EMPLOYMENT TRIBUNALS

Claimant: **Miss J M Beresford**

Respondent: **Leicestershire Partnership NHS Trust**

Heard at: **Leicester**

On: **6, 9 –12 July 2018**

Before: **Employment Judge Ahmed**

Members: **Mr M E Robbins**
Ms R Wills

Representation
Claimant: **In person**
Respondent: **Mr Richard Powell of Counsel**

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The Claimant's complaints of automatic unfair dismissal for having made a protected disclosure, detriment for having made a protected disclosure, an unlawful deduction of wages, breach of contract and unpaid holiday pay are all dismissed.

2. The Claimant is ordered to pay to the Respondent £230.00 in respect of the Respondent's costs.

3. The Respondent shall be paid £20.00 in respect of a deposit paid by the Claimant pursuant to an order at the Preliminary Hearing on 17 March 2017.

REASONS

1. In a claim form (ET1) received by the Tribunal on 28 November 2016, Ms Jane Marie Beresford brings various complaints against the 'NHS Leicestershire and Rutland Healthcare NHS Trust'. The correct title of the Claimant's employer was however as identified above ("The Trust") who are substituted as the correct Respondent.

2. At this hearing the Claimant represented herself as she has done throughout. The Respondents were represented by Mr Richard Powell of Counsel, instructed by Browne Jacobson Solicitors.

3. Although ultimately this case has been about alleged whistleblowing the reality is that the alleged whistleblowing has been little more than a legal peg with which the Claimant has used to ventilate her various grievances about the Trust. In other words, what the Claimant really feels aggrieved about is how she was treated and dismissed her from her employment which at the end of the day has nothing to do with the stated complaints. As she does not have the necessary qualifying period of service to bring a complaint of unfair dismissal she has used another vehicle to bring these matters to the Tribunal. Her original claim contained all manner of claims and complaints, most of which were dismissed because the Tribunal had no jurisdiction to hear them, some were dismissed as having no reasonable prospect of success at a Preliminary Hearing before Employment Judge Camp on 17 March 2017 (the "Preliminary Hearing") and one was struck out for failure to pay a deposit. There was a complaint as to an unlawful deduction where the Claimant has made little or no reference to at the hearing. The same is the case in respect of the holiday pay claim.

4. The extant complaints after the complaints were struck out, dismissed or not allowed to proceed (as identified by Employment Judge Heap in her Order of on 4 December 2017) are: -

5.1 Automatic unfair dismissal contrary to section 103A Employment Rights Act 1996 ("ERA 1996").

5.2 A complaint of having suffered a detriment for having made a protected disclosure contrary to section 47B ERA 1996.

The Claimant's allegations of whistleblowing are limited to the events of two days, namely 17 and 24 August 2017.

5.3 A complaint for outstanding wages for the period 9 -15 November 2016.

5.3 Breach of contract relating to 4 weeks' notice pay.

5.4 A claim for £75.00 outstanding holiday pay.

6. Before setting out the facts, there is one matter which is relevant clearly but of a sensitive nature to the Claimant. It is the Respondent's case that some of the difficulties experienced by the Claimant and with her colleagues during her relatively short period of employment were due to the fact that she has a hearing impediment. At the commencement of this hearing it became evident within the first few minutes that the Claimant clearly could not hear fully. The Claimant indicated that she could hear but it was clear from her responses that she was having difficulty. Ms Beresford denied then, as she has done throughout this hearing, that she has a hearing problem. This was despite the fact that at the Preliminary Hearing she told Employment Judge Camp that she could only hear half of what was said. At that stage the Claimant was applying to amend her claim to include a complaint of disability discrimination. One of the alleged disabilities being relied on was a hearing impairment. In refusing the amendment application at paragraph 26 of his Order Employment Judge Camp records this: -

"There is at least one further problem with the proposed disability discrimination claim, which may explain why the claimant did not originally bring it: is telling someone she is deaf and has a memory problem, even if done with a raised voice and in a patronising manner, disability-related harassment as a matter of law? LM evidently believed the claimant had or might have a hearing problem because she referred her [the Claimant] to Occupational Health; and it turns out she was right – the claimant (so she told me) has something like 50 percent hearing loss."

7. In her witness statement, Ms Jane Wright who gave evidence for the Respondent, relates an incident on 17 August 2016 when she was somewhat surprised that the Claimant asked her name three times though they both share the same first name. That might have been down to a memory problem but given that the Claimant asked about something else several times too it suggested to Miss Wright that unless the Claimant had a very poor memory it was because the Claimant had not heard what was said. The Claimant's other colleagues reported similar concerns.

8. For our part we are satisfied that the Claimant does have hearing difficulties and we mention that because it is germane to the case. We arrive at that conclusion for these reasons. Firstly, as has already been mentioned, the Claimant herself told Employment Judge Camp that she has something like 50 per cent hearing loss. That comment would not have been referenced in the order unless the Claimant had actually said so. Secondly, there is in the bundle a set of hearing tests which were undertaken by Occupational Health at the instigation of the Respondent which clearly demonstrate that the Claimant has a hearing impediment. Ms Beresford suggests that neither the Tribunal nor the Respondents are experts at interpreting the data but with respect, the results are clear and easy to understand. The tests accord with what the Claimant told Employment Judge Camp that she has somewhere between 35 to 60 per cent hearing loss. Thirdly, it was evident from our own experience that the Claimant was unable to hear all that was being said. As a result, we made adjustments to the hearing room which included placing the Claimant very near to where were made to the Tribunal room, to move desks which resolved the problem which were clearly of assistance to her.

9. In relation to the 'detriment' whistleblowing allegations, Employment Judge Camp succinctly summarised the Claimant's case at paragraph 15 of his Order as follows:

"The claimant ("C") wishes to rely on the following alleged protected disclosures:

a. on or about 17 August 2016, she did a home visit on a particular child with a colleague called Jane Wright ("JW"). Afterwards, C asked JW if she had noticed anything in particular about the child. C said she was concerned about the child's weight and noted that the child's underwear was very dirty. JW did not respond, or otherwise show any interest in what C was saying. That is all that was said. I'll call this "disclosure 1";

b. on or about 24 August 2016, C spoke to one of her managers, Louise Martin ("LM"). She told LM that she had a concern about a child she had seen with JW on 17 August, that JW would not talk to her about it, and that she wanted the matter looked into.

She did not say what the concern was. LM said nothing more than something about their having been a breakdown in communication between C and JW and that communications between the two of them needed to be better. That was the extent of the conversation between them. I'll call this "disclosure 2".

THE FACTS

10. Ms Beresford was employed by the Respondent as a Community Nursery Nurse on a 6-month fixed term contract from 15 August 2016. It is clear from the application form and pack that the use of a car was an essential requirement for the role as the Claimant was required to visit clinics and perform home visits as part of her duties. Ms Beresford was in fact made a conditional offer of employment on 20 May subject to references and other checks. This offer was made unconditional on 27 July 2016. Ms Beresford signed the contract of employment on 2 August 2016. She therefore had plenty of time to ensure that she had her own car in readiness to start the job.

11. The Claimant's first day at work was 15 August 2016. Both 15 and 16 August appear to have been uneventful as the Claimant was undertaking induction. For that she did not need a car.

12. On 17 August 2016 she was met by Ms Louise Martin, the Clinical Team Leader and one of the Claimant's Line Managers. Ms Martin took the Claimant to the Well Baby Clinic so that she could shadow Ms Jane Wright, a Healthy Child Programme Practitioner (previously known as Community Nursery Nurses). These clinics are for parents/parents and young children up to the age of 5. They offer parents the chance to discuss general health issues and to have the child weighed. The weight is recorded in the familiar red book.

13. The first incident which caused Ms Wright concern was that whilst she was weighing one of the babies Ms Beresford began asking questions regarding a leaflet. This leaflet is given to parents informing them about the health visiting service. Ms Beresford read the leaflet and said that some of the information within it was incorrect. Ms Wright was somewhat taken aback as she was surprised that she chose to air her views on the correctness of a leaflet in front of a parent and in any event the Claimant was herself mistaken. Ms Wright did not think it was appropriate to do that and explained this to Ms Beresford.

14. The parent and child then left followed by the next mother and her baby. The baby was approximately 15 months old. The mother was worried about her baby's weight but said that she had been referred to a dietician by a health visitor. Ms Wright weighed the baby and wrote it down in the red book. Ms Wright did not feel there was any need for concern as the child was already under the care of a dietician. Any issues as to weight would be dealt with by the dietician. Ms Wright noticed that the baby's vest was stained but not dirty. They looked like stains that had simply not come out in the wash rather than a child who was not being properly cared for. The vest worn seemed on the large side for the age of the child but Ms Wright had seen the mother and child on previous occasions, visited them in their home and did not think there was any cause for concern. The older child who accompanied them and the mother were both appropriately dressed.

15. After the mother and baby had left Ms Wright said that it was good that the child was under the care of a dietician. Ms Beresford did not respond. Instead Ms Beresford began to write things down on a piece of paper. The Claimant in fact denies writing anything down but if she did write anything this note has never been disclosed. Ms Beresford was in the habit of writing things down. Other notes have been disclosed.

16. Ms Wright asked Ms Beresford what she was concerned about as she had made a note. Ms Beresford said it was to do with the baby's weight. Ms Wright

acknowledged that it was on the low side but she was reassured by the fact that the baby was under the care of a dietician. Ms Beresford said she was unaware of that which was somewhat surprising for Ms Wright as the reference to a dietician had been discussed only a few minutes earlier in her presence.

17. Ms Beresford's account, relevantly, is that after the child was weighed and the entry made in the red book she noticed that the weight was below the bottom centile. She noticed that it had been below the bottom centile for some time. We should mention that Ms Beresford is quite wrong on this point as the entries in the book do not support her position. Ms Beresford says that she felt the child appeared neglected, the skin was discoloured and patchy and there were signs of being grossly undernourished. She was concerned about the child's appearance and clothing. After the family had gone and the clinic had finished Ms Beresford said she asked Ms Wright if she noticed anything unusual about the child to which Ms Wright said "I don't know, I don't know the child". Ms Beresford says that she told Jane Wright that she was concerned but Ms Wright said "it's not the standard I would expect but that's none of my business". Ms Wright denies the Claimant's account as to the conversation.

18. The Claimant then attended a safeguarding training session on Thursday 18 August. There are no issues that arise out of that.

19. On Friday 19 August 2016 Ms Beresford arrived at the Fairmead Community Centre in Melton Mowbray. Ms Wright was surprised to see her as she clearly remembers telling the Claimant to go to Oakham instead. When asked why she had not done so, Ms Beresford did not respond. We are satisfied that the reason for that lack of response was simply that the Claimant had not heard what had been said.

20. Over the next few days, several staff expressed concerns about Ms Beresford's demeanour and behaviour. They independently expressed concerns about the Claimant's hearing and ability to retain verbal instructions. Staff also reported that they had seen Ms Beresford using public transport when they expected her to be driving her own car.

21. On 24 August 2016, which is the second of the two occasions on which the Claimant alleges that she made whistleblowing disclosures, Ms Beresford was at a meeting with Ms Martin. Ms Martin asked Ms Beresford how she was settling in. Ms Beresford said she thought she was doing well. Ms Martin said it had come to her attention the Claimant was using public transport and whilst it was not an issue during the induction period staff were expected to drive between bases. She reiterated that the application for the job made it clear that the holder of the post must be a car owner. She asked Ms Beresford to bring her car to work on the next working day. Ms Beresford then explained that her car tyres had been slashed and she had been struggling to get someone to replace them. Ms Martin told the Claimant that she needed to get the issue resolved as soon as possible. She also told the Claimant that she needed to see the original copies of her car insurance documents and the vehicle's MOT.

22. We pause there to say that it is now clear that the explanation the Claimant gave to Ms Martin was not true. As it emerged at this hearing the Claimant had in fact SORN'd her vehicle (that is made a 'Statutory Off-Road Notification') to DVLA. The vehicle the Claimant owned at the time was a Nissan Almera, the MOT of which had expired on 21 July 2016.

23. In the exchange of e-mails about the car, Ms Beresford wrote to Ms Karen Clark of the Respondent (who was asking for a copy of the MOT certificate and insurance), Ms Beresford wrote:

> *"I will bring what I have – I have informed Louise [Martin] that I am having repairs carried out on my current car and then changing my car. I will bring details of my new car at a later date when it is finalised."*

24. The honest reply at this point would have been that the Claimant did not have access to a road-legal car. The Nissan did not have a valid MOT (which had expired over a month age), the Claimant had SORN'd the vehicle and there was no evidence of it ever having business insurance.

25. At the meeting on 24 August, Ms Martin had also raised issues that Ms Wright had expressed about the Claimant's conduct on 17 August. We are satisfied that it was Ms Wright who raised these issues and not the Claimant. Ms Martin said that it was inappropriate for the Claimant to question Ms Wright about a leaflet in front of a patient and that she should have discussed it with Ms Wright privately. Ms Beresford said that she had found Ms Wright to be unsupportive and that Ms Wright did not explain things properly. Ms Beresford says she told Ms Martin that Ms Wright had been behaving in a bullying manner, that her chair had been removed, that Ms Wright had refused to allow the Claimant to sit in the same office and that Ms Wright had refused to communicate with her.

26. The reference to the Claimant not having anywhere to sit refers to an incident which occurred on 19 August 2016 when the Claimant had gone to the wrong venue. What actually occurred was that the Claimant was allocated a desk in the office but did not wish to sit there. Instead she went to sit at another desk which did not have an appropriate chair. She then spent her time in the computer room where there was indeed a chair. The allegation therefore insofar as it is relevant is without foundation because the Claimant did have a chair to sit on and used it.

27. On Thursday 25 August the Claimant shadowed Ms Martin in the morning at Melton Mowbray but left the office early saying that she was leaving to get her car MOT'd. She left at approximately 3:15 pm. She was not challenged by the staff as to where she was going or when she would return as they were not sure whether her leaving early had been arranged with Ms Martin. The Claimant did not return to the office for the rest of the day. Her absence is not claimed to be work-related

28. On Friday 26 August 2016 the Claimant attended training in the morning. It was due to finish at 12:30 pm and the Claimant was expected to return to Melton for a meeting with Ms Martin at 2:00 pm. By 2:30 pm the Claimant had not arrived. Two calls by Ms Martin on the Claimant's mobile phone went straight to her mobile answering service. Ms Martin left messages which were not returned. Ms Martin began to get concerned as to the Claimant's safety. In line with the Respondent's lone working policy, she decided that along with another member of staff she would go to the Claimant's home address to conduct a 'safe and well' check.

29. The address the Claimant had given for her home was in Nottingham. There was some confusion as Ms Beresford had been telling some of her colleagues that she was living in Keyworth. Ms Martin enquired of HR as to the Claimant's address who told her that the most recent address given was Quorn Lodge Hotel. Accordingly, Ms Martin and a colleague proceeded to Quorn Lodge Hotel where they were told that there was no record of anyone by the Claimant's

name staying at the hotel over the preceding two weeks. Ms Martin texted the Claimant and e-mailed her again asking her to contact her. She also made enquiries with Mr Brooks, the Family Services Manager, who also made efforts to contact the Claimant. A decision was made that if there was no information by 5:00 pm the Police would be informed. At 4:49 pm, Mr Brooks telephoned to confirm that Ms Beresford had been in touch. A short while later Ms Martin received a text from Ms Beresford to say that her phone was not working properly and would cut off from time to time. She said that she was getting a new phone the following day.

30. On Tuesday 30 August (the Monday being a Bank Holiday) Ms Martin met with the Claimant to deal with the car issue. Ms Beresford said that the car was with a repair garage and it needed a lot of work. It would take approximately a month. As a result, she did not have the necessary car documents although we should say that was a rather odd conclusion as the fact that the car was being repaired would not have affected the existence of the documentation. Ms Beresford said she was thinking about getting another car though she was concerned about the expense given that her post was only for a 6-month period.

31. Ms Martin explained that the Claimant could not possibly be without a car for a month. She told the Claimant that she could take unpaid leave while she found a suitable car and provided the relevant documents. It was at this point that the Claimant admitted that the car's MOT had expired earlier.

32. Following the meeting Ms Martin took advice as to what should be done. In the meantime, the Claimant remained employed and able to work. The following day, on 31 August, the Claimant attended a work study session up to 12:30 pm but did not return to Melton as had been arranged. Instead at 3:45 pm she telephoned Ms Martin to say that she was getting a new car "sorted".

33. On 1 September 2016 Ms Beresford rang Ms Martin to say that her car was now insured but she was waiting for the documents. Ms Martin asked if the documents could be e-mailed to her. When they were examined Ms Martin noticed that business use insurance was not covered. By this point however the Claimant had purchased another vehicle, a Peugeot 206, which whilst having a valid MOT did not appear to have business use insurance.

34. We digress a little at this point to say that at no time during this hearing have we been taken to any documents which shows confirmed business use insurance on any vehicle. The Claimant's issues with her insurers was the subject of a later complaint that Ms Beresford made to the Financial Ombudsman who wrote to the Claimant in the following terms:

> *"Brightside* [the insurance company] *has provided me with the information Ms Beresford inputted when she initially took out the insurance in March 2016. Screenshots of the quote show that she put the class of use as 'social, including commuting to a single place of work'.*
>
> *The class of use on the policy wasn't changed to business until 31 August 2016 when Ms Beresford called to also change her address and vehicle. Brightside has provided me with a recording of this call.*
>
> *In the call, Ms Beresford acknowledged that she didn't have 'business' use on the policy previously and the staff member confirmed that she only had 'social'. Ms Beresford's new job was then discussed with her confirming that she now drove to a number of places for her job.*

As a result of the changes made, a premium refund of £204.33 was made to Ms Beresford. I can see that the updated policy documents showing the new class of use was sent to Ms Beresford by e-mail on the same day.

In the light of the above, I am satisfied that Ms Beresford didn't put the class of use as business when she initially got the insurance. When she did request it later on, Brightside correctly added it to the policy. Because of this, I won't be asking it to do anything else."

35. The above facts are consistent with a letter from Brightside of 1 September 2016 which confirms the change in the Claimant's insurance policy although the letter does not refer to the identity of the vehicle. The Claimant taxed her Peugeot vehicle on 31 August which suggests that vehicle was purchased on that day.

36. On 31 August at 10:55 am Ms Martin e-mailed the Claimant in which she said:

"Further to your e-mail, I note that you are not able to provide us with a valid MOT document for your previous vehicle when you commenced the job on 15 August and therefore did not have access to a vehicle for work purposes. You explained to me on August 30th that the MOT had in fact expired on 23 July prior to commencement of your post.

I am writing to confirm that in the light of the fact that you now have a suitable vehicle, you will be able to return to work this afternoon. You will need to bring your insurance and MOT documents when you come in today so they can be verified, a copy can be obtained for your personal records.

You will not now need to take annual leave unless you cannot produce the necessary documentation… look forward to seeing you later."

37. The Claimant acknowledged receipt of that e-mail at 1:00 pm saying that she "looked forward to seeing you later". The Claimant did not however return to work that afternoon and phoned at 3:45 pm to say that she was getting her car "sorted out". Ms Martin made it clear that this was unacceptable and that this was another episode of unauthorised absence.

38. On 1 September 2016 Ms Beresford e-mailed Ms Louise at 2:21pm to say that she had been scheduled to spend the day with Midwives at St Mary's Birth Centre in Melton Mowbray and whether Ms Martin still wanted her to do this. At 4:36 pm Ms Martin e-mailed the Claimant as follows:

"Hi Jane, no I do not want you to go to St Mary's. I want you to come in to the office 9:00 am as discussed today."

39. The following day Ms Martin was at Melton to find that Ms Beresford had arrived with her car documentation but had been at St Mary's at 8:00 and left her bags there as she was planning to go back there after showing Ms Martin the documents. Ms Martin was in her word "incredulous" given the clear instruction that the Claimant was not to go to St Mary's Hospital.

40. Ms Beresford showed Ms Martin a document from a Government website which confirmed that her Peugeot had a valid MOT until 2 February 2017 and that it was taxed but she still did not show Ms Martin evidence of business use car insurance documentation.

41. On 2 September 2017 Ms Martin discussed the matter with Ms Jane Sansom, Family Services Manager and the Claimant as to the recent events. It was decided that the Claimant would be suspended. The reasons for

suspension were set out in a letter of 5 September 2016 and were as follows: -

41.1 Failing to return to duty resulting in unauthorised absence on 2 occasions on 28 and 31 August;

41.2 Failing to remain on duty until allocated time of 5:00 pm without prior approval on 2 separate occasions on 23 and 25 August;

41.3 Failing to inform her Manager on the start date that the Claimant had no access to a vehicle or relevant up to date documentation;

41.4 Failing to inform her Manager that MOT had expired on 24 July, thus breaching paragraph 42 of her contract of employment;

41.5 Disobeying reasonable instructions in relation to providing necessary motoring documentation, i.e. valid insurance and MOT for role as a Community Nurse.

41.6 Loss of trust and confidence emerging from incidents reported by the team members.

42. The subsequent internal investigation was undertaken by Ms Collette Towey who has now retired from the Trust. Ms Towey began her investigation on 7 September ending it on 19 September. It is by any standards a very detailed and comprehensive investigation.

43. The results of the investigation led to the Claimant being placed into disciplinary proceedings. A disciplinary hearing was held on 8 November 2016. Prior to it the Claimant lodged a grievance. A disciplinary hearing took place on 8 November 2016 chaired by Mr Mark Roberts at which the Claimant chose not to attend. In her absence the Claimant's conduct was considered carefully and in some detail. It was decided that the Claimant would be dismissed summarily without notice.

44. Ms Beresford subsequently lodged an appeal which was dealt with by Ms Rachel Billsborough, Director of Community Health Services. Ms Beresford did not attend the appeal hearing either. In a letter dated 3 January 2017 the appeal was dismissed.

45. Earlier, on 27 October 2016 the Claimant had engaged in early conciliation with ACAS.

46. On 28 November 2016 she presented her ET1.

THE ALLEGATIONS

47. The allegations of detriment from the alleged whistleblowing are set out at paragraph 21 of the Order of Employment Judge Camp made at the Preliminary Hearing and are as follows: -

47.1 That on or about 17 August 2016, Miss Wright refused to give the claimant a lift in her car and told her she would have to make her own way;

47.2 That on the same date, Miss Wright 'reported' the Claimant to management for taking the bus to work;

47.3 That on or about 19 August 2016, the Claimant arrived at the Children's Community House at Melton Mowbray. Miss Wright is alleged to have said she was not expecting the Claimant and did not want her to be there and that C should go to Rutland. The Claimant was required to sit separately from Miss Wright and another nurse who was there;

47.4 That on the same date, later in the day, every time the Claimant went to sit at a table, Miss Wright told her she could not sit there leaving C having to stand in the middle of the office;

47.5 That on or about 24 August 2016, shortly after allegedly making disclosure 2, Miss Martin shouted at C telling her she was "*deaf*" and had "*memory problems*";

47.6 That from around this time, other staff began talking about the claimant behind her back and making allegations about her, referring unpleasantly to the number of grandchildren she had, about her grandson's goldfish having died, about her not having a partner, having a memory problem, being deaf, not being 'with it', not being 'on this planet', being vacant, 'zoning out', having poor presentation and being unprofessional etc.

47.7 That on or about 25 August 2016, Ms Martin instructed the Claimant not to come back into work until she had a road-legal car and was driving;

47.8 That on or about 30 August 2016, Ms Martin again shouted to the claimant that she was deaf and had "a memory problem", falsely accused her of having taken unauthorised absence on 26 August 2016, told the Claimant have to take unpaid leave; then, after a telephone call in which Ms Martin said of the Claimant – in an unpleasant way – "*aahhh, she can't live without her salary*", told the Claimant to take the afternoon of 31 August and the whole of 1 September as annual leave in order to sort her car out.

47.9 That when the Claimant attended work on 1 September 2016, having sorted her car out, Ms Martin falsely accused her of having taken unauthorised absence the previous afternoon;

47.10 That on or about 2 September 2016, Ms Martin falsely accused the Claimant of not following instructions to attend the Children's Community House that day, but in fact Ms Martin had instructed her to work elsewhere;

47.11 That on or around or after 2 September 2016, the respondent and/or Ms Martin falsely accused the Claimant of not having provided documents showing she had a road-legal car, but in fact the Claimant had emailed them on 31 August 2016 and gave originals to an administrator called "Mel" on 2 September 2016;

47.12 Making the allegations that led to the claimant's suspension on 2 September 2016, and suspending her;

47.13 Making the allegations that led to the claimant being disciplined and ultimately dismissed, and, more generally, making the allegations that were made during the investigation that formed part of the disciplinary process (whether or not they were allegations that led to dismissal)."

THE LAW

48. Section 43B ERA 1996 sets out circumstances in which there can be a qualifying disclosure and states:

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

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

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

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

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

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

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

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."

49. Section 43C ERA 1996 sets how a qualifying disclosure becomes a protected disclosure:

"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer."

50. Section 47B ERA 1996 prohibits detriment for making a protected disclosure and states:

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

(2) … this section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X)."

51. Section 103A ERA 1996 deals with automatic unfair dismissal in relation to whistleblowing and states:

"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."

CONCLUSIONS

52. In her e-mail of 14 June 2018 the Claimant confirms that her allegations of a qualifying disclosure are brought under Section 43B(1)(a), (b), (d) and (f) ERA 1996.

53. The legislation requires the disclosure to be that of *information*, not merely an allegation. The lines between information and allegations are not always easy to draw (see **Kilraine v London Borough of Wandsworth** [2018] EWCA Civ 1436). However, in this case it is difficult to see that the Claimant is doing either, that is either making an allegation or providing information. Some of the difficulties that the Claimant would have in establishing a whistleblowing claim were set out in Employment Judge Camp's order of 17 March 2017 at paragraph 17.2 to 17.6. It is not proposed to repeat them here. In our judgment the Claimant was not disclosing any information on 17 or 24 August.

54. In relation to the incident on 17 August 2016, the facts are against the Claimant. We have been presented with the red book of the relevant child. The Claimant did take issue with the identity of the child but it became clear that it was the same child under discussion. That being so the relevant entries in the child's red book are within the bundle.

55. The entries show quite clearly that at the time the readings were logged by Ms Wright, the child's weight was increasing and not decreasing. There is only one occasion when the child's weight dips ever so slightly below the lowest centile but it is not true to say, as the Claimant does in one of her accounts of the incident that "3 months after the baby was referred to a dietician, the weight was still falling".

56. The Claimant's position in relation to what she believes occurred on 17 August has changed several times. The Claimant's account in the further and better particulars is at variance with her account in her witness statement which is at variance with her closing submissions. In fact there is an escalation over time with the degree of seriousness as to the incident increasing with the passage of time.

57. In her written closing submission, Ms Beresford says:

"There were other concerns that I had on that day, however, at the trial I felt it inappropriate to discuss the baby's physical signs of abuse."

58. At no stage did the Claimant prior to the point of closing submissions indicate that she had discussed any signs of physical abuse. The allegation is wholly unfounded and without substance.

59. We are satisfied that there was no protected disclosure made by the Claimant on 17 August or 24 August 2016 or indeed at any point. That would be sufficient to dispose of the case but we have nevertheless gone on to deal with the specific detriments alleged in this case. Our findings (adopting the same numbered paragraph as the allegations above) are as follows:-

59.1 This is factually incorrect. The Claimant did receive a lift from Ms Wright.

59.2 This is factually incorrect. In any event, the Claimant was given a lift by

Ms Wright.

59.3 The Claimant turned up at the wrong venue. It is possible that she did not hear the instructions but there is no doubt they were given. They were overheard by Ms Amanda Taylor of the Respondent. They have nothing to do with anything that happened on 17 August. The Claimant was not required to sit separately. She was sitting in a computer room where there was a chair.

59.4 This has already been dealt with above.

59.5 The Claimant was not shouted at but it is quite possible that someone spoke louder than usual so that the Claimant could hear. There were discussions about her hearing and memory problems but the Claimant was not called 'deaf' by anyone. The accounts of several staff, none of whom were aware even on the Claimant's own case of the alleged disclosures, was that the Claimant was having hearing and memory problems. If those staff members were unaware of the disclosures, the comments could not have been because of any disclosure.

59.6 As mentioned in the preceding paragraph none of the staff who are alleged to have made the remarks are, even on the Claimant's own case, were aware of the alleged disclosures.

59.7 We prefer the evidence of Ms Martin to that of the Claimant in relation to the events of 25 August. Whilst with hindsight Ms Martin may have been advised to tell the Claimant not to return to work until she had a road legal car, the fact is that she did not say that to the Claimant at that time.

59.8 This allegation needs a little context. As at 25 August, the Claimant had a car which had by then its tyres replaced, which had non-business use insurance and required some minor repairs. The car also needed an MOT as this had expired. In the contemporaneous e-mail exchange, the Claimant says she was having repairs carried out on her current car and was thinking of changing that car. That as we have already mentioned was untrue. The vehicle had in fact been SORN'd. The Claimant was misleading the Respondent into believing that this state of affairs had only arisen recently. The MOT had expired some time ago. In the e-mail exchanges the Claimant simply ducks the issue of the MOT and instead seeks to send a document by way of an attachment in relation to insurance by doc.hub which the Respondents were unable to open. The Claimant later presented the MOT document to the Respondent on 2 September but there was still no evidence of business use insurance. Precisely why the Claimant went to the lengths that she did remains unexplained even now. The amount of work required to put the vehicle in a roadworthy condition does not appear to have been substantial. The Claimant at an early stage had a tyre or tyres replaced. The remaining work to put the Nissan through the MOT was relatively minor. The Claimant said in evidence that she could not find a garage which would undertake an MOT which we find difficult to accept as most garages will no doubt undertake an MOT as the worst that will happen is that it will fail but later she said that the car had *failed* its MOT. The Claimant's evidence has been inconsistent. Her actions were puzzling because she had funds to have the repair work undertaken or to purchase another vehicle whilst keeping the Nissan. The Claimant was clearly aware of the fact that the job required her to have her own transport. She was not told that she should not return to work until she had a road legal car because she continued to work after 25 August when she did not have a road legal car. The Claimant was told on 30 August to take unpaid leave while she found a suitable car but that was in different circumstances and entirely

justified. This allegation as to the comment attributed *("ahhhhh, she cannot live without her salary*") is inconsistent with the Claimant's own contemporaneous note at the time where she records that Ms Martin said *"aahhhh, I know*".

59.9 The Claimant was not falsely accused of having taken unauthorised absence. She sent an e-mail at 1:00 pm telling Ms Martin that she looked forward to seeing her later but in fact the Claimant rang Ms Martin's mobile phone at 3:45 pm to say that she was sorting out her new car. The Claimant was absent and the absence was unauthorised.

59.10 The Claimant clearly disobeyed the instructions sent to her by e-mail.

59.11 There is no record of the Claimant having sent the documents. The Claimant has sent several documents by doc,hub which the Respondents were unable to open.

59.12. The suspension was clearly unrelated to any protected disclosure. It was for the reasons the Respondent gives as set out above.

59.13 The dismissal was genuinely and quite properly for misconduct.

60. We do not find that the Claimant had a reasonable belief in the making of any alleged disclosures. The allegations have evolved over time. We are satisfied the allegations are not made in good faith.

61. For the reasons given, the complaints of whistleblowing, automatic unfair dismissal and detriment are all dismissed.

62. In relation to holiday pay and an unlawful deduction of wages, the Claimant has had several opportunities to set out the basis of the claim or how any sum is calculated but has failed to do so. The Respondents have paid two sums of £422.60 and £39.31 totalling £461.91. In the absence of any evidence that the sums paid are short of what is due, the complaints are dismissed for lack of evidence.

63. Finally, we deal with the complaint of breach of contract. We are satisfied that the Claimant committed several repudiatory breaches which evidenced an intention not to be bound by the terms of the contract. The Claimant knew that she needed a road-legal car at but did not have one in the early stages and later failed to provide evidence of MOT and then of business use insurance. She was clearly aware that she did not have business use insurance as evidenced by the recordings of the conversations between her and her insurers unearthed by the Financial Ombudsman.

64. The Claimant committed several repudiatory breaches namely: -

64.1 Commencing employment knowing that she would not be able to comply with her contractual obligation to have a road worthy vehicle;

64.2 Commencing employment knowing that she would not be able to comply with her contractual obligation to have a car which was insured for business use;

64.3 Disobeying reasonable management instructions to attend work;

64.4 Disobeying reasonable management instructions to attend work at specific locations;

64.5 Being untruthful or misleading her employer as to the documentation regarding her vehicle;

64.6 Having unauthorised absence from work.

65. For those reasons, we are satisfied that the Respondent was entitled to dismiss the Claimant summarily without notice.

COSTS APPLICATION

66. Following the announcement of our decision the Respondent made an application for costs.

67. The Claimant was ordered to pay a deposit of £30 in respect of the complaints of age discrimination, £10 in respect of the unfair dismissal and £10 in respect of the whistleblowing detriment. She did not pay the £10 for age discrimination and therefore that complaint was struck out. She has paid £20 deposit for the other two complaints.

68. We have found against the Claimant for substantially the same reasons as given in the deposit order and by virtue of Rule 39(5) of the Employment Tribunal Rules of Procedure 2013 the Claimant is to be treated as having acted "unreasonably".

69. We have gone on to consider whether we should exercise our discretion to make an order for costs. We are satisfied that we should. The Claimant has used these present proceedings as a way of airing her grievances against those whom she felt had complained of her and who had been critical of her rather than for genuine believing that the conduct was because of whistleblowing. The allegations have not been made in good faith and were bound to fail. She has at various stages referred to backstabbing, being libelled and so on. Clearly, her pride was hurt but these proceedings were not the solution. She could not have been in any doubt about her prospects of success given the clear comments by Employment Judge Camp. However, she has doggedly pursued these unmeritorious allegations which since the date of the deposit order have resulted in costs to the NHS in excess of £20,000. There are substantial costs prior to the deposit order.

70. The Claimant has little or no money. She has now sold her vehicles and the proceeds have gone on a deposit for rented accommodation. She has earning capacity and therefore will have the ability to pay something though it will not be a great deal. This will be no doubt be seen as something of a pyrrhic victory for the Respondent. Quite why the Trust regarded Ms Beresford as the preferred candidate when she does not appear to have held down any job for longer than a few months in the last 9 years remains something of a mystery. It is puzzling as to why at no point during the selection process the Claimant's hearing problems were not identified and why, given the long gap between the conditional offer of employment and the Claimant starting work, there was no inspection of her MOT and insurance documents to ensure that she was able to fulfil her duties before she actually started. In relation to the latter, the point was put to Mr Roberts and he acknowledged that dismissal could have taken place sooner. However, the fact that it did not do so does not affect the Respondent's justifiable decision in dismissing the Claimant later.

71. In the circumstances, we consider that having regard to the Claimant's potential future earning capacity, which exists but is somewhat limited, that a

relatively nominal costs order of £250 is appropriate.

72. As the Claimant has already paid a £20 deposit, that sum should be paid out to the Respondent and the balance payable by the Claimant will be £230.

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Employment Judge Ahmed
Date: 4 September 2018

JUDGMENT SENT TO THE PARTIES ON

5 September 2018.....