



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs T Gillions

**Respondent:** Homestaight Partnership Limited

**Heard at:** Leicester      **On:** 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> July 2018

**Before:** Employment Judge Hutchinson

**Members:** Mr K Rose  
Mr J D Hill

## Representatives

**Claimant:** In Person

**Respondent:** Mr N Shah, Solicitor

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that: -

1. The claim of suffering detriments because of making protected disclosures fails and is dismissed.
2. The claim of disability discrimination fails and is dismissed.

# REASONS

## Background and Issues

1. The Claimant presented her claim to the Tribunal on 15 November 2017. She had worked for the Respondents as a self-employed casual worker undertaking home support between April and August 2017. Her claim form claimed that she had suffered a detriment which was that the Respondent had not offered her “a permanent contract at the end of my probation”. She said that the reason for this was:

“I blew the whistle on unsafe practices at work.”

2. In the claim form she explained that she had raised concerns regarding documents being dated incorrectly and requested further training in several fields which she had not been given.

3. She said that she had been placed in situations which were unsafe for herself and her clients and when she had raised the issue she had been told not to worry.

4. She said that on 3 August 2017 she spoke to the Care Quality Commission (“CQC”) and “blew the whistle about the unsafe practices I had witnessed”.

5. At a Case Management Preliminary Hearing (“CMPH”) conducted by my colleague Employment Judge Clark on 23 February 2018 he ordered the Claimant to provide further particulars of her whistleblowing complaints. The Claimant confirmed again that the detriment asserted was the decision to terminate her engagement. The Claimant did not allege that she was an employee but said she was a worker and the Respondent had conceded that she was a worker.

6. At that CMPH Employment Judge Clark had allowed the Claimant to amend her claim to include claims of disability discrimination. The alleged disability was cerebral palsy and at this hearing the Respondents conceded that the Claimant did suffer from a disability, namely cerebral palsy, which satisfied the definition set out in Section 6 of the Equality Act 2010 (“EA”).

7. The Claimant claimed that she had suffered discrimination arising out of her disability under Section 15 EA and that the Respondents had failed to make reasonable adjustments as they are obliged to do under Section 21 of the EA.

## **The Issues**

### Protected disclosure – detriment

8. The Claimant now relies on the following alleged protected disclosures: -

8.1 On 19 May 2017 the Claimant disclosed to Stevie Jackson that she had to administer eye drops and fill MAR sheets without training.

8.2 On 7 June 2017 the Claimant had a conversation with Sam Wheeler and Georgina Balmford where she said that she had been deadlifting. The Claimant did not know that she had been doing anything wrong. This was disclosed to Georgina Balmford who told her not to undertake any lifting.

8.3 On 17 June 2017 the Claimant spoke to Georgina Balmford and asked for additional training after it had come to light that she had made an error. The Claimant says she was unaware that she had done anything wrong until she was informed of it.

8.4 On 22 June 2017 following training the Claimant spoke to Georgina Balmford and said that according to the instructor prompting clients was the same as giving medication.

8.5 On 25 June 2017 the Claimant sent an e-mail to Sam Wheeler saying, “did you talk to Georgie and Stevie about extra training”.

8.6 On 24 July 2017 the Claimant had a telephone conversation with Georgina Balmford re a cleaning complaint and discussed her disability.

8.7 On 24 July 2017 the Claimant requested spot checks on cleaning or further training following a complaint that had been made by a client to Georgina Balmford.

8.8 On 24 July 2017 the Claimant e-mailed Georgina Balmford regarding a MAR sheet completion by another carer/team worker.

8.9 On 24 July 2017 the Claimant called Sam Wheeler as she could not contact management to discuss a medication issue.

8.10 On 25 July 2017 the Claimant called Georgina Balmford regarding MAR sheets dated April when it was undertaken in July and was told that new ones would be sent.

8.11 On 25 July 2017 the Claimant sent an e-mail to Georgina Balmford regarding the MAR sheets with the wrong date and queried why they had not been updated since April.

8.12 On 29 July 2017 the Claimant had a conversation with 2 trainers after a training session. They were called Alex and Denise. She says she expressed her concerns over providing personal care and was upset over a complaint made by a client.

8.13 On 1 August 2017 the Claimant called CQC regarding several issues: -

- Administering eye drops without training
- Providing personal care without training
- Errors with MAR sheets
- Lack of confidence in going to her employers or doing the right thing
- Lack of training
- Lack of response

9. We to decide whether any of these matters amounted to a protected disclosure. To do so we have to be satisfied that it amounted to a disclosure of information rather than simply expressing a concern. It must be a “qualifying disclosure”. In this case the Claimant relies on the following subsections of Section 43B of the Employment Rights Act 1996 (ERA): -

- (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject
- (d) That the health or safety of any individual has been, is being or is likely to be endangered

10. The Tribunal will then have to determine whether the Claimant was subjected to the detriment that she complains of (the termination of her contract) because she had made those protected disclosures and not for any other reason.

Disability discrimination

Section 15 EA – discrimination arising from disability

11. The acts that the Claimant relies on as discrimination arising in consequence of her disability are as follows: -

- 11.1 Further training was not provided.
- 11.2 The way the complaints made against her were handled.
- 11.3 The failure to review the jobs that she had to undertake.
- 11.4 The failure to provide suitable work for the Claimant on the rolling weekend shift rota.
- 11.5 The failure to support the Claimant or move her to different clients.
- 11.6 The termination of her contract.

12. The Tribunal will have to be satisfied that the matters arose in consequence of the Claimant's disability and that the Claimant was treated unfavourably. Did this unfavourable treatment arise in any way out of the Claimant's disability?

13. If we are so satisfied has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

14. It is not in dispute that the Respondents knew about the Claimant's disability. The provision, criterion or practice ("PCP") relied on in this case are as follows: -

- 14.1 The requirement to perform the duties of the role with only basic instruction or direction.
- 14.2 The standard system for allocating clients and work.
- 14.3 The requirement to work alone.
- 14.4 The requirement to fulfil the job role.

15. We must determine whether any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time.

16. If so, we must determine whether the Respondent knew or could reasonably have been expected to know that the Claimant was likely to be placed at any disadvantage.

17. If so, we must ask whether there were steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage. The burden of proof does not lie on the Claimant; however, it is helpful to know what steps the Claimant alleges should have been taken. In this case the Claimant relies on: -

17.1 Further training should have been provided.

17.2 The Claimant should have been told of deficiencies in service delivery as it arose.

17.3 The handling of the complaint should have been dealt with more sensitively.

17.4 The job should have been reviewed.

17.5 She should have been provided with suitable other work.

17.6 She should have been provided with lone worker training.

17.7 The Respondent should have undertaken a risk assessment.

18. If so we must ask whether it would have been reasonable for the Respondent to have taken those steps at any relevant time.

### **The Hearing**

19. Prior to the hearing commencing the Tribunal had read the statements and the relevant documentation. We commenced with hearing the evidence of the Claimant. We also had a witness statement from the Claimant's husband which we considered. For the Respondents we heard from: -

- Stephanie Jackson
- Sharon Batkin
- Georgina Balmford

20. These are all Directors of the Respondent company.

21. We also had a witness statement from Alexandra O'Hara who was an ex-employee of the Respondents. She had been responsible for the Claimant's induction training.

22. The Tribunal also had an agreed bundle of documents and where I refer to page numbers it is from that bundle.

23. There was little dispute on the facts. However, the evidence of the Respondent's witnesses is crucial because the disputes concern their treatment of the Claimant. The Tribunal were satisfied that the Respondent's witnesses gave credible evidence. Their evidence was consistent and was supported by the documentary evidence produced at the time.

## **The Facts**

24. The Respondents provide home support and personal care services. This includes cleaning, companionship, respite care, shopping and errands, help with medication, washing, dressing and general personal care. The Directors of the company are Stephanie (Stevie) Jackson, Georgina Balmford and Sharon Batkin.

25. The Claimant was engaged as a self-employed casual worker and performed services for the Respondent from 15 May 2017. The Claimant's role was to provide the type of support listed above.

26. The Claimant suffers from cerebral palsy. The Respondent accepts that this amounts to a disability as defined in Section 6 of the Equality Act 2010 (EA). The disorder affects muscle tone, movement and motor skills and the Claimant was born with this condition.

27. At the age of 31 the Claimant has learnt to live with the condition and she lives independently with support from her husband.

28. Her left leg is one and a half inches shorter than her right leg which results in her having a permanent limp. Because of this she wears a raised insole whilst out and she also has a plastic walking splint to be used when she is inside.

29. She suffers pain in her left flank and lower back and uses painkillers obtained over the counter to help her with the pain. She has low muscle tone in the affected left side and her arm gets tired easily. The muscles on her left-hand side are not as well developed and are weak and she can trip up on a regular basis.

30. Her left hand has limited fine motor skills so she is unable to do such things as pinch her fingers together, move her fingers independently from one another or grasp small objects. This affects her ability to carry heavy items in her left hand and her ability to use a fork to eat.

31. She has two grab rails in her bathroom and a perching bar in the bath.

32. She has mild learning disabilities which she says do not affect her greatly on a daily basis but do mean that it can take her longer to learn any new tasks asked of her and she often has to seek extra guidance.

33. Mrs Gillions has worked very hard all her life to not allow her condition to hinder her development and she described how she has "surpassed expectations". As she says she just "gets on with it".

34. This attitude clearly impressed Stevie Jackson when she first met the Claimant on 28 April 2017 when she attended a coffee morning the company had held at the local village hall. She said that she wanted to work for the partnership and was cheerful and enthusiastic.

35. Stevie Jackson liked her attitude and explained to Mrs Gillions that workers for the Respondents were subcontractors who choose their own work. She said there was a job specification for every job and Mrs Gillions would know exactly what was expected of her with each client. Hazards and risks were identified and she said that the company's ethos was to care for people they work for and the people who work for them.

36. At the time Mrs Gillions was working at a local pub each morning doing a cleaning job.

37. On 4 May 2017 Mrs Gillions was interviewed by Georgina Balmford. They discussed her disability. Mrs Gillions said that it had never stopped her doing anything. The interview notes are at pages 43-45.

38. In her application form (pages 37-42) she described herself as having a:

“Mild disability (cerebral palsy) allows me a level empathy and understanding for those that require extra help on a daily basis, something that I feel immensely proud to be able to have. My disability does not define me, it rather has provided me with amazing opportunities throughout my life, and I feel I make a good ambassador for “Different people” that are out there, I like to think I am the proof that anyone can do anything no matter what”.

39. The application form went on to say that her “customer service skills are second to none” and she described several skills, experience and qualifications that she had.

40. After the interview the Respondents decided to take the Claimant on as a sub-contractor and she was to be managed by Stevie Jackson and Georgina Balmford. She was a self-employed casual worker. There was no obligation to provide her work. The Claimant was under no obligation to accept work. The terms of her engagement are set out in an agreement (pages 46-52). It provided that the engagement could be terminated at any time immediately by either party.

41. Mrs Gillions was provided with extensive training for her role. Alex O’Hara was responsible for the induction training which was conducted on 5 May 2017. This comprised matters such as: -

- Health and safety
- Lone working
- Moving and handling
- Other matters

42. The induction was a mixture of question and answer session, with a quiz, role play and scenarios and lasted about 3 hours.

43. Alex O’Hara and Mrs Gillions discussed her disability and how it would affect her work. Mrs Gillions said that she lacked fine motor skills in her one hand and had very little strength in one arm and walked with a limp. The Claimant was told that she would be aware of what each job consisted of and she would only take on jobs that she felt she could carry out.

44. There was an issue about Mrs Gillions moving and handling. Because of the issues of strength in her left side it was agreed that she would not be able to carry out tasks that involved client handling.

45. Mrs Gillions commenced working for the Respondents on 12 May 2017.

46. On 19 May 2017 the Claimant in an e-mail to Stevie Jackson raised a query about administering eye drops without training (page 58). She said that a colleague, Sam, had told her what to do and she had been able to complete it directly but that she would need training before she visited the lady again. She had not been instructed to do this and Ms Jackson immediately replied saying that she should arrange to come in to meet her and that they could do the training for administering the eye drops.

47. This was during the first week of her working for the Respondents. She had 4 visits during that first week which were a mixture of home support and cleaning. She also attended the care certificate work shop covering Handling Information and Infection prevention and control.

48. During the following 2 weeks she should also have attended the Equality and Diversity workshop and undertaken the eye drop training but she had to cancel because one of her children was ill. On the following week she attended the Care Certificate Fluids and Nutrition workshop.

49. On 31 May 2017 Stevie Jackson contacted the Claimant and asked her if she could "take a slot" where she would take a client out for lunch. The work involved pushing a wheelchair and Stevie Jackson wanted to know if this was something that she could do. She could not do this. The e-mails exchanged between them on 31 May 2017 are at pages 61 and 62. It can be seen from this that the arrangement was that if the Claimant could not undertake any assignment she should not do so as there were plenty of other assignments for her to undertake.

50. During the week commencing 5 June 2017 Mrs Gillions cleaned for the Ferdinands. They telephoned Stevie Jackson to complain that they were unhappy about the way that the Claimant had greeted them and said that she talked too much and sprayed polish around without rubbing it in. They asked Stevie Jackson not to send Mrs Gillions again.

51. A log of this complaint (and others) are at pages 65-67.

52. An incident occurred around 7 June 2017 when the Claimant told Georgina Balmford that she had been lifting a client. She was told that this was not part of the care plan and she should not be doing this. This had been covered during her induction training. Ms Balmford's concern was that whilst the Claimant was new and not experienced she was not listening to the clients and she was sometimes trying to do too much including things that she should not have been doing.

53. On 12 June 2017 Stevie Jackson met with Mrs Gillions to discuss the complaint from the Ferdinands. Ms Jackson explained that it was important for her to introduce herself quietly and get to know people. She was told that whilst her exuberance was a positive it could be overpowering for some clients. The Claimant accepted the advice and said that she had been told that before. They discussed the spraying of the polish and Mrs Gillions denied the allegation in respect of this. She was reassured and told not to worry. They discussed some further qualifications that Mrs Gillions might obtain if she wanted to study for a diploma in health and social care work and she was given the contact details for Rutland Adult Learning and told to contact them.



54. Also on that day Mrs Gillions informed Ms Jackson that she did not wish to work Fridays any longer due to some other commitments. During this week she also attended the Care Certificate "Working in a person centred way" course.

55. During the week commencing 19 June 2017 Mrs Gillions took on looking after Leslie Upjohn. He was terminally ill and had to spend some time in hospital. That week she also attended a care certificate workshop "Your personal development" and a medication awareness training session.

56. On 27 June 2017 Stevie Jackson met with Allison Morgan from Rutland Adult Learning to discuss Ms Gillions's wish to take the diploma in health and social care. Allison Morgan said that she thought that it was too soon for her to do this qualification and to wait until she had completed her care certificate. At a meeting to discuss her current progress it was agreed with Mrs Gillions that it would be better to wait.

57. On 5 July 2017 Stevie Jackson received a complaint from Heather McMenemy, daughter of Vera and David Branson. She said that her parents were unhappy with the quality of the Claimant's work and her attitude. Mrs Gillions had been asked by Vera Branson to go to the shop on an errand and she had been gone a long time and when she got back she stayed in her car talking on the phone before going back into the house.

58. The following day 6 July 2017 Stevie Jackson received an e-mail from Delene Feuth (page 77) who was another contractor. She said that Vera and David were unhappy with Tree's work and that they didn't want to get her into trouble but did not want to give her any more hours of work with them.

59. There were issues about her "hoovering" and "making" the beds. Ms Feuth said that David Branson (who suffered from dementia) became agitated when Mrs Gillions visited.

60. On 22 July 2017 the daughter of a service user Rita Waites telephoned the office to complain about the Claimant's cleaning. They were not happy with the service and cancelled the cleaning contract. Ms Jackson received an e-mail confirming the position and the client's concerns were set out in an e-mail to the Claimant on 24 July 2017 (page 88). It sets out a number of complaints about the quality of the Claimant's work. The e-mail ends:

"Generally not very thorough, more talking than cleaning."

61. The Claimant was kept informed about the position and Georgina Balmford had a discussion with the Claimant about this. The complaints about her cleaning ability and talking had nothing to do with the Claimant's disability.

62. On 27 July 2017 a service user Freda Showell complained to her care worker Sam Rockwell that the Claimant was "rude and lazy". The user's daughter called to say that the Respondents should not send her again. Ms Jackson had been away on holiday and on her return, she saw an email which had been sent by Gina Hacker, the daughter of Freda (page 99). The client was very upset about the way Mrs Gillions had performed her duties.

63. Georgina Balmford sent an e-mail to Stevie Jackson on 28 July 2017 after she had returned from holiday (page 97). It said:

“Her probation period is almost up – do we keep her on?”

64. In the week commencing 31 July 2017 there was an incident when Mrs Gillions was dealing with a service user called Mary who has dementia. She had asked the Claimant to leave her house and said she did not need any help. Mrs Gillions was concerned about Mary’s welfare and tried to calm Mary down and Mary became more agitated and threatened her with a walking stick. The Claimant contacted Stevie Jackson to tell her what had happened. They exchanged texts during the evening and Ms Jackson told the Claimant not to visit Mary and “not to worry”.

65. On 1 August 2017 the Claimant called the Care Quality Commission and there is a full transcript of the telephone call prepared by the Claimant at pages 167-174. The conversation started with the Claimant saying that she was “looking for a bit of advice”. She was concerned about “the position they are putting myself and some of my colleagues in”.

66. Eventually she told them that she was working for Homestraight and went on to describe the incidents that had happened at work. It can be seen from the transcript that she raised a number of matters: -

- About a lack of staff training and specifically administering eye drops to a person without having had the appropriate training
- Giving personal care to people without the appropriate training
- The MAR sheet not being fully completed and effectively audited
- Dealing with challenging behaviour

67. Stevie Jackson met with Mrs Gillions on 2 August 2017. They discussed the complaints and the incident with Mary. Mrs Gillions felt that Ms Jackson had trivialised the situation with Mary by asking her not to worry and asked for information on dementia. She was told that this would be covered in her upcoming training. A note of the meeting is at page 100. They also discussed the complaint by Freda Showell. Mrs Gillions accepted that she had been sat on Freda’s bed on the phone and the bed had been made in a “slovenly manner”. She complained that she had not been briefed properly. She was told that she needed to improve the quality of her work. At no stage during the discussion did the Claimant say that she had raised any concern with the Care Quality Commission.

68. After the meeting with the Claimant Ms Jackson had returned to her office to find that e-mail from the Care Quality Commission raising issues that had been reported to them by one of their sub-contractors. Ms Jackson thought this resonated with her conversation with Mrs Gillions and telephoned her to ask her if she had reported them to the CQC. This was only in the context that it would help them to know so that in her response she could reflect the things that they had agreed at the meeting earlier in the day. 69. Ms Jackson assured Mrs Gillions that she was not angry about this in any way and indeed that if Mrs Gillions had any concerns she was right to report things to the CQC. She would have just preferred that she had discussed those concerns with her first.

70. We did not see the e-mail to the Respondents but their reply dealing with the various points is at pages 101 to 104. The reply was not dated but was completed in early August 2017 by Ms Jackson. It deals with several “concerns” which were;

- Lack of staff training re administration of eye drops
- Giving personal care without training
- MAR sheets not completed
- Dealing with challenging behaviour

71. By the middle of August 2017, the Claimant had completed her 3 months probationary period and was due for a probationary review. The Claimant was away on holiday between 18 and 25 August 2017 and the review was arranged for Monday 4 September 2017. It would be conducted by Georgina Balmford and Stevie Jackson. The invitation is at page 105.

72. On 31 August 2017 the Respondents received a complaint from another home support worker that Mrs Gillions was not completing the tasks required of her when visiting their client. The worker complained that the Claimant had recorded matters in the daily diary sheet that she had not completed. The Client was contacted and told the Respondents that the Claimant had left early.

73. The Claimant had in fact left her client 30 minutes early due to the onset of a urinary tract infection. She did not inform the Respondents about this until the following day (page 113).

74. On 1 September 2017 Stevie Jackson and Georgina Balmford met and discussed whether they wanted to continue or terminate the Claimant's contract. They discussed her performance and the excessive number of complaints that had been made concerning her work and her general attitude to work. By now the Claimant had had considerable training and support and they agreed that her attitude and approach to work did not meet the standards required and they decided to terminate her contract.

75. On 4 September 2017 the probationary review meeting was conducted with the Claimant by Ms Balmford and Ms Jackson. They went through her work and experiences in the document the Claimant prepared at pages 108-110. It can be seen from the document that she had acknowledged that she had received several complaints about her service. They told the Claimant at the end of the meeting that they would not be giving her any further work.

76. On 5 September 2017 the Claimant asked for a "full breakdown of the issues that led to me not being kept on" in an e-mail at page 116.

77. Stevie Jackson replied on 11 September 2017 (page 117). Attached to the letter were details of the complaints at pages 65-67 and 83-87.

78. At no stage during her time with the Respondents did the Claimant complain that she could not perform her duties. When she told the Respondent, she could not push a wheelchair this was accepted by the Respondents. She received induction training before she started and during her probationary period attended many training sessions with the Respondents. At no stage did the Claimant identify any adjustments that she needed.

## The Law

### Disability discrimination claim

79. The Claimant makes the following complaints: -

79.1 Discrimination arising from disability. Section 15 of the EA provides: -

- “(1) A person (A) discriminates against a disabled person (B) if: -
- (a) A treats B unfavourably because of something arising in consequence of B’s disability, and;
  - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.”

The Tribunal must be able to identify matters that arise in consequence of the Claimant’s disability and also decide if the Claimant received unfavourable treatment. We must then determine whether the Respondents treated the Claimant unfavourably in any of those ways because of any of the things that arise in consequence of the Claimant’s disability.

If we are so satisfied the Respondents then must show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

79.2 Failing to make reasonable adjustments. Section 20 of the EA provides: -

- “(1) Where this act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 in the applicable schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises of the following 3 requirements.
- (3) The first requirement is a requirement where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as is reasonable to have to take to avoid the disadvantage.
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

80. Section 21 EA provides that if there is a failure to comply with any of the above-mentioned requirements there is a failure to comply with the duty to make reasonable adjustments and that A discriminates against the disabled person if A fails to comply with that duty in relation to that person.

81. It is the Tribunal's duty to identify a provision, criterion or practice otherwise referred to as a PCP. We must ask whether any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time.

82. If we are so satisfied we must ask whether the Respondent knew or could reasonably have been expected to know that the Claimant was likely to be placed at any disadvantage and if so were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant; however it is helpful to know what the steps the Claimant alleges that should have been taken.

83. Finally, if so we have to ask ourselves would it have been reasonable for the Respondent to have to take those steps at any relevant time?

Whistleblowing – detriment

84. The relevant law is to be found in the Employment Rights Act 1996. Section 43A provides: -

“Meaning of “protected disclosure”

In this act a “protected disclosure” means a qualifying disclosure (as defined by Section 43B (which is made by work in accordance with any of Sections 43C to 43H).

“Section 43B - disclosures qualifying for protection: -

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

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

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

...

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

...

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

concealed.

Section 47B – protected disclosures: -

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

85. Mr Shah referred us to 3 cases namely: -

- **Chesterton Global Limited (t/a Chesterton’s) and Another v Nurmohamed** [2017] EWCA civ 979
- **Parsons v Airplus International Limited** [2017] UK EAT 0111/17
- **Blackberry Ventures Limited (t/a Chemistree) v Ghia** [2014] UK EAT 0449/12

86. Lord Justice Underhill in the **Chesterton** case referred to above offered guidance as to the approach to be taken in general:

“27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of S.43B as expounded in **Babulla**... The Tribunal thus has to ask: -

- (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and;
- (b) whether, if so, that belief was reasonable.

28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the Tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that it is perhaps particularly so given that the question is of its nature so broad textured. The parties in their oral submissions referred both to the “range of reasonable responses” approach applied in considering whether dismissal is unfair under Part X of the 1996 Act and to the “Wednesbury approach” employed in (some) public law cases. Of course, we are in essentially the same territory, but I do not believe that the result to test formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the Tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that view is not as such determinative.

29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the Tribunal finds were not in his head at the time he made it. Of course, he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive.

Likewise, in principle a Tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time; all that matters is that his (subjective) belief was (objectively) reasonable.

30. Fourth, 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; otherwise, as pointed out... above, the new Section 49(6a) and 103(6a) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase “in the belief” is not the same as “motivated by the belief”; but is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.”

87. In respect of whether the disclosure relates to something that is in the worker's interest he went on to say:

“37... Where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under Section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as the personal interest of the worker. Mr Reid's example of doctor's hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of a particular case...”

## **Our Conclusions**

### **Whistleblowing detriment**

88. In this case the Claimant is claiming that she has suffered a detriment which was the decision to terminate her engagement. She acknowledges that she worked on a self-employed basis for the Respondents for just 3½ months. She also acknowledges that she was subject to a 3-month probation period and complains that the reason for the termination of her engagement was because she had raised protected disclosures.

89. We are satisfied in this case that the reasons for the termination of her engagement had nothing to do with the alleged disclosures and were as follows:

89.1 The Claimant was unreliable. Her timekeeping was unsatisfactory with instances of, disappearing during her work and leaving early. Examples of this are the complaints made by the client Branson on 5 July 2017, the complaint by Mirth on 31 August 2017 and the complaint by Peachey of 4 September 2017.

89.2 The Claimant was not providing a service to the clients in accordance with the care plan. Examples of this are the Waites complaint on 22 July 2017 and the complaint on 31 August 2017 by Mirth.

89.3 There were many complaints about the Claimant upsetting her clients, talking too much and not doing her work. The quality of her work was called into question by Ferdinand on 7 June 2017, Branson on 5 July 2017, Waites on 22 July 2017 and Showell on 28 July 2017.

90. Because of these complaints the Respondents lost clients including Waites. The last straw was the issue about Mirth on 31 August 2017 when she had completed a task sheet saying that the tasks had been completed when they had not. This amounted to falsification of a document which caused the Respondents to no longer trust the Claimant.

91. We are satisfied that during her engagement a systematic programme of training had been given to the Claimant and she had been spoken to on many occasions and encouraged to improve her performance. Her performance did not improve and it was these performance issues which led to the termination of her engagement which had nothing to do with anything else.

92. The Claimant has tried to persuade us that she raised protected disclosures. The disclosures being about the following matters namely: -

- That she had not received appropriate training
- There were issues about her completing the MAR sheet
- She had not received appropriate support

93. The Claimant gave us several examples (12) of matters she says that she raised with the Respondents which she says amount to protected disclosures between 19 May 2017 and 29 July 2017. We are not satisfied that any of them amounted to protected disclosures. They were not disclosures of information. They were simply concerns relating to her training that were raised in the usual way with her managers, particularly following complaints that had been received by the Respondents about her.

94. The final disclosure that she says that she made was her call to the Care Quality Commission on 1 August 2017. The transcript of the call shows that she simply rang the CQC asking for advice about undertaking tasks without training and some errors with the MAR sheets. We are satisfied that they did not amount to a protected disclosure. It was seeking advice and there was no public interest in this alleged disclosure in any event. In respect of this conversation we are satisfied that she did not have a reasonable belief that the Respondents had breached their legal obligations as she alleges. She certainly didn't say this to the CQC. Her whistleblowing complaint fails.

## **Disability Discrimination**

### **Discrimination arising from disability**

95. We are satisfied that the termination of her engagement did not arise in any way out of anything to do with her disability. The issues and complaints made by the clients of the Respondent did not in any way relate to her disability. They related to the unsatisfactory performance of her work for the Respondents and their clients. She had been provided with continuous training from the start of her engagement on 5 May 2017 until just before the end of it on 29 August 2017. Throughout her 15 weeks training she was progressing to obtaining a care certificate. Her shortcomings had nothing to do with any lack of training.



96. Her ability to vacuum and clean and undertake the quality of work that was necessary for the clients was to do with her careless attitude. This was not acceptable for someone undertaking this sort of work.

97. We are satisfied that where the Claimant said that she could not undertake tasks such as pushing a wheelchair the Respondents were sympathetic and said that she did not need to do that. There was no failure to review jobs she could not undertake because she was not provided with jobs she could not undertake because of her disability.

98. The Claimant was herself responsible for assessing which jobs were suitable for her to undertake and which she could manage and she was aware of what she had to do and that she could turn down assignments that she was not capable of undertaking.

99. At no stage did the Claimant ask for any adjustments to be made other than those that were granted by the Respondents.

100. When the complaints were received we are satisfied that these were handled sensitively and properly by the Respondents. There was no suggestion made at any time by the Claimant or anyone else that the complaints related in any way to the Claimant's disability. The Claimant was provided with support when she needed it and with adequate training to undertake the tasks she was asked to do.

101. There was no failure to provide her with alternative work. She always had work to undertake whenever she wanted it. When the Claimant wanted to undertake weekend work this was given to her when it was available.

102. We are satisfied that the reason for her dismissal related to the final incidents at the end of August 2017 when the Claimant's integrity was called into question by leaving work early and not informing the Respondents and completing documentation indicating that she had completed tasks when she had not. This had nothing to do with her disability.

103. The Claimant had training and support from the Respondents and there is no evidence as to how the Claimant was disadvantaged by working alone in the community because of her disability. Her job by its very nature involved working alone and at no stage did she mention to the Respondents that she was anyway disadvantaged in respect of working alone.

104. We are satisfied in this case there was no need for the Respondents to undertake a special risk assessment for the Claimant. The Claimant had assured the Respondents that her disability would not affect her ability to undertake the tasks that she had to complete. At no stage did her disability mean that she was more vulnerable to injury than any none disabled comparator or that there would have been fewer complaints if some risk assessment had been undertaken.

105. We are satisfied in this case that the Claimant has not suffered any discrimination arising from her disability as defined in Section 15 of the Equality Act 2010.

**Failure to make reasonable adjustments**

106. The Claimant was not required to perform her duties with only basic instruction and direction. She was only instructed to undertake tasks that she could perform and was provided with adequate training and direction to perform those tasks.

107. The system for allocating work did not place the Claimant at any disadvantage. She only had to undertake work she was satisfied she could perform. She never raised any issue that she could not undertake any of her tasks because of her disability.

108. The requirement to work alone did not place her at any disadvantage. She had received training about working alone and never raised any concerns in respect of this.

109. The Claimant's ability to undertake the job role was not affected by her disability. None of the tasks she needed to undertake were difficult. She never raised any issue about the performance of her role. She knew what was expected of her but on many occasions, did not carry out her work to the reasonable standards required of her.

110. The Respondents have not failed to make reasonable adjustments in accordance with the requirements of Section 21 of the EQA.

111. For these reasons all the claims fail and are dismissed.

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Employment Judge Hutchinson

Date 10 October 2018

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE