



EMPLOYMENT TRIBUNALS

Claimant: Ms V Penlington

Respondent: The Poor Servants of The Mother of God

Heard at: Liverpool

On: 24, 25 and 26 April 2018
27 April 2018
(in Chambers)

Before: Employment Judge T Vincent Ryan
Mr A G Barker
Mr J Murdie

REPRESENTATION:

Claimant: Mr. S. Pinder, Solicitor
Respondent: Mr G. Mitchell, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant made protected disclosures to the respondent on 27 April 2017 (in a telephone conversation with a senior manager), on 12 May 2017 in an email to a member of the respondent's Human Resources department, and on 18 May 2017 when she lodged a formal grievance, which she addressed to the respondent's Human Resources department. The claimant's disclosures were of information which in the reasonable belief of the claimant were made in the public interest and tended to show that a criminal offence had been committed and that the respondent had failed, was failing and was likely to fail to comply with legal obligations to which it was subject.
2. The respondent dismissed the claimant with notice on 19 June 2017 where the principal reason for the dismissal was that the claimant made protected disclosures. The claimant was unfairly dismissed.
3. The respondent subjected the claimant to the following detriments:

- (1) In the period from 12 May 2017 to 22 May 2017 the respondent prepared notes and statements from its employees including unfair and inaccurate criticism of the claimant with a view to justifying her dismissal.
 - (2) On 22 May 2017 the claimant was required to attend a meeting at which she was dismissed without any prior notification or indication of the true purpose of the meeting in circumstances when she believed that it was to deal appropriately with her grievances.
4. The claimant's claims that she was subjected to the following detriments on the ground that she had made a protected disclosure or such disclosures fail and are dismissed, namely in respect of the allegation that she was subject to detriment by:
- (1) Having to make daily contact with the respondent whilst on bereavement leave;
 - (2) Being asked as to her whereabouts for the shift of 6 and 7 May 2017;
 - (3) Being transferred from the respondent's site at Garston Old Road to its site at Elder Gardens;
 - (4) By having to complete "shadow" shifts;
 - (5) By being failed at a medical assessment on 11 May 2017;
 - (6) By being accused of having submitted incorrect timesheets on 17 May 2017.

REASONS

1. The Issues

1.1 The parties' agreed List of Issues was as follows:

- "(1) The claimant brings the following claims –
- 1(a) Pre-dismissal detriment(s) contrary to section 47B of the Employment Rights Act 1996 ("ERA"); and
 - 1(b) Automatic unfair dismissal contrary to section 103A ERA.
- (2) Detriment claim: do any or all of the following communications amount to the disclosure of information which in the reasonable belief of the claimant were made in the public interest for the purposes of section 43B ERA -
- 2.1 The telephone call from the claimant to Paul Wilkinson-Barton in which the claimant informed Mr Wilkinson-Barton that she had identified a discrepancy in the petty cash at Garston Old Road;

- 2.2 Did the telephone call referenced at paragraph 2.1 take place on 27 or 29 April 2017;
- 2.3 On 12 May 2017 (11:16) the claimant's email to Fela George in which the claimant informed Mr George that –
- (a) I am being assigned to a further two week shadow shift despite having already done. Due to this I am losing income regarding sleep in shifts which I was informed to be x2 per week'.
 - (b) The approach to the claimant's medication competency assessment 'was inappropriate and humiliating...I felt it was undermining to my capabilities by Stefan...My overall concern is this is now due to my contacting HR initially'.
- 2.4 On 18 May 2017 (at 23:38) the claimant's email entitled 'formal grievance' to Mr George which referenced the contents of the 12 May 2017 email and informed Mr George:
- (a) 'I have been informed I am to shadow shift for the fifth week...I am not being given answers as to why this continues and is unacceptable. It is humiliating and undermining'.
 - (b) 'I would appreciate the appalling treatment of myself to be addresses ASAP and obviously want answers as to why I am experiencing victimisation following raising legitimate concerns due to monies discrepancy whilst at Garston Old Road'.
- 2.5 As regards the communications referred to the claimant has confirmed her allegations in relation to the public interest issue in her further particulars, see paragraph 5 on page 81I of the bundle (in this Judgment all page references are to the trial bundle unless otherwise indicated)."

The respondent denies that the claimant has made any protected disclosures.

- (3) To the extent that the claimant made qualifying disclosures, were such disclosures 'protected disclosures' for the purpose of section 43C ERA? As regards the alleged protected disclosures the claimant relies upon the further particulars, note paragraphs 1-4 from page 81E of the bundle. The respondent denies that the claimant has made any protected disclosures (see amended grounds of resistance pages 81R, 81V, 81Y.

- (4) Did the respondent subject the claimant to any or all of the following alleged detriments from the date of the telephone call referenced at paragraph 2.1 above to 22 May 2017, namely –
- 4.1 The management and treatment of the bereavement leave which commenced on 29 April 2017;
 - 4.2 The claimant being moved from the Garston Old Road (“GOR”) site to the Elder Gardens site;
 - 4.3 The requirement of the claimant to complete further shadow shifts at the Elder Gardens and therefore not being permitted to complete sleep in shifts;
 - 4.4 On 11 May 2017 the claimant's medication competency assessment conducted by Stefan Brunt;
 - 4.5 On 16 May 2017 the timesheet concerns raised by Mr Brunt;
 - 4.6 The failure to properly allocate the claimant to a rota;
 - 4.7 The lack of attention given to the claimant's concerns;
 - 4.8 Preparing documentation in relation to the claimant's conduct and performance;
 - 4.9 The involvement of Mr Turner in the management of the claimant's concerns and the failure to notify the claimant of the same;
 - 4.10 Not providing the claimant with evidence in relation to the concerns about the claimant's conduct;
 - 4.11 By not applying or following a disciplinary or capability procedure in relation to the claimant's conduct or performance;
 - 4.12 On 22 May 2017 Mr Wilkinson-Barton asking the claimant to attend a meeting without providing her with prior notice and/or information as to why she was required to attend;
 - 4.13 As regards the detriments the claimant relies upon the information in the further particulars, see paragraphs 6 and 7, from page 81I. The respondent denies that the claimant was subject to the detriments as alleged, and also that they may for reasons related to the alleged protected disclosures (see pages 81N, 81S, 81T, 81U, 81V, 81W and 81X).
- (5) In particular –
- (i) Did any of the allegations set out above occur?
 - (ii) If so, did any of the above amount to detriments?

- (6) If the Tribunal finds that the conduct listed at paragraphs 4.1 to 4.13 did occur as the claimant alleges and did constitute a detriment, was that act or deliberate failure to act done on the ground that the claimant had made a protected disclosure?

Automatic Unfair Dismissal

- (7) Was the claimant dismissed by the respondent on 19 June 2017?
- (8) If so, was the sole or principal reason for that dismissal that the claimant had made protected disclosures?"

2. The Facts

2.1 The respondent is a registered charity working with vulnerable people offering social, pastoral, educational and healthcare support in a number of countries including the United Kingdom, where it delivers social care services through the Frances Taylor Foundation ("FTF"). The respondent issues written statements of terms and conditions to its employees and operates a number of policies applicable to its employees, including:

- Safeguarding (pages 82-90)
- Sickness absence (91-98)
- Probationary period (99-101)
- Grievance (102-107)
- Absence management (108-114)
- Whistle-blowing (114A-114D)
- Client finance (115-138)
- Medication (139-176)

2.2 The respondent has a Chief Executive Officer, Mr Nigel Turner, who is called a Social Care Director, and a Board of Trustees chaired by a member of the respondent's religious congregation. There are other directors in the United Kingdom including Heather Todd who is the Deputy Director of Social Care. The respondent's Liverpool Adult Services ("LAS") has a structure set out at page 183 including a Service Manager, Mr Paul Wilkinson-Barton ("**PWB**") who is supported by administrative officers and a Finance Officer, a Deputy Service Manager, Sheila Wall, and three team managers, Caroline Forster, Pat McGoran and Vera Jones. LAS is responsible for nine premises occupied by the respondent's clients. The respondent's approach to its adult clients is that the occupied premises are the clients' homes and the clients' privacy should be respected. The respondent employs approximately 390 full-time employees in the United Kingdom.

- 2.3 The claimant's immediate line manager was the team manager, Vera Jones, who was responsible for premises at 68 Garston Old Road ("GOR"), 7 Elder Gardens ("EG") and 71 Darby Road.
- 2.4 The claimant was employed on a probationary basis for six months. There is a detailed probationary policy at pages 99-101 which includes the need for induction, training, support, review, monitoring and a contract to assist the probationer. Probationary periods can be extended or foreshortened. The documented policy and procedures imply a supportive and instructional working environment where probationers would be given an opportunity to prove, and improve, themselves even if this needed correction of errors, so that they could gain valuable experience.
- 2.5 The claimant was employed by the respondent as a support worker from 10 April 2017 (following interview by PWB on 17 March 2017) until termination with notice on 19 June 2017, which notice was given to her orally and in writing on 22 May 2017. The claimant was issued with a written statement of terms and conditions. The claimant's terms and conditions of employment are at pages 199-204 and a job description is at pages 186-187. The claimant underwent an interview and subsequent induction with PWB and was issued with the applicable policies. At the time of her appointment by the respondent she was an experienced support worker, having been one elsewhere for somewhere in the region of 20 years.
- 2.6 It was the respondent's policy that on the appointment of any new staff or on the redeployment of any staff to a different site, that member of staff, regardless of their prior experience, would be expected to shadow colleagues for up to two weeks of their new or redeployed engagement. This was so that the support worker could get to know clients and become known by them, gaining mutual confidence and respect. During shadow shifts the support worker would not be allocated to sleepover shifts when there would be a requirement to administer medication and to work with fewer colleagues. Sleepover shifts attracted additional payment, which clearly therefore those who were shadowing did not receive. Whilst the respondent encouraged a family atmosphere for the benefit of its clients, its support workers were required to report absences on a daily basis directly to their line manager, unless otherwise agreed and in cases of approved annual leave or certified sickness absence.
- 2.7 The claimant's immediate line manager throughout her employment was Vera Jones. Ms Jones, however, went on prolonged sick leave at the end of April 2017 and did not return to work prior to the claimant's dismissal on 22 May 2017. In Ms Jones' absence the claimant's senior line manager was PWB albeit he was on vacation from 28 April 2017 until 11 May 2017. In the absence of Ms Jones and PWB the claimant addressed concerns, which are detailed below, to the respondent's HR department and specifically to Mr Fela George. Mr. George redirected her concerns and complaints to Heather Todd, the respondent's Deputy Social Care Director; Ms Todd was PWB's line manager who in turn reported to Nigel Turner (the CEO). It was in these circumstances that the claimant's

concerns went beyond her immediate chain of line management effectively escalating them to Ms Todd; this was driven by the circumstances described and not any wish on the claimant's part to circumvent reporting lines. PWB did not like this turn of events.

- 2.8 Following the claimant's induction she worked at GOR doing shadow shifts. On 27 April 2017 she did her first "sleepover" shift during which she administered medication. Until this point and whilst the claimant had expressed in evidence her misgivings about certain issues at GOR, the respondent had not expressed any concerns about her performance; indeed there was no evidence before the Tribunal throughout the claimant's entire employment that there was any complaint or concern about the claimant's performance as a carer.
- 2.9 On the night shift of Thursday 27/Friday 28 April 2017 the claimant was working with her colleague Jan Murphy. They noticed a discrepancy in the petty cash tin which had a deficit of £13.33. They noted this in the ledger. The claimant used the on-call system to telephone the duty manager to report the shortfall in the petty cash. The on-call manager was PWB and the claimant explained the situation to him. PWB said that he would take up the matter with Vera Jones the following morning, but in fact spoke to her that evening as he was about to go on his holiday. Ms Jones made enquiries as a result of which another support worker named Cate McHugh explained on 1 May 2017 that she had paid a milk bill for which she had the receipt and change of £13.33 which she had not had an opportunity to return to the petty cash tin (page 328). In the light of Ms McHugh's explanation a note was added in the ledger at GOR in red ink beneath the claimant's and Ms Murphy's entry regarding the shortfall explaining it and reminding service users not to use the on-call system for matters such as this. The note reads: "Milk bill was paid but had forgotten to write it in. In future can staff check with the staff that was on duty before contacting the on-call". That entry was made by Tracy Jones. Subsequently a number of support workers added their initials to that note indicating they had read it and understood it. By the time that that note was written and Cate McHugh had explained on 1 May how the error had occurred the claimant was no longer working at GOR, Vera Jones was on sick leave and PWB was on annual leave. The claimant did not see the note. The claimant did not receive any explanation regarding the deficit and its recovery. The respondent's ledger and these notes are at pages 325-329.
- 2.10 Following the night shift of 27/28 April 2017 the claimant was told of the death of her half-brother. She contacted the respondent to say that she would need a few days bereavement leave and to arrange the funeral. The claimant spoke to Sheila Wall, one of the team managers, in the absence of Vera Jones and PWB. She was asked to contact the respondent daily with an update as to when she was likely to return, and she was requested to do this in accordance with the respondent's policies and procedures to assist in the proper preparation of duty rotas. The request was not related to the claimant having spoken to PWB about the petty cash issue.

- 2.11 The claimant had been unhappy prior to 27 April 2017 about the allocation of shifts to her. She had anticipated being able to do sleep-in shifts albeit she understood the need for some period of shadowing. She was particularly disturbed about having been put on a duty rota for eight days continuously which she felt was unfair. She gave evidence to the effect that from the start of her employment she felt vulnerable because she was put into a difficult working situation. It was one with which she was unhappy. She did not think that handovers were carried out properly between shifts. From her experience and confidence in her own performance, she was critical of various practices at GOR.
- 2.12 Whilst she was off work on bereavement leave the claimant telephoned Mr. George (in the HR department) voicing her concerns about work, saying that she was not happy with the shift allocation and that there were no proper handovers. She criticised other things too. Mr George referred the claimant's concerns to Heather Todd, the Deputy Social Care Director, as stated in the absence of Vera Jones and PWB. The claimant expected that Heather Todd would contact her following Mr George's email to Heather Todd which appears at page 205(a). In the absence of contact by 5 May 2017 the claimant emailed Mr George to state that there had been no contact and to confirm to him that she would be absent from work for her half-brother's funeral on 8 May and until then. The claimant did not contact her local manager. The claimant's local manager was not made aware by Mr George of the claimant's continued absence and expected that she would attend work on 6 and 7 May 2017 having not heard from her. The claimant believed that having told Mr George, as he was her HR contact, she had complied with the respondent's requirements.
- 2.13 Heather Todd indicated to the claimant by email that they could speak over the weekend, and on Saturday 6 May they had a lengthy telephone call. It would appear from the evidence that the telephone call took longer than Ms Todd had anticipated, however the claimant was only following up Ms Todd's suggestion in making the call. Ms Todd's summary is at page 206(a). The claimant had raised various concerns relating to her time at GOR and it was agreed that she would write to Heather Todd following her half-brother's funeral with more details. During the conversation the claimant expressed her reluctance to return to GOR. Ms Todd suggested that as an alternative, on a temporary basis while matters were being resolved at GOR, she would be redeployed to the house at EG. The claimant agreed to this proposal, also believing it to be on a temporary basis pending satisfactory resolution of issues at GOR. As agreed the claimant then wrote to Ms Todd by email albeit on 7 May and not after the funeral. The claimant's email to Ms Todd is at page 208 and in it she listed a number of concerns regarding working practices at GOR. Those concerns included what she considered to be lack of communication, rota issues, and absence of handovers and money checks despite requests. Further details were given by the claimant of the shortfall on 27 April (albeit she got the date wrong and referred to 29 April) and she confirmed that she had spoken to PWB about a shortfall of £13 (in fact £13.33). There were other complaints also.

- 2.14 Because of the claimant's move to new premises, EG, she was required to complete only shadow shifts; she was not therefore allocated sleep-ins when she returned to work on 9 May 2017. This was in accordance with the respondent's established practice.
- 2.15 On 11 May 2017 PWB returned to work from his holiday. He spoke to his colleague Ms Forster, catching up on events that had occurred in his absence. Ms Forster told PWB that the claimant was "still" making an issue over the £13.33 petty cash deficit at GOR. PWB decided to prepare a statement about the claimant on 12 May 2017 recommending that she would not be confirmed in post at the end of her probation. When asked in cross examination why he prepared that report (at page 226) he replied, "because on 27 April I had made a note, I then went on annual leave and when I returned to work I was told there was still an issue about the missing, not so missing, money" (evidence given by PWB on 26 April 2018 at the Employment Tribunal at approximately 11:15am). Ms Forster also told PWB that the claimant was unhappy with the preparation of rotas at GOR.
- 2.16 On 11 May 2017 the claimant failed an in-house medical assessment that was required before she could be allowed to administer medication to clients on her own. The medication policy and procedure checklist is at pages 318-321. Mr Stefan Brunt was the respondent's manager that administered the medical assessment. Mr Brunt was the "observer" whose handwritten notes are shown on that form, and the column entitled "staff member's comments" sets out the claimant's comments in her own handwriting. The claimant failed the medical assessment because she left a vulnerable person who had been assessed and classed as lacking mental capacity as she was taking her medication instead of staying with that person to supervise, and because her storage of medication was inadequate; the cabinet was not locked by her. The claimant conceded that she left the client before seeing to it that medication had been taken and explained in the staff member's comments column that she wished to assist another client at that time. Mr Brunt assessed the claimant's practice as unsatisfactory, recommending that he or another member of staff or manager would undertake the assessment with the claimant again on another occasion. This was not therefore a disciplinary or dismissing matter; the claimant was in her probationary period; this was the first time she had carried out the respondent's in-house assessment and she was to be given a further opportunity.
- 2.17 In her evidence to the Tribunal the claimant gave unsatisfactory evidence, about the assessment at 2.16 above, firstly saying that she had been called out of the room by Mr Brunt who was trying to catch her out and that is why she left a client unattended; then she said that she was merely distracted by Mr Brunt who called to her so that she stood up and looked his way, which she says justified Mr Brunt in failing her. The claimant gave this evidence in an unconvincing and unreliable manner, particularly bearing in mind her documented comments at pages 318-321. Mr Brunt reported the claimant's failure to PWB.

- 2.18 On 12 May 2017 PWB prepared the statement/report referred to above (2.15) and this appears at pages 227-228. This was a report for the benefit of Ms Todd. In it PWB comments that the claimant had raised concerns about her rota and “missing monies at GOR” and that she had failed her medication assessment with Mr Brunt. PWB reported that on the basis of those three matters he would be suggesting that the claimant would not be confirmed to post and sought advice as to how to proceed. The Tribunal finds in the light of PWB’s evidence above that his primary concern was over the reported missing money at GOR (£13.33). PWB felt he had dealt with that issue raised by the claimant on 27 April and did not expect it to still be a live issue upon his return from holiday, let alone that it would have been fed back to Mr. George and then to as senior a manager as Heather Todd. The Tribunal finds on the basis of PWB’s evidence that his mind was made up no later than 12 May 2017 that the claimant’s employment would be terminated. He said in evidence that subsequent issues that arose with the claimant thereafter was not what he considered to be “new” evidence to take into account in reaching a decision about her future, but merely confirmed the decision he had already made. The Tribunal finds that PWB sought evidence to use against the claimant after 12 May to vindicate his firm decision made on 11 or 12 May 2017 to dismiss the claimant. He did so because of her reporting of the petty cash deficit which was the reason that he decided to dismiss her.
- 2.19 Also on 12 May 2017 the claimant sent a further email to Mr. George which appears at page 225. She was unaware of PWB’s recommendation to Heather Todd set out at pages 227-228. Having thanked Mr George for his assistance she wished to clarify her present position and she again set out some background information. She stated that since she had raised her concerns at GOR (referring to the petty cash deficit of £13.33 and failure to conduct proper handovers) she had encountered difficulties, and that she was encountering further difficulties having made contact with him initially. She complained of matters that she considered to be reprisals and stated that she was wary of contacting him. The claimant was making a disclosure to Mr George of what she considered to be detriments which she had suffered for having made disclosures about practices at GOR and a cash deficit which she believed to have been caused by theft. The claimant wanted HR to know that having raised valid concerns tending to suggest the possibility of criminal activity or a breach of legal obligations to clients she had suffered reprisals, was undermined, humiliated and made to feel wary.
- 2.20 On or about 16 May 2017 Ms Forster contacted the claimant to remind her that there were outstanding timesheets which were required so as to complete records and substantiate the payroll. On 16 May 2017 the claimant submitted her timesheets for up to and including 21 May 2017 by post to the respondent. She had therefore “pre-empted” shifts to 21 May 2017. She was not instructed to do this. Mr Brunt took up this matter with the claimant and she reacted defensively and dismissively of Mr Brunt, which upset him. The claimant was discourteous and aggressive but did not suggest, until the Tribunal, that she had acted under any instruction or

guidance from Ms Forster in preparing anticipatory time sheets; she had not.

- 2.21 By this stage the claimant had been redeployed to EG on shadowing shifts and was still not having sleepovers; this was in accordance with practice so as to gain familiarity with residents. EG closed for a holiday on or about 19 May 2017 and the claimant was redeployed further to the house at Darby Road. She was required to shadow again in accordance with the established practice for the reasons already stated.
- 2.22 PWB wanted to substantiate his earlier decision to dismiss the claimant and sought supportive statements from Mr Brunt and Ms Forster. They made notes and statements which were not shown to the claimant but which PWB wished to rely on to justify his stance. PWB also escalated matters by summarising two areas of concern in correspondence that was circulated to, amongst others, Nigel Turner, the Chief Executive Officer and the Board of Trustees, namely the claimant's allegations of bullying against Mr Brunt and concerns that he had over the claimant's performance and the nature and the frequency of her complaints. Mr Turner took on board both sets of concerns. Mr Turner advised that Mr Brunt be investigated and temporarily moved pending investigation; the investigation was into the claimant's bullying allegation made against Mr Brunt. Mr. Turner also instructed that the claimant be investigated with particular reference to her recruitment materials and any medical evidence about her; this was to better inform the respondent's managers as to anything relevant in the claimant's past.
- 2.23 On 18 May 2017 the claimant submitted a grievance to Mr George which appears at pages 242-243. The email is dated 18 May 2017 and timed at 23:38. She reported a deteriorating situation at work and incorporated reference to her earlier correspondence of 12 May setting out her complaints and concerns. The claimant repeated dismay at being placed on shadow shifts only, alleging that she was not being permitted to carry out her job which would include sleepover shifts and the administration of medication, working with clients without the need for support and supervision. She felt humiliated and undermined. The claimant queried why she was "experiencing victimisation following raising legitimate concerns due to money discrepancy whilst at Garston Old Road". The claimant was not only again raising the issue of the money deficit in the petty cash tin but continuing acts of what she considered to be detriments because of that stated concern. Because she was moving to Darby Road the claimant was again to further shadow shifts in accordance with the respondent's policy, and she was drawing to Mr George's attention this new information as she considered it amounted to detrimental treatment. This was a disclosure by reference to earlier disclosures of possible criminal activity in respect of the money and of breaches of legal obligations in that she, a whistleblower, was being subjected to detriments.
- 2.24 On 21 May 2017 Mr Brunt provided PWB with a statement he wished to receive regarding the claimant, and that statement is at page 230. PWB

prepared notes that he would rely upon in a meeting with the claimant at which he would terminate her placement and employment with the respondent.

- 2.25 On 22 May 2017 Sarah Wood, who was Acting HR Manager at this time, wrote to the claimant saying that her grievance would be investigated. It was not at that time, and it was not investigated prior to the claimant's dismissal albeit a report was subsequently prepared on 9 June 2017 which appears at pages 270-275. Ms Wood either knew at the time that she wrote to the claimant saying that her grievances would be investigated, or shortly after so writing, that the respondent was about to dismiss the claimant (see below).
- 2.26 On the same day, 22 May 2017, Sarah Wood had a telephone conversation with Ms Todd which she later summarised in an email at page 259. Ms Todd wanted her advice on terminating the claimant's employment. PWB was in the room with Ms Todd when Ms Todd was obtaining advice from Sarah Wood as to how the respondent could terminate the claimant's employment. PWB gave the Tribunal unconvincing evidence that he was not aware of what was discussed because he was doing other work in the room at the time. His evidence was not given in a cogent and credible way, and in all the circumstances the Tribunal considers it more likely than not that he was following the conversation as he had a direct interest in it. By this stage PWB may not have seen the claimant's grievance of 18 May but he was aware of its contents and he discussed it and all other circumstances surrounding the claimant with Heather Todd on 2 May 2017. They also discussed Sarah Wood's advice, which is set out at page 259.
- 2.27 In the light of Sarah Wood's advice PWB felt able to act upon the decision he had made on 12 May 2017 to dismiss the claimant. He called the claimant to a meeting. The claimant believed the meeting was to discuss her grievance. She was given no prior notice of the meeting or any indication of the agenda. It was PWB's intention following Sarah Wood's advice to call the claimant into a meeting with the sole intention of dismissing her.
- 2.28 There are notes of the meeting of 22 May 2017 at page 262 and they are a true and accurate record, including of the claimant's reference to her grievance, her belief that the meeting was to discuss it, but that PWB wanted to discuss "concerns raised from several people". The claimant asked for a representative but was not allowed one. When PWB listed four generalised points of concern about the claimant's performance, namely her attitude and approach, alleged unwillingness and failure to accept local policies, a failure to maintain effective working relationships and a failure to meet standards in respect of medication, the claimant called the meeting to a halt and left. Before she left PWB informed the claimant that she would not be confirmed to post, which was the respondent's terminology for concluding a probationer who had not satisfactorily completed the probationary period and their employment was being terminated. The claimant had been taken completely by

surprise by the meeting and was unprepared for it. As conceded by PWB, there was nothing the claimant could have said at that meeting that would have made any difference to its outcome. PWB sent the claimant a confirmatory letter on the same day, and that appears at page 263. The four concerns are listed without details being provided. PWB's four stated reasons did not match the six stated reasons explained by Ms Todd to Ms Wood and upon which Ms Todd gave her advice at page 259, although they more or less relate to each other.

- 2.29 The claimant was told that she had a right to appeal the decision and that she should appeal to Heather Todd. The claimant felt this was futile, albeit she did not know at that stage that Heather Todd had initiated the request for advice from Sarah Wood and had discussed the claimant's termination in detail and Sarah Wood's advice with PWB before the meeting on 22 May 2017 that resulted in her dismissal. On the basis of the evidence it heard and the documents seen the Tribunal concludes that the claimant's conclusion that an appeal would have been futile was a reasonable conclusion for her to reach.
- 2.30 From 27 April 2017 to 22 May 2017 nobody within the respondent's organisation had confirmed to the claimant, directly or indirectly, that the £13.33 which the claimant believed had been stolen from the petty cash tin had been properly accounted for, with a receipt and refund of change from the monies taken from the tin. The claimant's persistence in raising the matter was because she was unaware that it had been resolved to the respondent's satisfaction.
- 2.31 During the course of the claimant's employment the respondent did not follow its probationary period policy, grievance policy or whistle-blowing policy. The claimant was not given the contract for training support provided for under the probationary policy; the protective provisions within that policy were disregarded. None of the steps required under the grievance policy were put into effect during the claimant's employment, albeit subsequently a report was prepared. The respondent did not consider that the claimant came under the whistle-blowing policy and was dismissive of her repeated disclosures that there was a deficit in the petty cash at GOR on 27 April 2017 and that there was an inadequate handover or no handover between shifts. The respondent has a legal obligation to care safely for its clients, such as by ensuring safe and adequate handovers when shifts change and to account for clients' money, pooled as it was in the petty cash tin for sundry expenses. In the circumstances of an unaccounted for deficit in the petty cash tin there was the potential of criminal activity and a reasonable suspicion that the same had occurred; the money in the tin should balance with the records and there ought to be receipts for expenditure. The respondent also had a legal obligation not to subject "whistle blowers" to detriments.
- 2.32 On 29 April 2017, 12 May 2017 and 18 May 2017 the claimant disclosed information to the respondent tending to show that there had been an inadequate handover at the end of shifts and also a deficit in the petty cash tin on 27 April 2017, and furthermore that having raised these

concerns she was subjected to detriments such as to penalise or deter whistle-blowing.

3. The Law

- 3.1 Section 43A ERA defines protected disclosures by reference to section 43B (qualifying disclosures) which are made by a worker in accordance with sections 43C to 43H. Section 43B lists the types of disclosures that qualify for protection, at 43B(1)(a)-(f) ERA including 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 a number of things, including that a criminal offence has been committed, is being committed or is likely to be committed, or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. Such qualifying disclosures must be made to the employer or other responsible person, and in this context a line manager or allocated Human Resources officer would be a responsible person employed by the respondent suitable to receive a qualifying disclosure.
- 3.2 A worker has the right not to be subjected to any detriment by the employer done on the ground that the worker has made a protected disclosure. Section 103A provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure; this would be an automatically unfair dismissal.
- 3.3 It is good practice to decide why an employer acted as it did before becoming involved in lengthy esoteric debate about whether there has been a protected disclosure so as to ensure the relevance of any such finding; if the Tribunal were to find that the employer's actions were not influenced by any potential disclosure but have an obvious innocent explanation for action or inaction then there is no need to over deliberate to establish whether in fact the comments or observation made by the employee amounted to a qualifying or protected disclosure. The Tribunal should establish the employer's motivation and rationale for action or deliberate action.
- 3.4 Mr Mitchell for the respondent referred in his submissions to various authorities, which the tribunal took into account, as follows:
 - 3.4.1 *Darnton v University of Surrey* [2003] ICR 615 – The Tribunal must consider the reasonableness of a claimant's belief in the matters disclosed by applying a subjective test, asking whether or not the claimant actually believed that what was being disclosed was true, and then an objective test to consider whether the belief was reasonable.
 - 3.4.2 *Everett Financial Management Limited v P Murrell* EAT/552/02/MAA, EAT/553/02/MMA, EAT/952/02/MAA and paragraphs 22 and 23, addressing the importance of findings of fact as to causation and as to whether the dismissal was one which was automatically unfair pursuant to section 103A as

opposed to relying on principles of general unfairness relevant only to section 98(4) ERA. Mr Mitchell emphasised the need for disclosure of information before there could be a qualifying and protected disclosure in this context.

3.4.3 *Chesterton Global Limited v N Verman and M Nurmohamed and Public Concern at Work* [2017] EWCA Civ 979 – Mr Mitchell emphasised the four factors to be taken into account as:

- (1) The number of affected employees;
- (2) The nature of the information disclosed and whether it was genuinely of public interest or was merely trivial;
- (3) The nature of any wrongdoing alleged;
- (4) The identification of the wrongdoer as to whether or not the wrongdoer was a prominent or not prominent person.

3.4.4 *Dr N Malik v Cenkos Securities PLC* UKEAT/0100/17/RN. UKEAT/0101/17/RN – Mr Mitchell referred the Tribunal to paragraphs 86, 87, 90 and 92 but without elaboration. The point being made presumably is that the decision maker ought to have personal knowledge of the protected disclosure otherwise he or she could not have been materially influenced by it, making the decision that is being challenged, and one cannot import the knowledge and motivation of another person to that decision maker; it would be unjust for a decision maker to be liable in the circumstances where he or she was personally innocent of any discriminatory motivation. The Tribunal ought to consider any collusion where that is alleged or otherwise relevant.

4. Application of Law to Facts

4.2 The parties' agreed List of Issues was as follows:

2.1 *Do any or all of [a number of cited] communications amount to the disclosure of information which in the reasonable belief of the claimant were made in the public interest for the purposes of section 43B ERA, such as the telephone call from the claimant to Paul Wilkinson-Barton in which the claimant informed Mr Wilkinson-Barton that she had identified a discrepancy in the petty cash at Garston Old Road:*

There was a cash shortfall in the petty cash tin observed by both the claimant and her colleague. The person responsible for withdrawing money from petty cash had failed to properly account for it and provide evidence of a receipt for a milk bill paid and did not do so until 1 May following the claimant's observation. The claimant had reason to suspect that there had been theft and she reported the shortfall in the petty cash tin by telephone to Paul Wilkinson-Barton. This was a disclosure of

information tending to show that there had been a criminal act and that the respondent had failed in its legal obligation to safeguard its vulnerable clients.

2.2 *Did the telephone call referenced at paragraph 2.1 take place on 27 or 29 April 2017:*

27 April 2017. The claimant's recollection is incorrect. PWB's evidence was credible by reference to the dates of his holiday and also reliable in that it was supported by documentary evidence provided including the respondent's register in which the claimant had made a dated note of noticing the shortfall in the petty cash tin and of her telephone call.

2.3 *On 12 May 2017 (11:16) the claimant's email to Fela George in which the claimant informed Mr George that –*

(a) *I am being assigned to a further two week shadow shift despite having already done. Due to this I am losing income regarding sleep in shifts which I was informed to be x2 per week'.*

(b) *The approach to the claimant's medication competency assessment 'was inappropriate and humiliating...I felt it was undermining to my capabilities by Stefan...My overall concern is this is now due to my contacting HR initially'.*

The claimant disclosed to Mr George allegations that she was being subjected to detriments which she believed to be because of the protected disclosure relating to a cash shortage at GOR. This was the disclosure of information tending to show a breach of legal obligation to her as an employee and to those who make protected disclosures. She referred back to her initial contact with "HR" which was a reference in part to the reported cash deficiency (potentially a criminal act).

2.4 *On 18 May 2017 (at 23:38) the claimant's email entitled 'formal grievance' to Mr George which referenced the contents of the 12 May 2017 email and informed Mr George:*

(a) *'I have been informed I am to shadow shift for the fifth week...I am not being given answers as to why this continues and is unacceptable. It is humiliating and undermining'.*

(b) *'I would appreciate the appalling treatment of myself to be addresses ASAP and obviously want answers as to why I am experiencing victimisation following raising legitimate concerns due to monies discrepancy whilst at Garston Old Road'.*

Our findings in the respect of the 18 May email are the same as in respect of the 12 May email.

- (3) *To the extent that the claimant made qualifying disclosures, were such disclosures 'protected disclosures' for the purpose of section 43C ERA?*

The claimant was correct in believing that there was a shortfall in the petty cash tin on the night of 27 April and had reason to believe that this showed criminal activity, at least in respect of accounting. Although she was unhappy with some of the treatment she received prior to 27 April she had reason to believe that there was an escalation because she had made complaints, and indeed she was correct in her feeling that PWB's view of her had hardened because she persisted in voicing concern over the cash shortfall and he wished to terminate her employment. She disclosed matters of concern which tended to show breaches of legal obligations and criminal activity. She believed these matters to be true. Theft or false accounting in respect of clients' money entrusted to the respondent and potential detrimental treatment of those raising such matters and bringing them to the concern of the respondent were matters of public interest. The claimant made protected disclosures by virtue of the communications of 27 April 12 May and 18 May 2017.

- (4) *Did the respondent subject the claimant to any or all of the following alleged detriments from the date of the telephone call referenced at paragraph 2.1 above to 22 May 2017, namely –*

4.1 The management and treatment of the bereavement leave which commenced on 29 April 2017:

The claimant communicated quite properly with her HR contact, Mr George, who did not communicate information regarding the claimant's absence properly to the on site line manager. The on site line manager was unaware that the claimant was to be absent for a protracted period of time around the date of the claimant's half brother's funeral. This was a simple error and miscommunication and the treatment of the claimant was not related in any way to her having made protected disclosures.

4.2 The claimant being moved from the Garston Old Road ("GOR") site to the Elder Gardens site:

This move was agreed between the claimant and Heather Todd because of the claimant's concerns about management at GOR and her treatment there. Specifically she was concerned about a rota that placed her on eight consecutive days' duties which commenced prior to her first protected disclosure. The claimant's

move to EG was not a detriment because of her having raised a protected disclosure.

4.3 The requirement of the claimant to complete further shadow shifts at the Elder Gardens and therefore not being permitted to complete sleep in shifts:

This was in line with the respondent's established practice and procedure known to the claimant and implemented for good reasons wholly unrelated to the claimant having made any protected disclosures.

4.4 On 11 May 2017 the claimant's medication competency assessment conducted by Stefan Brunt:

The claimant failed the assessment for the reasons that she acknowledged in the completed record. The claimant failed to properly and securely store medication and to properly oversee the administration of medication to a vulnerable adult. She failed the medical assessment because she did not satisfy its proper requirements and the failure was not related in any way to the claimant having made protected disclosures.

4.5 On 16 May 2017 the timesheet concerns raised by Mr Brunt:

The claimant had pre-dated timesheets which were to be used in the calculation of wages. She had not been instructed to do so. It was clearly bad practice and entirely proper for the respondent to raise it with her. The matter was not raised as one of concern for any reason related to the claimant having raised a protected disclosure.

4.6 The failure to properly allocate the claimant to a rota:

The claimant was at all times properly allocated to rotas following 27 April 2017. The established practice was to put staff on a rota shadowing colleagues on day shifts for the first two weeks of any placement. Being on a shadow shift necessarily meant loss of sleepover pay increments but this was not in any sense related to the claimant having made a protected disclosure.

4.7 The lack of attention given to the claimant's concerns:

The claimant's genuine concern over the petty cash deficit on 27 April 2017 was looked into by both PWB and Vera Jones. In consequence of that the money was accounted for. The claimant was also concerned about being rostered for eight successive days and this was not

repeated once she formally raised her concern. The other matters of concern to the claimant where she felt that she was being subjected to detriments did not amount to detrimental treatment. The problem was that the claimant was not informed of the outcome of the petty cash deficit issue and she was dismissed principally for continuing to raise the issue. There was no lack of attention to her proper concerns.

4.8 Preparing documentation in relation to the claimant's conduct and performance:

This amounted to a detriment insofar as PWB sought evidence to justify the decision which he had already taken to dismiss the claimant. Upon his return from holiday PWB decided to dismiss the claimant because she continued to raise issues over the petty cash deficit although he thought he had resolved the matter. He canvassed colleagues for information that would bolster his decision and, to his mind, justify and vindicate it. He did this to the exclusion of any consideration or canvassing of positive views and exculpatory evidence which would have mitigated his earlier decision. This was to the claimant's detriment as by this method he obtained sufficient information to solicit from a HR professional advice to the effect that the claimant could be dismissed without her having any recourse.

4.9 The involvement of Mr Turner in the management of the claimant's concerns and the failure to notify the claimant of the same:

This came about by way of an enquiry as to how matters should be dealt with by the respondent. Mr Turner was in any event generally a "hands on" Chief Executive Officer. His advice to PWB was appropriate in that he felt Mr Brunt should be suspended pending investigation into bullying and that Mr Brunt would not be returning to work with the claimant. Mr Turner also advised that enquiry be made into the claimant's background as shown in the recruitment papers which could have been beneficial to the claimant if that documentation contained relevant information that might explain the claimant's conduct or sensitivity. Mr Turner's involvement was not detrimental to the claimant.

4.10 Not providing the claimant with evidence in relation to the concerns about the claimant's conduct:

The claimant was not told that the £13.33 that had not been accounted for subsequently found and accounted for satisfactorily. The claimant, however, has relied upon

innocent conduct of the respondent as being blameworthy and amounting to detriment when it was not, and as such this allegation is not made out.

4.11 By not applying or following a disciplinary or capability procedure in relation to the claimant's conduct or performance:

In the circumstances it could have been argued that following a disciplinary or capability procedure would have been detrimental as the claimant was adamant that she had done nothing wrong and that her performance was satisfactory. In the light of our findings whereas the respondent could have disciplined the claimant or conducted capability hearings, for example in respect of pre-dating timesheets and failing a medical assessment, it did neither. Those matters were held against the claimant and this all relates back to the predetermination by PWB upon his return from holiday. In the circumstances putting the claimant through such formal procedures would have been detrimental, and merely window-dressing to cover PWB's firm intention to dismiss. In the light of our overall finding we do not consider that failing to following disciplinary and capability procedures amounted to detrimental treatment. By the time they became relevant the decision had already been made and that was the fundamental fault of the respondent.

4.12 On 22 May 2017 Mr Wilkinson-Barton asking the claimant to attend a meeting without providing her with prior notice and/or information as to why she was required to attend:

The claimant quite reasonably believed that she was to attend a meeting with PWB to consider her grievance; her expectations were raised. She had no reason to suspect at that time that she was to be dismissed on allegations such as those which PWB recited to her at the meeting. Her protestations during that meeting were waived away and she was peremptorily and summarily dismissed. Subjecting her to that meeting without prior notice and/or information was detrimental treatment. The claimant was subjected to it because she had raised protected disclosures.

4.13 As regards the detriments the claimant relies upon the information in the further particulars, see paragraphs 6 and 7, from page 81I. The respondent denies that the claimant was subject to the detriments as alleged, and also that they may for reasons related to the alleged protected disclosures (see pages 81N, 81S, 81T, 81U, 81V, 81W and 81X).

- (5) *In particular –*
- (iii) *Did any of the allegations set out above occur? Yes.*
- (iv) *If so, did any of the above amount to detriments? Yes – see above.*
- (6) *If the Tribunal finds that the conduct listed did occur as the claimant alleges and did constitute a detriment, was that act or deliberate failure to act done on the ground that the claimant had made a protected disclosure? Yes – see above.*

Automatic Unfair Dismissal

- (7) *Was the claimant dismissed by the respondent on 19 June 2017? Yes.*
- (8) *If so, was the sole or principal reason for that dismissal that the claimant had made protected disclosures?” Yes. PWB decided to dismiss the claimant upon his return from holiday when he was informed that the claimant was still making an issue over the cash shortage at GOR and had taken that matter beyond her immediate line manager (Vera Jones, shortly afterwards absent) and him, but going instead to HR when he was on holiday. By virtue of that referral the matter came to the attention of Heather Todd and then the Chief Executive Officer, Mr Turner.*
5. The claimant believed that money had been stolen from the residents’ petty cash fund at GOR and she did so because of the shortfall which had not been accounted for when she noticed it, a view shared by a colleague. That was a reasonable belief. The claimant believed that she was subjected to detriments with regard to sleepover shifts and shadowing, and whereas she was not correct she had reason to believe this because she had been allowed a sleepover shift (rather than a shadow shift) on the night that she made her protected disclosure but never thereafter.
6. Had the claimant been employed for two years but dismissed in the manner in which she was dismissed then there would have been issues of general unfairness under section 98 Employment Rights Act 1996. Principles of general unfairness, however, are not relevant in the current circumstances. In this situation there was clearly a disclosure of information both as to potential criminality and that the claimant as a whistle-blower was being subjected to detrimental treatment. The Tribunal concludes that the claimant was dismissed for having made those protected disclosures. It was a question of causation, and the cause was the claimant’s disclosures. It was the disclosures that tainted the view held by PWB with regard to the claimant.
7. Potential criminality affected all of the claimant’s service users where the respondent was responsible to look after their money and personal belongings. Alleged detrimental treatment of whistle-blowers in circumstances where they were protecting the best interests of clients or service users potentially affected over 300 of the respondent’s employees. Both such matters would have had an

effect generally bearing in mind the charitable status of the respondent and the sensitive nature of its work looking after vulnerable adults. In these circumstances there was a considerable number of affected employees. The information disclosed was not merely trivial but was of public interest in that it involved alleged criminality by people in positions of trust and responsibility for vulnerable adults, and then the respondent's treatment of those members of staff that raised such issues. The wrongdoing alleged both as regards handling of cash and handling of staff who protected the interests of vulnerable adults with regard to their money are very serious issues. The alleged wrongdoers were the members of staff responsible for service users' cash and a senior manager who resented the claimant's pursuit of disclosures. In those respects the identified "perpetrators" were prominent. They were both more prominent than a probationer carer looking after the interests of the vulnerable adults in her care. PWB had personal knowledge of the protected disclosures and was wholly influenced by them in making his decision to terminate the claimant's employment. This is not a case of imported knowledge and motivation of another person to the decision maker.

8. Issues of remedy will be considered at a remedy hearing in respect of which the parties shall submit to the tribunal their joint estimated length of hearing and details of dates when they would not be available to attend a remedy hearing within the six month period starting on the date that this judgment is sent to the parties. If the parties require any further case management orders they ought to apply to the tribunal.

Employment Judge T Vincent Ryan

Date: 16.05.18

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

15 June 2018

FOR THE TRIBUNAL OFFICE

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