the community service any longer and arranged for Service User 5 to come to the day centre. The Claimant observed Service User 5 being accompanied by another worker and in these proceedings sought to establish that Ms Byrne, was, in effect depriving her of work prior to her dismissal. When there were further meetings, the Claimant had spare "service user slots", but so did other colleagues, because a colleague had returned from maternity leave, and albeit part-time, there was some short term extra capacity. The truth about Ms Byrne's communication to the Claimant was that she had told the Claimant a lie about why Service User 5 was no longer allocated to her; she had not wanted hurt the Claimant's feelings and she knew that she would be able to re-allocate work in due course.

86. I now come in the disputed chronology to Mr White. My general assessment of Mr White as a witness was that he struck the Tribunal as giving entirely genuine and unprepared evidence about the circumstances that gave rise to these events.

87. He wanted stability at Armley Grange, including permanent staff, because of the benefits from that which he well recognised from his substantial career to date in general management of services for the vulnerable and in housing need.

88. The previous offering of fixed terms to the Claimant was an unsatisfactory situation, in his view, which had come about because of maternity leave, and the care context. The latter included the local authority's lack of clarity about how long this particular service at Armley Grange was to be continued, and whether it was to

continue at all, and if so in what form. The context was not of his, or the Respondent's, making.

89. Given Ms Malcolmson's TQR, of which Mr White was also aware, his wish for permanent staff struck the Tribunal as inherently likely. His view that he could convert a contract, or make a position permanent, because he had done it before, also struck the Tribunal as genuine. He knew that the Society did not necessarily permit such a conversion, but he thought he could make an exceptional "business case" for that.

90. Mr White did not dispute that he had told the Claimant he could do that, and would do so: he wanted to make her position permanent. That is exactly what he said to the Claimant and no doubt that would have been a source of great relief to her, given his senior management position.

91. Unfortunately for the Claimant, and others, that proved not to be deliverable by Mr White, but that is a mile away from saying that he had any reason to hold anything against the Claimant, much less that he had in his mind protected disclosures she had made. This chronology of events does not involve the Claimant being suspended, or on my findings being subject to any ill treatment after she raised various safeguarding concerns, including those I have found to be protected disclosures. Quite the contrary: she had raised safeguarding concerns and her contract had been renewed in the preceding year. On the other hand, her manager, who had not appropriately addressed similar concerns, had been suspended and later resigned.

92. Against that background I come to consider the reason for Mr White's change of position on allocating a permanent position to the Claimant. In my judgment, the real reason is not a conspiracy as the Claimant believed. It is simply the advice and instructions given to Mr White by the Respondent's Human Resources team concerning fair employment practices. That advice was that it would be necessary to advertise and provide for competition for a permanent position. That was believed to be fair to everyone, and in short, Mr White lost the business case argument.

93. There were a number of other occasions when the Respondent has similarly insisted upon that employment practice. It has resulted in others not securing a permanent position from a temporary or fixed term contract, and on at least one occasion within these witnesses' knowledge and experience, not maintaining employment such that an individual lost their employment with the Respondent.

94. That is a challenge for individuals working in this sector, and it was certainly a source of strain for the Claimant to have uncertainty in her employment, which explained the number of times she raised the matter with her managers. The Claimant was also, perhaps wisely given lack of permanence in her post, doing agency work whilst working for the Respondent, and continues to do so now. The role with the Respondent was part of a portfolio of work that she was undertaking at that time.

95. In my judgment Mr White wanted permanent staff, but he was advised that he must follow due process, and he followed that advice, albeit it was not his wish and it created more work for an already strained service. Mr White mitigated the potential hardship to the Claimant by extending her contract once more to allow for her to remain in post until the recruitment process could happen. That was not something that he had to do, but he did it nonetheless. It was also indicative of Ms Byrne and

Mr White expecting and wanting the Claimant to secure the position. Ms Byrne also told the Claimant not to worry and told her about the other candidates. She provided the Claimant with a good deal of information about the recruitment process in a light-hearted way, and in a way which suggested that she believed in all likelihood the Claimant would secure a position (there were two permanent posts advertised).

96. The extended fixed term contract came to an end in the context of the decision by Mr White to follow the HR advice that a permanent position needed to be the subject of advertisement and competition. That was a level playing field for all potential candidates and the Claimant's written application was strong.

97. I have heard evidence about the interview day and events on that day in some detail and necessarily so. The Claimant's account, and to some extent the undisputed chain of events, and the selection process, could be supportive of the Claimant's case that Mr White's evidence about his change of position should not have been accepted. In short, her case was that the events leading up to the interview day were a total sham.

98. There were undoubtedly a series of unfortunate events on that day, but they do not in any way support the suggestion that Mr White's reason for not simply converting her contract to a permanent contract, and for the contract expiring when it did, was because the Claimant had made protected disclosures.

99. The Claimant's allegations, or rather the inferences she seeks to draw about the interview day included that other members of staff at Armley Grange did not assist her, or direct her to the right place for the interview (such that it was delayed) and she appeared late. I now understand that this lack of help was not levelled at Mrs Reith, but at others. Given the focus of staff on the service users, and that instructions had been given about how and where to attend the interviews, and that was no other reason for other staff to set out be unhelpful to the Claimant, in my judgment the Claimant simply misunderstood what was to happen and waited in the wrong place. No other candidate misunderstood in that way, although the Claimant's understanding was based on her perception of what would happen. The events on that day, the lateness and the difficulty in making sure that matters ran according to the plan was simply a series of unfortunate mishaps and miscommunication. Sometimes things just go wrong, and in my judgment that is exactly what happened on that day. It was not contrived or orchestrated by any of those the Claimant alleges conspired in her dismissal.

100. The Claimant's performance in the interview was no doubt affected by the late start, but also by the Claimant's palpable fear of losing her job. The Claimant's answers were affected by crying at times, and they were not considered to be as strong as those of the other two candidates by Ms Byrne and Mr White. (The Claimant did not ask questions of Ms Byrne and Mr White in relation to the scores which she and other candidates were awarded. I did. In the interests of justice it seemed to me that at the very least, Mr White or Ms Byrne ought to be able to explain similar scores or scores which were not obviously explicable. I assessed their evidence in this regard again, as reliable and doing their best to recall their genuine assessments of the candidates at the time).

101. Ms Byrne knew, of course, that if the Claimant did not perform better than at least one other candidate, she would not secure a permanent contract. I accept that Ms Byrne, as the Claimant alleged, looked down at times during the interview. I consider on my assessment of her evidence that she was very sorry that matters

were proceeding as they did, but that was not of her making. The result of these interviews, which led to the best two out of three interviewed candidates being appointed to a permanent post, was that the Claimant was not appointed.

102. It is convenient here to address the cases on both sides that one or other party or witness is deliberately lying and the way in which I resolved matters in making my findings of fact.

103. I have made findings of parties telling untruths, in some cases having reasons for a lack of candour. The example of course is Ms Byrne in relation to service user 5. She did not want the Claimant to know the real reason for matters changing because it would upset her, and she therefore told an untruth to the Claimant. On the Claimant's case, she told Mr White a lie (that she considered Ms Byrne to be very nice), because she feared for her job. The short point is that it does not always follow that because a witness has told one lie, for which they may or may not have reasons or be able to explain, they are not to be believed on other matters. (In passing, however, I consider the Claimant's later evidence about Ms Byrne to be unreliable and the statement to Mr White to be the accurate reflection of her feelings at the time).

104. It became clear in this case that the Claimant has brought previous proceedings against a previous employer. This emerged after I asked questions about an entry in her diary indicating a reason for her feeling that if she makes disclosures about safeguarding, then "bad things" follow. In this case that has almost been a self fulfilling prophecy: the Claimant's fear of losing her job and anxiety about that has caused so much upset that the Respondent could not overcome it by any of the usual measures, including the kindness of Ms Byrne, either on the interview day or more generally. That was despite the contract being extended twice.

105. In my judgment, the Claimant's case is unreliable. The exemplar is her interpretation of Ms Byrne looking down in the interview. Her case is that Ms Byrne wanted the Claimant to fail and had no intention of allocating the permanent role to her and this explains her downcast eyes. That is one possible explanation. The other, entirely more likely in my judgment, is Ms Byrne's genuine sorrow and embarrassment for the claimant that her interview was going badly.

106. The Claimant has persuaded herself that her treatment has been because she raised safeguarding concerns. She has demonstrated an oversensitivity to being in her words "told off" at work. Being provided with direction about how she should do her job, whether in robust terms, or gentle, or friendly terms is similarly characterised.

107. In my judgment the Claimant has convinced herself and exaggerated some events (file throwing, for instance) no doubt by telling and re-telling them as the proceedings required her to do through the provision of further and better particulars and other documentation of her case, in order to prove her thesis as to why she finds herself without a permanent post with the Respondent. She has clearly been mistaken in her recollection about other events. She may well have made entries in her diary at different times, that is in the personal diary and her work diary based on mistaken recollections that she has convinced herself were the chain of events in this case. Her pain at the loss of this second job has been overwhelmingly apparent in this Tribunal and in my judgment it has affected her state of mind. I do not consider that Mrs Keighley has deliberately lied to this Tribunal for gain or for some

other purpose. I have considered in relation to various matters that her evidence is simply not reliable, as I have, for instance in relation to Mrs Reith's recollection on one occasion. Deliberate lying, persuading oneself of a different version of events and believing it over time, and being mistaken in recollection, are different activities.

108. I also want to address capacity because it has been clear to me that the Claimant has, at times, been impaired through distress and underlying mental ill health during the course of this hearing, and no doubt during the course of preparation for it and the parties and the Tribunal have made accommodation accordingly. That said, equally, she has very intelligently and diligently sought to prepare a case producing enormous amounts of documentation and analysis which are suggestive of a very keen mind. Capacity to conduct proceedings, in this case to bring an Employment Tribunal claim, involves understanding the decisions that you are taking, understanding what you are doing to execute them, and understanding that they may have both cost and benefit. The Claimant has been vigilant and hardworking in undertaking that activity, even though she has been impaired at times through ill health.

109. I have therefore been satisfied throughout that she has had capacity in the sense I describe: to know what she is doing, and to make decisions in connection with this case. There was certainly no medical evidence before me to suggest otherwise. Nevertheless capacity includes the capacity to make unwise decisions, and to be wrong at times, and to be mistaken, and the likelihood of that is no doubt increased through mental impairment, whether that is episodic or a more permanent state of affairs.

110. The result of the conclusions that I have reached is that the Claimant has not proven on the balance of probabilities, or at all in my judgment, that the principal reason for Mr White's decision to let her contract expire in accordance with the fixed term which she had agreed, given her lack of success in the permanent appointment process, was influenced by the making of the protected disclosures which I have found were made (not eleven, but on my account seven).

111. For all those reasons the Claimant's complaint of unfair dismissal is not well founded and does not succeed. The complaint is dismissed.

112. I indicated that I would explain to the parties the formalities of this decision and how it will be confirmed in writing. There will be issued a Judgment, that is a record of the decision signed by me which will come to the parties within a reasonably short period of time. As to the reasons for that decision if the parties wish to have those reasons typed you will be aware that the dicta phone has been running as I have been speaking. Those reasons can be requested to be typed and they then need to be faired and approved by me for error and completeness. If either of the parties wish to have those reasons typed they need to make a written request to the Tribunal and they need to make that within fourteen days of the short record of the decision being sent to the parties. Once they are typed and faired and sent to the parties then they will become a matter of public record, subject to the anonymisation of service users and other staff. Albeit my findings are only as necessary to determine the issues, that is a matter on which the parties may wish to reflect in all the circumstances of this case.

<u>Discussion and Conclusions on Costs Application</u>

113. This is an application made on behalf of the Respondent seeking up to £25,000 in costs on the basis of my decision this afternoon that the Claimant's complaint of unfair dismissal (having made protected disclosures) was not well founded and has failed.

114. The Respondent has made an application on two bases. The second is that the Claimant recorded a meeting with Mr White and took a photograph of a service user and that that conduct is or was vexatious such that the provisions of Rule 76 are engaged. I have dismissed that part of the application because the rule requires vexatious, abusive, disruptive or otherwise unreasonable conduct in the bringing of the proceedings or the way that they have been conducted. In my judgment the ambit of the Rule does not extend to pre-proceedings conduct connected with the employment or certainly it would not extend to conduct in the course of employment in the circumstances of this case.

115. As to the first ground of the application, that is made on the basis of a letter dated 1 August 2017 and said to have been sent by email to Mrs Keighley from the Respondent's in-house employment solicitor, Ms Chopra. The conclusion of that letter is such that if the Claimant decides to continue on with her complaint then the Respondent reserves the right to make an application for costs and to draw to the Tribunal's attention that letter and the information contained within it.

116. In that letter the Respondent set out a chronology of the Claimant's case and the analysis of the issues that had been discussed in case management. Firstly, did the Claimant make protected disclosures, and secondly, whether the motivation behind the Claimant not being appointed to the permanent role of community support worker was because she had made those protected disclosures. They were correctly said to be the issues to be considered by the Tribunal.

117. The Respondent's case, as set out in that letter, was that it considered that it was inconceivable that the Claimant's complaint would succeed.

118. The Respondent asks that I conclude that her conduct in continuing with the litigation after that letter was such as to meet the threshold descriptors in 76(1)(a), that is it was either unreasonable, vexatious, abusive or disruptive conduct to continue. To be fair Ms Keogh does not say it was vexatious, abusive or disruptive, but that it was unreasonable to continue on after that point.

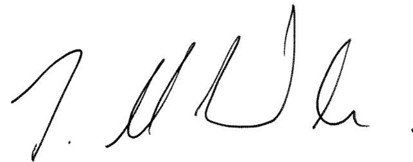
119. My reasons and Judgment in this case have explained the complexity of the evidential material before the Tribunal and the breadth and depth of that. I have also heard from five witnesses on behalf of the Respondent in addressing the matters that were subject of the complaint, and an enormous amount of detail about her complaint provided by the Claimant.

120. I have also today heard that at the time that the August letter was sent the Claimant was in Malaysia caring for her mother and that whilst she recalls contact from ACAS in relation to a settlement offer being made (which is also openly part of the discussion between the parties on the Tribunal's file to the effect that an offer of £12,000 was made to settle the proceedings at that time) she does not recall this letter warning her of the potential for costs to be sought at the close of these proceedings.

121. In assessing the reliability of her recollection, I also take into account her reaction to that application being made this afternoon. In my judgment it is clear that whether that email was sent and received, or not, the Claimant did not digested the

consequences of it, or indeed necessarily digest the request that was being made of her, in essence, to withdraw her complaint. There was no reply by the Claimant to that letter, or at least there has been no reply before me this afternoon. I accept her evidence that she was unaware of it. In those circumstances I consider that it cannot be said that she was acting unreasonably in pressing on with her case.

122. Even if I had not reached that conclusion of fact about the letter being sent and received by the Claimant at the time, and I had come on to consider whether the Claimant was unreasonable in pressing on notwithstanding that letter, I take into account the complexity in the evidence and that the burden of establishing that the principal reason for dismissal was the making of the disclosure was the Claimant's. Nevertheless the chain of events undisputed in this case was such that it was explicable and reasonable for her to hold the belief that she held, in all the circumstances of the case, and it has only been on a very close examination of all that material that the Tribunal has been able to reach the conclusions that it has reached. Those conclusions were in no way, and could no way be described as the most, or more likely conclusions, before the evidence was heard, nor is this a case in which, as the letter said, it was inconceivable that the Claimant would succeed. In those circumstances the Respondent's application for costs fails.



Employment Judge JM Wade

Date 21 December 2017

REASONS SENT TO THE PARTIES ON

21 December 2017

FOR THE TRIBUNAL OFFICE