



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A Lupascu

**Respondent:** Complete Care Homes Ltd

**Heard at:** Hull **On:** 22-24 January 2019

**Before:** Employment Judge Maidment (sitting alone)

## **Representation**

**Claimant:** In person

**Respondent:** Mr M Howson, Consultant

**JUDGMENT** having been sent to the parties on 30 January 2019 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## **The Issues**

1. The Claimant's sole complaint in these proceedings is of unfair dismissal. The Claimant does not have the two years' service necessary to bring a complaint of ordinary unfair dismissal. Her contention is that her dismissal was automatically unfair, the reason or principal reason for her dismissal being that she had made a number of protected disclosures – whistleblowing. The protected disclosures relied upon are set out in 7 numbered sub-paragraphs of paragraph 3 of the case management summary produced after a preliminary hearing held by Employment Judge Eeley on 18 September 2018. They are further set out in the Tribunal's factual findings below in circumstances where the Respondent accepts that the majority of alleged disclosures were indeed made and constitute protected qualifying disclosures. The primary issue therefore for the Tribunal from the outset was clearly to be whether the Claimant was dismissed because of those disclosures. The Respondent contends that her dismissal was because of her making a medication error.

## **Evidence**

2. The Tribunal had before it an agreed bundle of documents numbering some 371 pages. The Claimant, in the Tribunal's initial discussion with the parties,

identified some documents she had requested, but which had not been disclosed. In particular, she sought the disclosure of a medication sheet for 12 April 2018 in circumstances where she had only received those relating to 13 April onwards. The Tribunal considered that to be potentially relevant and ordered the Respondent to make enquiries. Subsequently such document was produced. During the course of evidence, a further issue arose as to whether the Claimant had made an annotation on the reverse side of a medication record. As a result, the Respondent was requested to and did indeed obtain the original medication record which resulted in the Claimant being recalled to give some further brief evidence. It was confirmed by the Tribunal that the Claimant could rely on an additional 'significant incident report' dated 23 April 2018 which she had appended to her witness statement. This was a document originating from the Respondent in any event and reliance upon it caused the Respondent no prejudice. The Tribunal, however, refused the Claimant's request for the disclosure of statements referred to in a safeguarding report produced by North Yorkshire County Council. In particular, this related to the use of a thickener in a resident's drink in circumstances where the Respondent did not rely on this as an act of misconduct for which it had dismissed the Claimant.

3. Having identified the issues with the parties and dealt with matters of disclosure, the Tribunal then took some time to privately reading into the witness statements exchanged between the parties and relevant documentation. This meant that when each witness came to give her evidence, she could do so simply by confirming the accuracy of her statement and then, subject to brief supplementary questions, be open to be cross-examined.
4. The Tribunal heard firstly from the Claimant assisted very ably by the court appointed interpreter, Mr Risnoveanu. On behalf the Respondent, the Tribunal then heard evidence from Miss Wendy Baggott, Home Manager and then from Mrs Mary Johnson, formerly Assistant General Manager at the Respondent's nursing home.
5. Having considered all of the relevant evidence, the Tribunal makes the following findings of fact (and includes within the next section its conclusions as to whether the Claimant made the protected disclosures as contended for by her).

## **Facts**

6. The Claimant was employed by the Respondent as a registered nurse at its nursing home for elderly residents in Scarborough known as St Bernadette's from 4 July 2016.
7. On 7 March 2017 the Claimant told the Respondent's general manager, Susi Jones, that there were insufficient staff and not enough support for her

doing her job. Furthermore, she said that there was a group of employees including Wendy Baggott (the home manager) and an individual called Hayley who were not being required to confirm start and finish times at work and who just wrote down when they were “in” work. She asserted that there were unsafe levels of staffing for the number and needs of the residents. The Claimant was frustrated that she was not able to do her job properly. Ms Jones has not been called by the Respondent to give evidence and the Respondent in any event accepts that this disclosure was made by the Claimant and that it amounts to a protected qualifying disclosure.

8. In December 2017 the Claimant made verbal disclosures to Wendy Baggott and Roger Samura, the home’s owner. She asked to have a nurses’ meeting to clarify the scope of the nurse role. She asserted that care workers (rather than nurses) were being pushed to administer medication and deal with care plans when they were not qualified to do so. She asserted that Miss Baggott was trying to change the nurses’ job description. Again, the Respondent accepts that this disclosure was made and that it amounts to a protected qualifying disclosure.
9. The Claimant then asserts that she made a further protected disclosure at a staff meeting on 25 January 2018. The Tribunal has been taken to the notes of that meeting which in fact suggest that a colleague of the Claimant’s, Sam, explicitly referred to a shortage of staff. Nevertheless, the Claimant said that things were being rushed and that there was a shortfall in available staff caused by some staff coming in late because of their childcare responsibilities. The Tribunal considers that in making such comments the Claimant again provided information which in her reasonable belief tended to show a risk to health and safety in terms of the care of residents and that this was reasonably believed to be in the public interest. In respect of the other (accepted) disclosures made by the Claimant there is no contention by the Respondent that her beliefs were not reasonably held or that she had no public interest motive.
10. On 27 January 2018, the Claimant raised a written grievance which she gave to Mr Samura. This covered alleged bullying and changes to job descriptions, inappropriate tasks being given to carers, inadequate staffing levels, insufficient time to complete paperwork properly and problems with medication control. It also covered the suggested inadequacy of management arrangements, the fact that management was disorganised and that too many people tried to act as managers. The Claimant also complained about problems of the “on-call” system and an unfair allocation of work. She complained about unsafe handovers, having insufficient time and staffing levels. The Respondent accepts that the Claimant’s grievance amounted to a further qualifying protected disclosure.
11. The Claimant attended a meeting on 14 February 2018 with Susi Jones and Wendy Baggott at which they responded to her grievance. It is accepted

that the Claimant within that meeting repeated her earlier disclosures and that this amounts to the further raising of protected qualifying disclosures.

12. The Claimant next maintains that on 29 March 2018 she made a protected disclosure in a supervision meeting with Linda Dyke, Clinical Manager, where she repeated her earlier disclosures. The Tribunal has not heard evidence from Ms Dyke but has seen notes of the supervision meeting where it is noted that the Claimant raised the issue of information not being passed on between nursing and caring staff. Again, the Tribunal accepts that this amounted to a further protected qualifying disclosure.
  
13. On 7 May 2018 the Claimant wrote a statement in response to disciplinary allegations raised against her, which the Tribunal will shortly describe. In the course of this statement she asserted that there were insufficient procedures in place to check the safety of the residents' drinks and to investigate this with the relevant nurses when it was discovered that a thickener had been placed in a drink. She asserted that the safeguarding report which had been generated could have been avoided if appropriate procedures had been in place. The Tribunal notes that the Claimant also raised a number of issues, as indeed had been previously raised, relating to staffing shortages. In any event, the Respondent accepts that the statement of 7 May amounted to a further qualifying protected disclosure.
  
14. The Tribunal has no doubt that the Claimant was a challenging employee who placed great importance in the welfare of residents and also in her own professional standing. Miss Baggott did not agree with vast majority of the issues the Claimant was raising, particularly with regard to alleged staff shortages. From her point of view, she worked out staffing rotas to ensure compliance with CQC regulations and indeed applied a formula of staff against resident numbers which she said had been scrutinised by the CQC and found to be compliant. She also felt that part of the problem was that the Claimant did not include herself in those numbers as she was a member of nursing rather than caring staff. To Miss Baggott, this illustrated an element of inflexibility regarding how the Claimant saw her role. The Claimant was also regarded as resistant to change in her opposition to a companywide proposal that senior carers be allowed to prescribe medication as well as qualified nursing staff.
  
15. The Claimant's grievance of 27 January 2018 was addressed with a discussion taking place between the Claimant, Miss Baggott and Susi Jones on 14 February 2018. During that meeting it was recognised that the Claimant appeared not to be happy at work and with the Respondent and its management. However, at the end of the meeting there seemed to be some agreement that they had all made a start towards resolving what was seen as the important issue of proper communication between management and staff.

16. The Claimant had been seeking a nurses' meeting but Miss Baggott and Ms Jones saw the Claimant on her own as she was perceived by them to be the only one pushing for a meeting. There was a delay in this occurring. This arose from Ms Jones wanting to be in attendance as she, unlike Miss Baggott, was a qualified nurse.
17. Miss Baggott told the Tribunal that the Claimant's concerns did not bother her as she was able to answer them and, for instance, to prove in black and white that appropriate staff levels were in place.
18. On 28 February 2018 the Respondent was visited by a social care co-ordinator from North Yorkshire County Council, Emma Donkin. On reviewing a particular patient's care and support, she noticed that a thickener had been added to that resident's drink. The Claimant was on duty at that time and indeed was allocated as that particular resident's primary nurse. Ms Donkin was concerned that the resident had been given the thickener without it being medically prescribed. Ms Donkin also spoke to Miss Baggott on that day and both she and the Claimant were aware that the matter was being elevated within the Council as a safeguarding concern.
19. This resulted in a meeting being held with the Council's safeguarding team, a CQC Inspector and representatives of the Respondent, including Miss Baggott. Within the notes taken by the Council there was reference to concerns as to whether the Claimant had been telling the truth in discussions with Ms Donkin. It was also noted that the Claimant had previously been dismissed from a different nursing home by Ms Jones. It was ultimately unclear, however, who had put the thickener in the resident's drink and there were contradictory views amongst the Respondent's nursing and caring staff as to whether the thickener had been prescribed or not. In the final assessment of risk, it was noted that the Claimant had advised that she had started adding the thickener because she felt the resident was coughing/choking on normal fluids but that there was no evidence in the resident's notes relating to that decision and the Claimant did not seek medical advice from the GP until she was challenged on 28 February. It was nevertheless recorded that this was an isolated incident and that it was unlikely that it would re-occur now that staff were aware that thickeners could not be added without medical prescription. The resident was noted as being well. It was concluded that the alleged abuse stemmed from the Claimant being ill informed. It was noted that the management team at the Respondent were currently investigating the incident and reviewing staff communication with a view to further training. The minutes of this meeting were fact not approved within the Council until 1 May and were only then provided to Miss Baggott.
20. Before then, further issues arose arising out of a pharmacy audit which had taken place on 17 April. The first issue concerned the administration of medication called lisinopril to a resident. It was thought that the Claimant

had on one date failed to administer this medication, but had signed to say that she had given it even though the medication was not at the home. The second issue was a belief that the Claimant had administered to the same resident an antibiotic called clarithromycin together with simvastatin when the instruction from the GP was that the patient should stop receiving simvastatin while she was taking the course of antibiotics.

21. This resulted in Miss Baggott suspending the Claimant pending a possible disciplinary hearing. That suspension was confirmed to the Claimant by letter of 23 April 2018.
22. Miss Baggott prepared a Significant Event Reporting Form which was submitted to the Nursing and Midwifery Council ('NMC'). This described the concerns regarding the administering of lisinopril. It also described that an audit conducted by the Respondent's Clinical Manager, Linda Dyke and another nurse, Mr Biju George, had failed to identify the discrepancy.
23. As regards the continued administration of simvastatin to the patient together with the antibiotic, Miss Baggott reviewed the relevant 'MAR' (Medication Administration Records) of the patient.
24. The doctor's note on the MAR for the antibiotic for the week commencing 12 April was that the patient was to stop taking simvastatin whilst on this medication. The separate MAR sheet for the simvastatin showed that the Claimant had initialled the record to show her still administering simvastatin to the patient on 13 April and then Mr George doing likewise on the subsequent three days, when the Claimant was on leave. Indeed, Miss Baggott considered that the MAR sheets showed that the Claimant had also still administered the simvastatin on the evening of 12 April when the antibiotic had indeed first been administered.
25. Miss Baggott met with the Claimant on 30 April to conduct an investigation meeting. During the meeting Miss Baggott had before her and showed to the Claimant various MAR sheets. She referred to the medication audit undertaken by Boots on 17 April. She dealt with the issue of the lisinopril first. It appeared that the resident had been admitted into hospital and that as a result, whilst the records indicated that the Respondent's stock of lisinopril had been used up, it was possible that a dose remained within the home. Miss Baggott said that, whilst there was no evidence, the probability, she was thinking, was that the Claimant actually did give the tablet but had not accounted for the medication in the relevant paperwork. Miss Baggott stated that she was happy to remove this first allegation but with the advice given to the Claimant to ensure that "*the carry over balances balance*".
26. Miss Baggott then turned to the allegation regarding the administering of simvastatin at the same time as the antibiotic. The Claimant was shown the simvastatin MAR sheet which had on it no indication (the Claimant had

made none on the sheet) that the simvastatin be stopped despite the advice on the antibiotic MAR sheet that it had to be. The Claimant recognised that the GP's note by the antibiotic prescription said that the simvastatin had to be stopped but that she hadn't stopped administering it. She was asked for an explanation and she replied that she had one *"but it's not okay"*. The Claimant acknowledged making a mistake but asserted that this was not something which had happened before. She referred to pressure of work but said: *"I'm very sorry for this is the first time. Anything can happen when working under pressure. We are working under staff. Everyone is just pushing."* Miss Baggott said that if the Claimant had marked the simvastatin on the MAR sheet as not continuing then this wouldn't have happened. The Claimant repeated her apology. The Claimant continued to raise issues of understaffing but Miss Baggott responded that that was not the point and that her role was to make sure medication was given safely. She confirmed that the matter had been referred to North Yorkshire Council as a safeguarding issue.

27. Before the Tribunal, the Claimant asserted that the simvastatin MAR sheet for 12 April was marked by her with a 'G' to indicate that she had made a note on the reverse side saying that the administration of this drug had to cease. On obtaining the original MAR sheet it was clear that no annotation had been made on the reverse. Further, there was no discernible 'G' marked down for that date. Instead, the Claimant's initials appeared as, on the face of it, an indication that she had administered the drug on 12 April. The Claimant's position was that someone else had written her initials in and this was not her own writing. It is noted that these issues were raised before the Tribunal for the first time and had not been mentioned at either the investigation meeting conducted by Miss Baggott or the subsequent disciplinary hearing.

28. Following the meeting, Miss Baggott prepared a further Significant Event Reporting Form. This dealt firstly with the allegation regarding the lisinopril and confirmed that the allegation had been retracted. As regards the continued administering of the simvastatin, it was noted that the antibiotic medication had been prescribed on 12 April. The MAR sheet that came with the antibiotic medication gave the advice that simvastatin was to be stopped during the course of antibiotics. She noted that the Claimant had failed to follow the correct procedure, there being no evidence that she stopped the simvastatin on the MAR report or recorded it elsewhere. The Claimant was noted as having administered the simvastatin along with the antibiotic at the night-time medication round on 13 April. She referred to the Claimant in total having made 3 medication errors (including the possible lisinopril) and having not followed due procedure. It was noted that the Council and the CQC had been notified on 17 April and that an investigation meeting had been held. It was recorded that a disciplinary hearing would result. Not being a nurse, Miss Baggott recorded that she was not prepared at this time to offer recommendations but said that the seriousness of the allegation fell within the category of gross misconduct. She recorded that the mistake should have been rectified after the first instance, that the Claimant failed to

see her mistake and had failed to follow the most basic procedures. She said there were implications in terms of risk to the safety of residents and no mitigating reasons for the mistakes. She referred to the Claimant implying that staffing issues and pressure of time were the reasons for what had occurred.

29. By letter of 30 April 2018 the Claimant was invited to attend a disciplinary hearing on 4 May in respect of the dual prescription of the antibiotic and simvastatin. It was said that if the allegations were substantiated they would be regarded as gross misconduct and that employment might be terminated. The letter indicates the enclosure of the minutes of the investigatory meeting, the staff handbook, the NMC code and "*MAR sheets*". It is noted that within the Respondent's handbook the section dealing with disciplinary procedures gives examples of gross misconduct which includes the negligent or deliberate failure to comply with the requirements of the Respondent's policy and procedure concerning medicines.
30. Shortly after sending this letter, Miss Baggott received the report produced by North Yorkshire County Council on the thickener safeguarding issue. Having taken HR advice, she reissued a letter of invitation to the disciplinary hearing adding this as a matter of concern to be considered, i.e. the alleged failure of procedure regarding the administration of the thickener to the patient's drink without seeking the required approval which caused the patient to become dehydrated.
31. The Claimant was advised in both invitations to the disciplinary hearing of the right to be accompanied.
32. The disciplinary hearing on 4 May was chaired by Mrs Mary Johnson who had retired from the Respondent as Assistant General Manager and Training Manager in March. She however continued to be engaged by the Respondent as a consultant to assist with co-ordinating training and with disciplinary matters. Her clear evidence is that she was unaware that the Claimant had made any of her protected disclosures and the Claimant has been unable to challenge her veracity. She was, however, handed by the Claimant at the disciplinary hearing a typed and handwritten statement which included criticisms of the Respondent's management and accusations of bad practice in terms of staffing and that she had been bullied, in particular, by Miss Baggott. Mrs Johnson saw this primarily as a form of grievance raised by the Claimant. She said that the running of the home had nothing to do with her.
33. At the hearing, Mrs Johnson went through the allegations with the Claimant in some detail. It was confirmed that no allegation was continuing in respect of the lisinopril. Mrs Johnson firstly dealt with the issue of the administering of the antibiotic and simvastatin. The Claimant stated that this had been a



mistake on her part. Mrs Johnson considered the administration of the simvastatin on both 12 and 13 April. The Claimant said that the error had occurred on one day only, but for Mrs Johnson an error on one day was sufficiently serious. There was then a discussion about the issue of the thickener. The Claimant referring to having just received the safeguarding report. In their discussion, the Claimant referred to Susi Jones as having previously dismissed her from other/previous employment. Mrs Johnson did not consider this to have any relevance to what she was determining.

34. Mrs Johnson adjourned the hearing to consider her decision. Before she made her decision, however, she was contacted by Miss Baggott who had concerns regarding the allegation relating to the thickener in that Miss Baggott thought that there had been a systematic breakdown in communications between staff and that a number of staff were potentially involved and at fault, not just the Claimant. She was therefore concerned regarding the possibility of any finding against the Claimant personally in respect of this incident.
35. Mrs Johnson took on board that view and dismissed the allegation against the Claimant relating to the provision of the thickener as multiple persons were culpable. She reflected that in a report she wrote up in concluding her deliberations.
36. However, as regards the administering of the simvastatin whilst the resident was also being administered an antibiotic, she concluded that the allegation was well-founded. The MAR sheet clearly stated that the medications should not be given together and that the simvastatin would have to be suspended. The Claimant was firstly at fault in not indicating on the MAR sheet that simvastatin should not be administered which could and should have been done, she considered, by putting a line through the following dates on the simvastatin MAR sheet for the duration of the antibiotic course. To be absolutely clear, a note could have been written next to it so that anyone could see that this medication was to be stopped. The Claimant had then also administered both of the drugs to the resident contrary to the GP's instructions of which she was well aware and where the instruction was clearly shown on the antibiotic MAR sheet. She considered that this matter was "very grave" and that the Claimant had not given any valid mitigation for her behaviour. She had looked at the rotas and staff to resident ratios which she found unremarkable and considered that there was no evidence of any greater levels of stress likely within the home than at any other times. She considered the Claimant to be in a position of trust and accountable for her practice as a registered nurse. Her conclusion was that the Claimant be dismissed for this offence and a recommendation was made that she also be referred to the NMC.
37. She considered that the Claimant's procedural errors had resulted in or at the very least contributed to Mr George then carrying on the Claimant's mistake for several days. She considered that the Claimant had simply

attempted to lay the blame on others by citing bullying and harassment by Miss Baggott, accusing managers of hunting for errors and of raising pressure of time. However, even if the Claimant was right, she did not consider that these excused her actions. It would have taken only seconds for the Claimant to read the GP prescription for the antibiotic and mark the simvastatin MAR sheet. She considered that the Claimant was grossly negligent. The impact of the Claimant's actions could have been, in her view, catastrophic as the 2 medications given to a poorly 92-year-old resident could have resulted in that resident's death. The Claimant was fully trained regarding the administration of medication and she considered there was simply no excuse for the Claimant placing a resident at risk.

38. On the morning of 8 May, the Claimant delivered a further typed statement to the home's main office. In this she repeated allegations of mismanagement within the home levelling particular criticism at Miss Baggott who she again accused of bullying and harassing her. Mrs Johnson did not think that she saw this before communicating her decision to the Claimant. She telephoned the Claimant later on 8 May to notify her of the decision she had already reached that the Claimant's employment be terminated. This was confirmed by letter of 8 May which notified the Claimant also of her right of appeal.
39. Mrs Johnson said that she did not take the decision lightly and took no pleasure from it. She said in cross-examination that she was no one's puppet and that she took her decision entirely independently and purely on the basis of what she saw as being an act of negligence in the handling of a resident's medication. She refuted any suggestion that she was involved in any conspiracy together with Miss Baggott or Ms Jones or that she had been influenced by any criticisms the Claimant had made of the Respondent and its management.
40. The Claimant appealed against that decision which resulted in her attending an appeal hearing before Ms Jones. Ms Jones conducted further investigations after the hearing on 21 May and the appeal hearing was reconvened on 19 June. She informed the Claimant that she had upheld the decision to dismiss her for the "drug error" but that the Respondent had decided to reduce the sanction from that of gross misconduct with summary dismissal and to pay her one month's salary in lieu of notice. The Claimant was informed of that decision by letter of 20 June.
41. Mr George was suspended from his own employment at the same time as the Claimant over the administration of the simvastatin with the antibiotic which he had continued for a number of days after 13 April. There was also in his case a separate allegation in respect of completing paperwork to falsely indicate that he had administered lisinopril to the same patient. Mrs Johnson chaired the disciplinary hearing in respect of the allegations against Mr George which resulted in both of those allegations being upheld

and in him also being dismissed for gross misconduct. She agreed that Mr George was guilty of more aspects of misconduct than the Claimant.

### Applicable law

42. Section 43A of the Employment Rights Act 1996 provides that a “protected disclosure” means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of the Sections 43C to 43H.

43. In turn Section 43B of the Employment Rights Act 1996 provides as follows:-

*“(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 and safety of any individual has been, is being or is likely to be endangered; .....*”

44. Section 43C deals with disclosure to an employer and in terms of qualifying disclosures provides the lowest threshold for an employee to overcome.

45. Section 103A of the Employment Rights Act provides that:-

*“An employee who is dismissed shall be regarded for the purposes of this Part 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.”*

46. This requires a test of causation to be satisfied. The section only renders the employer’s action impermissible where that action was done because the employee had made a protected disclosure. In establishing the reason for dismissal, this requires the Tribunal to determine the decision-making process in the mind of the dismissing officer which in turn requires the Tribunal to consider her conscious and unconscious reason for acting as she did.

47. The issue of the burden of proof in whistleblowing cases was considered in the case of **Maud v Penwith District Council 1984 ICR 143**. There it was said that the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and

which is capable of establishing the competing automatically unfair reason that he or she is advancing. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal. However, there is an important qualification to this which applies, as in the current case, where the employee lacks the requisite two years' continuous service to claim ordinary unfair dismissal. In such a case the Claimant has the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason.

48. Nevertheless, it is appreciated that often there will be a dearth of direct evidence as to an employer's motives in deciding to dismiss an employee. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the dismissal, it may be appropriate for a Tribunal to draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact. The Tribunal is not, however, obliged to draw such inferences as it would be in any complaint of unlawful discrimination.

49. Applying the applicable law to the facts as found, the Tribunal reaches the conclusions set out below.

### **Conclusions**

50. The Claimant, with less than two years' continuous employment, has no ability to bring a complaint of ordinary unfair dismissal challenging the reasonableness of the Respondent's decision to terminate her employment for a medication error. The Claimant was clearly regarded by the Respondent as a competent nurse (Miss Baggott was clearly genuine in that assessment of the Claimant) and the medication error, which she accepts she made, may well have been a one-off aberration, a human error the like of which the Claimant had not made previously. A decision to terminate her employment on that ground may be viewed as harsh, though that would not necessarily make such decision unreasonable in the context of the nature of the Respondent's activities and the Claimant's employment.

51. The sole basis on which the Claimant can and does indeed challenge her dismissal is that the medication error was not in fact the reason or principal reason for her dismissal, that being instead her having made protected disclosures – her being a whistleblower. The Tribunal has already explained its conclusions as to whether the Claimant made protected qualifying disclosures in the section headed "Facts" above. Indeed, the Claimant made a number of protected disclosures as described in that section.

52. Again, with less than two years' service, the burden of proof lies with the Claimant albeit in circumstances where the Tribunal accepts that an

employer will rarely admit to what is effectively a form of discrimination and that in appropriate cases a Claimant may be able to show facts from which inferences could be drawn as to the Respondent's real conscious or indeed unconscious motivation for the Claimant's dismissal.

53. In this case, it is clear that the Claimant could be seen as someone causing the Respondent, and in particular Miss Baggott, significant grief in terms of the complaints she raised about the running of the home and in particular Miss Baggott's management of it. Indeed, those complaints were repeated time and again and the Claimant clearly did not accept Miss Baggott's explanations.
54. On the other hand, Miss Baggott was certainly not threatened by the Claimant's complaints feeling that she had an answer to all of them and could effectively prove that many of the Claimant's concerns were unfounded.
55. On the Tribunal's findings, Miss Baggott was not the decision-maker in terms of the Claimant's dismissal. She did, however, initiate the Claimant's suspension and conducted an investigation. Nevertheless, the issue of the thickener was one discovered and pursued by North Yorkshire County Council with an understanding on the Council's part that the Respondent would take its own appropriate action internally in respect of what, at the very least, was a significant failure in communication. The Claimant has taken umbrage with some of the comments made in the safeguarding report produced in respect of this issue and that she was identified as the primary individual likely to be responsible. However, that arose from the initial findings of Ms Donkin of North Yorkshire County Council and an inconsistency she considered in the Claimant's account of how the resident came to be provided with a thickener. Importantly, whilst this was initially added as a disciplinary charge which Mrs Johnson would have considered, it was due to the intervention of Miss Baggott that it was removed as a live allegation against the Claimant. Miss Baggott took significant steps in contacting Mrs Johnson to tell her that it would be unsafe to conclude that the Claimant was guilty of misconduct in this issue, given a more systematic breakdown in communications which she had found and a number of people potentially responsible. This does not suggest that Miss Baggott was seeking to build up a case against the Claimant with a view to securing her dismissal.
56. Furthermore, there had originally been a further allegation under investigation regarding the administering of lisinopril. This was a genuine issue of concern for Miss Baggott but her investigation shows her being willing to view all of the evidence objectively and, in circumstances where there was no proof either way, to effectively give the Claimant the benefit of the doubt and remove this as an allegation despite there being an issue of an error with the paperwork even if the Claimant had prescribed the medication. Again, there appears on Miss Baggott's part to be no desire to

build any case against the Claimant but rather an inclination only to pursue allegations where there was genuinely thought to be a case to answer.

57. The sole allegation upheld by Mrs Johnson against the Claimant related to the continued medication of simvastatin together with the antibiotic. It was Mrs Johnson's decision that the Claimant's conduct in respect of this matter amounted to gross misconduct for which she ought to be dismissed. Mrs Johnson came across to the Tribunal as a very robust and independently minded individual who would be less likely than many to submit to any undue or outside influence. The Tribunal is absolutely clear in its conclusion that the decision was Mrs Johnson's alone. Furthermore, the Tribunal can only conclude that it was related to her view of the medication error and that alone.
58. Mrs Johnson was, on the evidence, unaware of the protected disclosures relied upon and whilst she was aware of the Claimant's view of the Respondent's home and Miss Baggott and that she had significant criticisms of both of them, she saw this as the Claimant effectively raising a grievance unrelated to the medication issue. She did not see the Claimant's concerns about the running of the home to be a matter for herself. They did not concern her. She concentrated on the allegations before her.
59. As regards the medication error, had the dismissal decision been difficult for Mrs Johnson to justify or, objectively, an overreaction to the level of misconduct or neglect involved, the Tribunal might have been in the territory of exploring whether this raised an inference of any additional motivation for the Claimant's dismissal. However, the Claimant accepted that she had made an error. Medication errors are by definition very serious matters. It is not unusual for nursing staff making medication errors to find themselves dismissed. Fundamentally, however, Mrs Johnson has explained in detail and to the Tribunal's entire satisfaction the view that she personally took of the error, how the Claimant's failure to follow due procedure contributed to the error continuing and how she viewed the potential consequences as being catastrophic in the context of a very elderly and unwell resident. There is no room for any inference of any ulterior motive and the Tribunal is satisfied that Mrs Johnson came to a genuine and independent conclusion regarding the appropriate sanction uninfluenced by any protected disclosures.
60. Whilst he was also guilty of additional serious misconduct, the Tribunal notes that Mrs Johnson also dismissed Mr George for the same error as the Claimant in circumstances where there is no suggestion that he was a whistleblower. Whilst she did not go so far as the Claimant in raising her concerns, it is also noted that similar concerns about staffing levels were raised by a colleague called Sam. There is no suggestion that she was badly treated as a result by the Respondent.

61. The Claimant was dismissed genuinely arising out of Mrs Johnson's conclusions in respect of her medication error. Her complaint alleging that the reason for her dismissal was her acts of whistleblowing therefore must fail.

Employment Judge Maidment

Date 21 February 2019