EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100049/2017

Held in Glasgow on 1, 5, 6 and 7 March 2019

Employment Judge: **W A Meiklejohn**
Members: **Mrs E A Farrell**
Ms M McAllister

Mr James Hunter — **Claimant**
Represented by:
Ms L Neil - Solicitor

The Richmond Fellowship Scotland — **Respondent**
Represented by:
Mr K McGuire - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Employment Tribunal is that the Claimant's claims of –

(a) automatically unfair dismissal under section 103A of the Employment Rights Act 1996 ("ERA"),

(b) unfair dismissal under sections 94 and 98 ERA, and

(c) victimisation under section 27 of the Equality Act 2010 ("EqA")

do not succeed and are dismissed.

REASONS

Introduction
E.T. Z4 (WR)

1. This case came before us for a Final Hearing on both liability and remedy. Ms Neil appeared for the Claimant and Mr McGuire for the Respondent. We had a joint bundle of productions extending to over 500 pages.

2. There had been two Preliminary Hearings, the first before Employment Judge Doherty on 19 April 2017 and the second before Employment Judge Garvie on 12 March 2018 (in the Note following which the procedural history of the case prior to that date is narrated).

3. Further and Better Particulars of the claim were submitted on behalf of the Claimant on 14 May 2018 (pages 29-33 of the joint bundle). These clarified that the claims being pursued by the Claimant were –

   (a) Unfair dismissal – procedural unfairness

   (b) Unfair dismissal – protected disclosure

   (c) Victimisation

4. All of these claims were resisted by the Respondent whose position was that the Claimant had been fairly dismissed for misconduct and had not been victimised.

Applicable law

5. So far as relating to the unfair dismissal and victimisation claims, this is contained in the following provisions of ERA and EqA –

Section 94 ERA – **The right**

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98 ERA - **General**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

   (a) the reason for (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee….

(3) ….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Section 27 EqA – **Victimisation**

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with proceedings under this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act….

6. So far as relating to protected disclosures, this is contained in the following provisions of ERA –

43A **Meaning of protected disclosure**

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B **Disclosures qualifying for protection**

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

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

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

(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, is being or is likely to be deliberately concealed….

43C **Disclosure to employer or other responsible person**

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

(a) to his employer….

Section 103A ERA **Protected disclosure**

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 his dismissal is that the employee made a protected disclosure.

Evidence and findings in fact

7. For the Respondent we heard evidence from –

- Mr D Houston, Area Manager, Glasgow South – the dismissing officer
- Mr J Heron, Area Manager, Lothians and Borders – dealt with the Claimant's dispute (ie grievance)
- Mr R Ibbotson, Executive Director – the appeal officer

We also heard evidence from the Claimant.

8. It is not our function to record every piece of evidence presented to us and we do not attempt to do so. We do however record the evidence which we regarded as material to our determination of the Claimant's claims.

9. The Respondent is a charity which provides social care to meet individuals' support needs, working principally with local authorities under formal framework agreements.

10. The Claimant was employed by the Respondent as a Senior Support Worker ("SSW") from 21 April 2009 until his dismissal on 5 October 2016. He has over 20 years' experience and is trained in mental health, addiction and social welfare. He holds a degree (BSc) in health and social care.

11. In his role as Area Manager, Glasgow South Mr Houston is line manager to 4 Team Managers who in turn are line managers to 12 SSWs. Mr Houston described the SSW role as "front line". We understood this to mean that SSWs deal directly with those individuals to whom the Respondent delivers social care.

12. The Claimant became a SSW within Mr Houston's service in the summer of 2014. Ms Sharon Bell became the Claimant's Team Manager in October or November 2014. The Claimant had not previously worked with Ms Bell. He had however raised a grievance against Ms Bell's line manager relating to staff not delivering the correct hours.

13. The Claimant told us that in December 2014 while he was driving Ms Bell to Park Circus she said "Last time I was here I got rid of an older gentleman who had mental health issues". The Claimant alleged that Ms Bell also said that she was going to get rid of him. We found this implausible but accepted that this was the Claimant's understanding of the conversation.

14. In 2015 the Claimant felt under increased pressure in his work. He had two stress related illnesses. He had difficulty sleeping and also had a back problem. He had a short (4 days) absence from work.

15. A number of events occurred which caused a deterioration in the relationship between the Claimant and the Respondent, which we summarise in the following paragraphs.

16. There were issues relating to the care of two service users. The Claimant felt that one was receiving inadequate care in her home and that the other's request for a mobility scooter should be supported which was contrary to the views of the other parties involved in this service user's care.

17. A grievance was raised against the Claimant on 13 May 2015. This was dealt with by Mr C Wilson. His decision letter to the Claimant was dated 31 August 2015 (pages 43-45). The allegations were partly upheld. Mr Wilson recommended that the Claimant should receive support to improve his practice in respect of his decision making, planning, staff deployment and communication with staff. The outcome was the Claimant being asked by Ms Bell to engage in an informal performance improvement plan ("PIP").

18. The Claimant raised his concerns with Ms Bell that the Respondent was not complying with its contractual obligations to Glasgow City Council ("GCC") in terms of the number of staff hours required in delivery of care to service users and that this was causing distress to staff. He believed Ms Bell was dismissive of his concerns and stopped inviting him to SSW meetings. He believed that he was being bullied and harassed by Ms Bell. The Claimant said that in October 2015 Ms Bell had told her team to be "creative with hours" – the Claimant gave the example of a group session where hours would be recorded for all those attending as if it was one-to-one care. The Claimant also raised this concern in an email to Mr S Sheard, HR Business Partner - Central, dated 30 November 2015 (pages 532-534). These were the Claimant's alleged protected disclosures.

19. The Claimant was called to a disciplinary hearing before Mr Houston relating to an alleged breach of confidentiality (relating to an employee of the Respondent who had had a termination of her pregnancy). The outcome was a first written warning. It was not clear from the evidence as to when exactly this took place.

20. From September 2015 the Claimant, having been unable to access staff rotas, started to keep a record of when the Respondent deployed adequate staff to meet their contractual obligations to GCC and when they did not. Over a period of 182 days the Claimant recorded only 8 days when there were sufficient staff deployed.

21. The Respondent's position regarding the alleged non-compliance with its obligations to GCC was that GCC were aware of their staff shortages, that

they maintained contact with GCC about this and, to the extent that contracted hours were not being met, there was an agreed variation of contract to reflect this.

22. Ms Bell invited the Claimant to engage in the PIP process but he declined to do so. According to the timeline contained within the Investigation Report mentioned in the next paragraph, the Claimant declined to participate when asked to do so on 30 October, 2 December and 22 December 2015 (page 40).

23. Ms Bell prepared an Investigation Report, said to be instructed by and addressed to Karen Robertson, Area Manager (pages 39-79), in relation to the Claimant's alleged refusal to engage in the PIP process. The Investigation Report records the Claimant's reasons for not participating – he was challenging the process, he was going through another process and he did not think the process was fair (page 41). The Investigation Report recommended that the allegation that the Claimant had not engaged in the informal PIP should be "taken forward".

24. A meeting took place on 3 December 2015 of those involved in the care of the second service user referred to in paragraph 16 above. The attendees included Mr R Young, a social worker with GCC and Ms E McLean, a Housing Officer with Hanover (Scotland) Housing Association ("Hanover"), Ms Bell and the Claimant. The service user lived in accommodation owned and/or managed by Hanover.

25. Following this meeting the Respondent received a Care Manager Concerns Form from Mr Young (pages 92-94) and an email from Ms McLean (page 95). Both were critical of the Claimant. Mr Young expressed concern about the Claimant's refusal to follow the service user's care plan. Ms McLean described the Claimant's behaviour at the meeting as "the most unprofessional I have witnessed in my working life".

26. Ms Robertson asked Ms C Tallinn to investigate these complaints. Ms Tallinn produced an Investigatory Report dated 25 March 2016 (pages 80-218). Her

recommendation was that the matter be taken forward under the Respondent's policies as follows –

"Disciplinary Policy: Reasons that warrant misconduct: Failure to comply with reasonable instructions

Disciplinary Policy: Reasons that warrant misconduct: Inappropriate behaviour or unprofessional behaviour

Disciplinary Policy: Reasons that warrant misconduct: Activities and impropriety in relation to the people TRFS support (whether or not within working hours) which the organisation reasonably considers to be detrimental to, or conflicting with, its interests

Staff Boundaries Policy: Giving information and advice: 3.7.4: Staff should be realistic and honest about the services they provide to the people we support and not give them false hope or make false promises about what they can do for the supported person.

Core Values and Standards in Care Practice Policy: Principles and Values: We will work to enable people to recognise risk and support them to take steps to manage this, while recognising and taking seriously our duty to protect and safeguard where this is necessary.

SSSC codes of practice for social service workers potentially breached include:

4.3: Taking necessary steps to minimise the risks of service users from doing actual harm or potential harm to themselves or other people

6.7: Recognising and respecting the roles and expertise of workers from other agencies and working in partnership with them"

27. Ms Tallinn's report referred to an earlier meeting attended by Ms Bell, Mr Young and Ms McLean on 24 July 2015 to discuss the service user's behaviour towards other tenants of his sheltered housing accommodation and

his wish to have access to a mobility scooter on the premises. The conclusions were that –

- There was no medical/mobility reason for the service user to have a mobility scooter
- His GP had not provided supporting evidence for the service user to have one
- Issues around the service user's challenging behaviour and alcohol use

28. It was decided that the service user should not be encouraged to purchase a mobility scooter and an independent advocate should be sought by the Claimant if the service user wished to pursue his application for a mobility scooter. At the meeting on 3 December 2015 the Claimant said that the service user's GP had indicated verbally that he now supported the service user having a mobility scooter but there was nothing in writing.

29. On 22 April 2016 Mr Sheard wrote to the Claimant (pages 219-223) inviting him to attend a disciplinary hearing to be held on 29 April 2016. The allegations reflected the matters set out in paragraph 26 above. The letter and its enclosures will have been bulky as, in addition to copies of Ms Bell's and Ms Tallinn's reports, it enclosed copies of the 7 appendices to the former, the 44 appendices to the latter and copies of the Respondent's Core Values and Standards in Care, Staff Boundaries and Performance Management policies.

30. The Claimant did not attend the disciplinary hearing scheduled for 29 April 2016 and it was rescheduled to 5 May 2016 in terms of Mr Sheard's letter to the Claimant dated 29 April 2016 (pages 224-227). This letter referred to an email from the Claimant requesting that the disciplinary hearing set for 29 April 2016 be rescheduled. It was accompanied by the same enclosures as the letter of 22 April 2016.

31. On 4 May 2016 the Claimant began a period of sickness absence which continued until his dismissal on 5 October 2016. He was suffering from

depression and sleep deprivation. His absence was covered by fit notes from his GP.

32. Within the Occupational Health report referred to below (pages 228-231) there are comments made by the Claimant including the following –

"I went home sick May 2016 following the communications of a colleague combined with being overwhelmed by 6.5 kilograms weight of written criticisms and attributed readings developed by line manager S Bell over an 18 month time frame, non stop negative criticism of my qualities my professionalism, my status and ability to function etc., I was expected to address the 6.5 kilos of paperwork and fashion response and a defense (sic) of same during my own free home-time impacting upon my quality of life and relative whom I support. Whilst continuing to work in a reduced staff team where the service was unable to effectively meet its contractual agreements"

33. Two statements made by the Claimant in the course of his evidence were of assistance in determining whether and, if so, when the Claimant first received an invitation to a disciplinary hearing. Firstly, the Claimant said that on a Friday in April 2016 he received a call from Mr Sheard who said "We're waiting for you". 29 April 2016 was a Friday. Secondly, the Claimant said that the postman had returned an item of mail to the Respondent because he was unable to deliver it.

34. Taking the evidence contained in the two preceding paragraphs together, we considered that, on the balance of probabilities, the Claimant had not received the Respondent's letter of 22 April 2016 inviting him to a disciplinary hearing on 29 April 2016 but had received the letter of 29 April 2016 inviting him to the rescheduled disciplinary hearing on 5 May 2016. The letter of 29 April 2016 began –

"I write further to your email of 29th April 2016 in regard to a request to reschedule a Disciplinary Hearing."

It seemed to us probable that the email referred to had been sent by the Claimant after he discovered he had been expected to attend a disciplinary hearing on 29 April 2016.

35. In addition to repeating the allegations (see paragraphs 26 and 29 above), confirming that Mr Houston would chair the disciplinary hearing and advising the Claimant of his right to be accompanied, the letter of 29 April 2016 contained the following paragraphs –

"If you wish, you can also present a written response to the allegations. Copies of any written statements should be sent to me prior to the hearing.

I have to advise you, as this is a reschedule of a disciplinary hearing at your request, that should you fail to attend this rescheduled hearing it may proceed in your absence and may arrive at a decision or outcome based on the findings of the investigation.

You should be aware if that if the above allegations are deemed to constitute gross misconduct, in accordance with The Richmond Fellowship Scotland Disciplinary Policy, this disciplinary hearing may result in disciplinary action being taken up to and including dismissal."

We should add that the Claimant referred to pages within the appendices enclosed with the letter being illegible which we believed to be correct as the same was the case with the version contained in the joint bundle. We considered however that the Claimant's allegation that the letter was "50% illegible" was an exaggeration.

36. The Respondent decided to obtain a report from their Occupational Health advisers who were at the time were Occupational Medicals Enterprise Ltd, based in Wokingham ("OME"). Dr M Strudley of OME conducted a telephone assessment in a conversation with the Claimant on 19 August 2016. His report was dated 22 August 2016 (pages 228-233) but referred to "Addendum report dated 26-08-16" and "Comments on the report received from the

employee on 24-08-16" and included (at pages 228-229) comments said to have been received from the Claimant.

37. The OME report stated (at page 231) as follows –

"It is considered that James is fit to attend management meetings (according to criteria provided by the Faculty of Occupational Medicine) with the following proposed adjustments advised:

- A suitable venue be agreed which may not necessarily be within the workplace
- James be accompanied, in keeping with company policies
- James be provided with additional time during meetings if required"

38. The Claimant referred to having "low feelings" at this time and having suicidal thoughts. He said that he had been "very ill" when Dr Strudley spoke to him. He also said that he was diagnosed with diabetes around this time. He said that the call with Dr Strudely lasted 10 minutes which he felt was inadequate.

39. The Respondent's view was that "management meetings" included a disciplinary hearing. We considered that was not unreasonable. The Respondent wrote to the Claimant on 12 September 2016 (pages 234-238) inviting him to a rescheduled disciplinary hearing on 20 September 2016. This letter was in broadly similar terms as those of 22 April 2016 and 29 April 2016 except that the second paragraph quoted at paragraph 35 above had been changed to read as follows –

"I have to advise you that as this is the rescheduling of a previous Disciplinary Hearing that should you fail to attend this rescheduled Disciplinary Hearing or fail to provide a written statement in advance of this hearing that it may proceed in your absence and may arrive at a decision or outcome based on the findings of the investigation."

40. The Claimant was unclear in his evidence as to whether he had received this letter. He spoke of not opening his mail and his sister putting mail in bags under his dining table. It seemed to us that, on the balance of probabilities,

that the Claimant did receive the Respondent's letter of 12 September 2016 but did not read it. This was not known to the Respondent and in our view they were entitled to proceed on the basis that the Claimant had received and read their letter of 12 September 2016.

41. The Claimant did not attend the disciplinary hearing scheduled for 20 September 2016 and it proceeded in his absence. Mr Houston wrote to the Claimant on 3 October 2016 (pages 239-243) to advise him of the outcome which was summary dismissal. It was evident from the length and detailed content of Mr Houston's letter that he taken reasonable care to consider the allegations before deciding on the outcome. He told us that at the time of reaching his decision he was unaware that the Claimant had raised a concern about the Respondent failing to meet its contractual obligations to GCC.

42. The Claimant's evidence was that he only became aware that he had been dismissed when he received a subsequent letter from the Respondent dated 20 October 2016 to which he responded by email on 25 October 2016 (page 244). In his email the Claimant indicated that he wanted to appeal his dismissal and complained that the Respondent had "pushed ahead with a formal process to rush my dismissal from working whilst I am not fit to work and absent with illnesses". Given that the Claimant had been absent from work since 4 May 2016, we did not agree that the process had been rushed by the Respondent.

43. Mr Ibbotson was appointed to deal with the Claimant's appeal. The appeal hearing took place on 28 November 2016. At the hearing the Claimant presented a 10 page document described as "appeal letter/grievance". Mr Ibbotson read this after the meeting and decided it should be treated as a complaint (ie grievance). He asked Mr Heron to deal with this.

44. Mr Heron conducted his investigation in the course of which he spoke to Ms Robertson, Mr Sheard and Ms Bell. He produced a report (pages 273-439, including appendices) which he sent to Mr Ibbotson. Apart from a couple of items, the Claimant's grievances were not upheld. Mr Heron wrote to the

Claimant on 16 March 2017 (pages 440-444) to advise him of the grievance outcome. He offered the Claimant a right of appeal but none was submitted.

45. Mr Ibbotson then resumed consideration of the Claimant's appeal. He wrote to the Claimant on 4 April 2017 (pages 445-448). In this letter Mr Ibbotson set out his conclusions on each of the Claimant's grounds of appeal, all of which he rejected.

46. The Claimant had prepared a schedule of loss (pages 525/525A). This recorded that his gross and net pay were £403.85 and £340.05 respectively.

Submissions

Mr McGuire for the Respondent

47. Mr McGuire provided his closing submissions in writing and expanded on these orally. His written submissions are contained within the case file so we will not rehearse them here. In very brief summary Mr McGuire argued that –

- The Respondent had dismissed the Claimant for a reason relating to his conduct which was a potentially fair reason for dismissal.
- Applying the approach set out in **British Home Stores v Burchell [1980] ICR 303** –belief of misconduct, reasonable grounds for that belief and adequate investigation – the Claimant's dismissal should be found to have been fair.
- Dismissal fell within the band of reasonable responses open to the Respondent – **Iceland Frozen Foods Ltd v Jones [1983] ICR 17**.
- The Claimant's dismissal should not be found to be procedurally unfair.
- There was no evidence that the Claimant's alleged protected disclosure (which Mr McGuire disputed) was the reason or principal reason for his dismissal.
- The Claimant's victimisation claim was based on his allegation of being bullied and harassed by Ms Bell, and harassment had to be because of a protected characteristic which was not the case here.

Ms Neil for the Respondent

48. The Claimant had provided information to Ms Bell and Mr Sheard indicating that the Respondent had breached its contractual obligations to GCC and that this had caused distress to their staff (which was a health and safety issue). The information also related to maltreatment of those requiring care. This was a protected disclosure and was clearly in the public interest.

49. The investigation by Ms Bell into the Claimant's alleged failure to engage with the PIP should have been passed to someone else because Ms Bell could not be objective. The Claimant's position was that there had been a sustained campaign against him conducted by Ms Bell and Mr Sheard.

50. The Claimant had told the Respondent about difficulties with receiving mail. He had disclosed his mental health issues. He was in no fit state to deal with a disciplinary process. He had not received a letter of dismissal. The Respondent had not followed a fair procedure and had not complied with the ACAS Code on Disciplinary and Grievance Procedures. The Code requires that an employer should explain the complaint and go through the evidence and give the employee a reasonable opportunity to ask questions; the Respondent had not done so.

51. The Claimant should have known that he was at risk of dismissal and should have been given the opportunity to make representations. There was no explanation as to why the Respondent had to proceed with disciplinary action when they did. The Respondent had relied on an inadequate conversation between the Claimant and their Occupational Health advisers. The Respondent had paid no heed to the Claimant's ill health when dismissing him.

52. An employee does not have to possess a protected characteristic to be protected against victimisation under section 27 EqA. The Claimant had raised concerns about the treatment of service users and a pregnant member of staff. These were protected acts in terms of section 27(2)(c) EqA.

53. Detriment involved the same test as discrimination – had the employee been disadvantaged? It did not need to be consciously motivated. It did not need to be the only or main reason for the treatment.

54. Ms Neil referred to the following cases –

- **The Trustees of Mama East African Women's Group v Mrs J Dobson UKEAT/0219/05**
- **Knight v London Borough of Harrow [2003] IRLR 140**
- **Royal Mail Group Ltd v Jhuti UKEAT/0020/16**
- **Nagarajan v London Regional Transport [1999[IRLR 572**

Discussion and Disposal

55. The key issue in this case was the reason for the Claimant's dismissal. Was it because he had made protected disclosures or because of misconduct?

56. We were satisfied that the matters which the Claimant reported to Ms Bell and Mr Sheard were protected disclosures. There was an allegation that the Respondent was failing to comply with its legal obligations under its contract with GCC. There was also an allegation that the Respondent, by failing to provide adequate staff resources as required under said contract, had caused distress to employees which was a health and safety matter. These matters fell within section 43B(1)(b) and (d) ERA respectively. This related to service provision which was publicly funded and involved the care of vulnerable service users. Accordingly, this was clearly a matter that was in the public interest.

57. However, and unfortunately for the Claimant, we were in no doubt that the reason for his dismissal had nothing to do with these protected disclosures. The investigation by Ms Bell into the Claimant's failure to engage in the PIP process was in our view background information. The catalyst for the investigation by Ms Tallinn which led to the Claimant's dismissal was the complaints about the Claimant received from Mr Young and Ms McEwan.

58. They represented organisations with which the Respondent reasonably sought to maintain a positive relationship. GCC was a significant provider of business to the Respondent and it was not surprising that the Respondent took seriously a complaint from GCC about the Claimant.

59. Ms Tallinn's investigation and report were thorough and supported her recommendation of further action. That necessarily led to the disciplinary action taken by the Respondent. The allegations against the Claimant, if well founded, might well in the view of a reasonable employer be regarded as gross misconduct.

60. The Respondent's Disciplinary Policy (pages 477-489) contains lists, said to be illustrative and not exhaustive, of conduct which will be considered Misconduct (pages 484-485) and conduct which will be considered Gross Misconduct. The first three items listed at paragraph 26 above came under the heading of Misconduct rather than Gross Misconduct. The other three items were potentially Gross Misconduct – serious breach of regulation or policy and breach of SSSC Code of Conduct.

61. Mr Houston's disciplinary outcome letter of 3 October 2016 (pages 239-243) identified which of the allegations against the Claimant were found to be gross misconduct. We were satisfied that this was a conclusion which was within the band of reasonable responses open to the Respondent.

62. Mr Houston's conclusion that the Claimant had been guilty of gross misconduct led to the decision that he should be summarily dismissed. The Claimant's protected disclosures played no part in the decision to dismiss him. Accordingly the automatically unfair dismissal claim had to fail.

63. Turning to the ordinary unfair dismissal claim, we were not persuaded that the Claimant's allegations of procedural unfairness were well founded. We were satisfied that the Claimant had on the balance of probabilities received two of the invitations to attend a disciplinary hearing (although he may not have read the one sent on 12 September 2016).

64. Each of the letters sent by the Respondent to the Claimant contained wording similar to that quoted in paragraph 35 above. The Respondents were entitled to assume – on the basis that their letters of 29 April 2016 and 12 September 2016 had not been returned as undelivered – that the Claimant had been advised that (a) he could present a written response and (b) a decision would be taken in his absence if he failed to attend.

65. The ACAS Code of Practice: Disciplinary Procedures (2015) provides as follows –

"**Hold a meeting with the employee to discuss the problem**

11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

12. Employers and employees (and their companions) should make every effort to attend the meeting…."

66. The ACAS Guide: Discipline and Grievances at Work (2017) provides as follows –

"What if an employee repeatedly fails to attend a meeting?

There may be occasions when an employee is repeatedly unable or unwilling to attend a meeting. This may be for various reasons, including genuine illness or a refusal to face up to the issue. Employers will need to consider all the facts and come to a reasonable decision on how to proceed. Considerations may include:

- any rules the organisation has for dealing with failure to attend disciplinary meetings
- the seriousness of the disciplinary issue under consideration
- the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service

- medical opinion on whether the employee is fit to attend the meeting
- how similar cases in the past have been dealt with

Where an employee continues to be unavailable to attend a meeting the employer may conclude that a decision will be made on the evidence available. The employee should be informed where this is to be the case….

67. While the Claimant was critical of the duration of his conversation with Dr Strudely of OME, the Respondent was entitled to rely on the advice given by their occupational health adviser. Their interpretation of that advice as indicating that the employee was fit to attend a disciplinary hearing was not unreasonable. It could not be said that no reasonable employer, having received the OME report, would have concluded otherwise.

68. We did not agree with the Claimant's assertion that the Respondent's decision to call him to a disciplinary hearing in September 2016 was rushed. He had been absent from work for more than four months. The Respondent had not called the Claimant to a third disciplinary hearing, the Claimant having failed to attend the earlier ones, until they had the advice from OME that he was fit to attend management meetings.

69. Accordingly, we decided that the Claimant's dismissal had not been procedurally unfair. The Respondent believed that the Claimant had behaved as alleged by Mr Young and Ms McLean and it could not be said that no reasonable employer would have regarded that as gross misconduct.

70. The appeal process conducted by Mr Ibbotson had been a careful reconsideration of the decision to dismiss. He had reviewed the document which the Claimant had presented to him at the meeting on 28 November 2016, had identified that this raised a number of grievances and had arranged for these to be investigated by Mr Heron.

71. The appeal process had effectively been put on hold pending the grievance outcome. When Mr Ibbotson received Mr Heron's report he resumed consideration of the Claimant's appeal and decided that it should not succeed.

It could not be said that no reasonable employer would have reached that conclusion.

72. Turning lastly to the victimisation claim, we reminded ourselves of the terms of section 27 EqA. We understood Ms Neil's position to be that the alleged protected act fell within section 27(2)(c) EqA – "doing any other thing for the purposes of or in connection with this Act".

73. We acknowledged that the Claimant had raised concerns about treatment of service users and a pregnant member of staff which could be construed as "doing any other thing for the purposes of or in connection with this Act". However, section 27 EqA is only engaged where the employer subjects the employee to a detriment because (our emphasis) the employee does a protected act or the employer believes that he has done so. The reason for the detriment here – the Claimant's dismissal – was not because the Respondent believed that the Claimant had done a protected act but because they believed that the Claimant had been guilty of (unrelated) misconduct, part of which the Respondent regarded as gross misconduct.

74. The Claimant had not been dismissed because he had done anything for the purposes of the EqA but because of the disciplinary allegations levelled against him and the determination that these constituted gross misconduct. Accordingly, the Claimant's claim of victimisation had to be dismissed.

Employment Judge **S Meiklejohn**

Date of Judgment **27 March 2019**

Entered in register and copied to parties **10 April 2019**