EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs S Clough	AND	Cornwallis Care Service Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin ON 29 July 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr Ryan McNaught, Friend
For the Respondent: Ms B Varney, Operations Director

JUDGMENT

The judgment of the tribunal is that
1: The claimant's unfair dismissal claim is dismissed; and
2: The claimant's claim for accrued but unpaid holiday entitlement is also dismissed; and
3: The claimant succeeds in her claim for unlawful deduction from wages and the respondent is ordered to pay the claimant the gross sums of £1,610.00 and £313.50, which is a total of £1,923.50.

REASONS

1. In this case the claimant Mrs Sarah Clough claims that she has been unfairly dismissed, and that the principal reason for this was because she had made protected disclosures. She also brings claims for accrued but unpaid holiday pay, and for unlawful deduction from wages. The respondent contends that the reason for the dismissal was misconduct, and denies the claims.
2. I have heard from the claimant, and I have heard from Mr Ryan McNaught on her behalf. For the respondent I have heard from Ms Bridget Varney, the Operations Director, and from Mr Stuart Clarkson, the Managing Director. I was also asked to consider a statement from Mrs A James on behalf of the claimant, but her evidence was disputed by the

respondent, and she was not here to be questioned on this, and accordingly I can only attach limited weight to it. .

3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent company owns and operates a number of care homes and has approximately 350 employees. In December 2016 the respondent purchased five care home assets from Morleigh Ltd, and the relevant employees transferred under TUPE from that company to the respondent. One of these care homes was known as Tregertha Court, which the respondent renamed Rivermead View. The claimant Mrs Sarah Clough commenced employment with Morleigh Ltd on 15 October 2016, and she worked at Tregertha Court. Her employment transferred to the respondent in December 2016. The claimant was employed as a Senior Health Care Assistant ("SHCA"), and generally worked night shifts. She was dismissed by reason of gross misconduct with effect from 16 March 2018 in the following circumstances.
5. On 15 December 2017 the claimant raised a concern in writing to her Home Manager Mr Paul Riley. She stated: "I would like to raise what I feel is a serious concern in regards to information not being passed on to all staff on the premises resulting in a failure to ensure the safety of both staff and residents. During my shift on 14 December 2017 I was informed that a resident has MRSA … I feel this to be a great risk to not only myself but staff and residents as well as this information was just not given to all staff."
6. On 23 December 2017 the claimant raised a further concern in writing to Mr Riley. This was effectively a grievance against two SHCAs on the day shift following their reaction to her confidential complaint about the MRSA and the fact that a resident had fallen out of bed and suffered harm.
7. On 29 December 2017 the claimant raised a further complaint in writing to another manager, namely Tracy Hipkin. In the first place she complained that since April 2017 she had been underpaid (at the rate of £8.50 per hour) when she was contractually entitled to be paid £9.50 per hour by reason of having finished an advance medication course. She asserted that she was owed an outstanding amount of at least £1,440.00, which would increase when overtime, bank holidays and weekend pay rates were taken into account. This aspect of the claimant's claim is discussed further below. The claimant also raised concerns in that letter about the MRSA issue, the ongoing grievance against the day staff, and the safety of residents because of the MRSA.
8. On 27 January 2018, the claimant raised a fourth complaint about health and safety concerns. This complaint related to a collapsed stair lift and the danger to staff and residents.
9. Two separate matters then came to the respondent's attention. The first was that the claimant had sent derogatory and offensive text messages about staff members and residents to another SHCA. The second was that she had neglected the care of an elderly resident EW who had fallen out of bed breaking her wrist and suffering further injury. By letter dated 8 February 2018 the claimant was suspended on full pay under the respondent's disciplinary procedure pending a disciplinary investigation into two allegations of potential gross misconduct.
10. Tracy Hipkin carried out the disciplinary investigation on 23 February 2018. The claimant had admitted sending a text to a colleague which had mentioned four residents by name with offensive content. The claimant did not deny having sent the text, and conceded that each of the resident's families would be "gutted", angry and "fuming" if they had seen what she had written. With regard to the lack of care for EW, on the night in question there was a problem with the fire alarm panel. The fire alarm was activated and the Fire Brigade visited the Home to resolve the problem. The claimant conceded that EW was to be observed every three hours throughout the night, but that she had not read EW's care plan. In addition, it seems that EW was not assisted with commode visits as recommended in

her care plan. Tracy Hipkin recommended that the matter proceeded to a disciplinary hearing.

11. The claimant was then called to a disciplinary hearing to answer these two allegations of gross misconduct. The hearing took place on 13 March 2018. Ms Bridget Varney, the claimant's Operations Director from whom I have heard, chaired the disciplinary hearing and took the decision to dismiss the claimant. Ms Varney confirmed the decision to dismiss the claimant summarily by reason of gross misconduct by letter dated 15 March 2018.
12. As confirmed in her letter, Ms Varney concluded that the text message which the claimant had sent included comments which were offensive and disrespectful towards residents and that she appeared to wish them harm. In addition, it included derogatory comments about her manager and another care worker. She concluded that such behaviour was unacceptable and did not reflect what the respondent expected of an SHCA.
13. With regard to the resident EW, she concluded that EW had requested help to access the commode. A male carer attended but advised that he could not help at that time and would return. He failed to return. EW attempted to assist herself and fell thus sustaining extensive bruising and fractures. EW reported that she was on the floor and unable to reach her alarm call bell for a number of hours. There was no written evidence to support the claimant's statement that any carer had checked on EW for the remainder of the night, and no welfare checks were documented. Although there were difficulties with the fire alarm panel and the Fire Brigade visit, it was the claimant's responsibility as SHCA to ensure that residents were safe and the claimant had failed to ensure this.
14. Ms Varney confirmed in her evidence today that the first occasion upon which she was made aware of the claimant's four complaints in late December 2017 and January 2018 was when the claimant told her during the disciplinary hearing that she had raised some complaints. Ms Varney's evidence is that these complaints played no part in her decision to dismiss the claimant by reason of gross misconduct, which was solely because of the two aspects of gross misconduct which had been investigated and which she had decided to uphold.
15. The claimant was notified of her right of appeal, and the respondent's procedure in that respect required an appeal to be submitted within five working days of receipt of the letter. The claimant did not submit an appeal until some weeks later in May 2018 when she completed a letter of appeal to Mr Clarkson, the respondent's Managing Director, from whom I heard. Given the delay and the failure to comply with the requirement to submit an appeal within five working days, Mr Clarkson concluded that the claimant was not serious about her appeal and declined to process her appeal.
16. Mr Clarkson has confirmed in his evidence that the four complaints which the claimant raised played no part in his decision to refuse to process the claimant's appeal. He says that he took that decision because the claimant was substantially out of time for submitting the appeal, and he did not think that she was therefore taking the process seriously.
17. The claimant has raised a claim with regard to accrued holiday pay. The position is slightly confusing because the respondent decided to synchronise the terms and conditions of employment for all of its staff. The claimant's holiday year had previously run from April, but along with other former employees of Morleigh Ltd, this was changed to the respondent's holiday year running from 1 January annually. There are therefore two relevant holiday years in play. The first is the holiday year running from 1 January 2017 to 31 December 2017. The second is the holiday year running from 1 January 2018, up until the claimant's summary dismissal on 16 March 2018.
18. The claimant effectively asserts that she is owed two weeks' accrued holiday pay from the 2017 holiday year, because she was restricted in the amount of holiday she was allowed to take, and was on certified sickness absence during the period of a fortnight's holiday. However, there is no written agreement in place between the claimant and the respondent authorising her to carry forward any accrued but untaken holiday pay as at the end of the 2017 holiday year on 31 December 2017. With regard to the final period of her employment, the respondent calculated that between 1 January 2018 and the claimant's dismissal on 16 March 2018, the claimant was entitled to 37.28 hours of accrued holiday entitlement,

and this was paid in the claimant's final pay, as confirmed in her payslip dated 29 March 2018.

19. I therefore conclude that on the termination of her employment on 16 March 2018, there was no accrued but untaken holiday pay which was due to the claimant.
20. The claimant has also raised two claims relating to unlawful deduction from wages. The first is straightforward, which is an underpayment of one week or 33 hours at £9.50 per hour in her final pay. The respondent conceded today that this has accidentally been omitted. The gross sum in question is £313.50, and the claimant therefore succeeds in her claim for unlawful deduction from wages in this regard.
21. The second claim for unlawful deduction from her wages is more complicated. The former employees of Morleigh Ltd earned less than the employees of the respondent, and following the TUPE transfer those employees (including the claimant) were afforded pay rises to bring them in line with the other employees of the respondent. SHCAs were paid at the rate of £8.50 per hour, or £9.50 per hour, depending upon the training which they had received with regard to administering medication. The national retailer Boots plc runs a system called Boots Care Learning. One training module is "Care of Medicines - Foundation Knowledge Test". There is then an advanced training module which is an Advanced Level medication training. With effect from 1 April 2017 the respondent agreed to pay its SHCAs £8.50 per hour for those with the foundation qualification, and £9.50 per hour for those with the advance qualification.
22. The claimant asserts that she passed both training modules on the same day, namely 13 April 2017, and gave both training certificates to the respondent. Nonetheless she was wrongly paid at the rate of £8.50 per hour, rather than the £9.50 per hour to which she was entitled, from 13 April 2017. She was paid the correct rate from 1 January 2018, but the claimant says this only followed her written complaint to Tracy Hipkin on 29 December 2017. The claimant has also adduced a written letter from her previous manager Mrs A James confirming that the respondent had received the advanced training certificate on or around 13 April 2017.
23. Mr Clarkson for the respondent denies that the respondent has ever received the advanced training certificate. He disputes the letter from Mrs James, who has since been dismissed by the respondent, and objects to the inclusion of that letter because she was not present to be questioned on her evidence.
24. On balance I favour the claimant's version of events for the following reasons. Her evidence is that she completed both training modules on the same day and the respondent still has both certificates, and the advanced certificate must have been lost by the respondent. Her version is supported by Mrs James, although I can only give limited weight to her letter. More importantly, the claimant's version of events is supported by her contemporaneous letter of complaint to Tracy Hickey dated 29 December 2017 in which she clearly asserts that she should have been paid the higher rate of £9.50 per hour from 13 April 2017. Immediately after that letter the claimant was then paid at the higher rate of £9.50 per hour from the beginning of January 2018. This is consistent with the mistake having been made as to her correct level of pay.
25. The Claimant worked on average 33 hours per week, which on average is 132 hours per month, and the differential in pay is therefore approximately £132.00 per month, for a period of eight and a half months. The claimant initially estimated the value of the claim at £1,440.00, but that did not include overtime, bank holidays or weekend pay rates which are higher (and should have included an incremental element on the £9.50 per hour). The claimant has calculated the sum due to her at £1,610.00 which seems to me to be a reasonable estimate in the circumstances. For these reasons I conclude that has been an unlawful deduction from the claimant's wages in this respect in the sum of £1,610.00. The claimant therefore succeeds in this claim as well.
26. Having established the above facts, I now apply the law.
27. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that 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, or is likely to be deliberately concealed.

28. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (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.
29. Under section 103A of the Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
30. The claimant also claims in respect of deductions from wages which she alleges were not authorised and were therefore unlawful deductions from her wages contrary to section 13 of the Employment Rights Act 1996.
31. The claimant also claims in respect of holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 ("the Regulations"). Regulation 14 explains the entitlement to leave where a worker's employment is terminated during the course of her leave year, and as at the date of termination of employment the amount of leave which she has taken is different from the amount of leave to which she is entitled in that leave year
32. I have considered the cases of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; Kuzel v Roche Products Ltd [2008] ICR 799 CA; Blackbay Ventures Limited t/a Chemistree v Gahir UK/EAT/0449/12/JOJ. Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ IDS 1077 p9.
33. As noted in Kilraine v London Borough of Wandsworth, tribunals should be careful when applying the EAT's ruling in Cavendish Munro Professional Risks Management Ltd v Geduld that, to be protected, a disclosure must involve information and not simply voice a concern or raise an allegation. The legislation does not distinguish between "information" and "allegations". The question is simply whether the disclosure imparts information, and the fact that it is also an allegation is irrelevant. If it is to meet the requirements of the whistleblowing provisions a disclosure of information must have sufficient factual content and be sufficiently specific.
34. The "public interest test" was considered by the EAT in Chesterton Global Ltd and Anor v Nurmohamed UKEAT/2015. The test is not whether the disclosure per se was in the public interest, but whether the worker making the disclosure had a reasonable belief that it was. The language of "reasonable belief" pre-dated the June 2013 amendment to the statutory provisions and had remained the same since. Cases such as Babula v Waltham Forest College CA IDS Brief 826 remain relevant. The workers' belief that the disclosure was made in the public interest has to be objectively reasonable.
35. In the first place I deal with the claimant's monetary claims. For the reasons set out above there was no accrued but unpaid holiday entitlement due to the claimant as at the date of the termination of her employment. Her claim for accrued but unpaid holiday pay is therefore dismissed.
36. With regard to her claim for unlawful deduction from wages, in the first place the claimant succeeds in her claim for 33 hours at £9.50 per hour which the respondent concedes has been accidentally omitted from her final pay. This is a sum of £313.50.
37. Secondly, for the reasons set out in detail above, I also find that the claimant has suffered an unlawful deduction from wages in the sum of £1,610.00 because she had qualified under the advanced module, had sent the relevant certificate to the respondent, but was not paid at the correct rate between 13 April 2017 and 31 December 2017.
38. Finally, I turn to the claimant's unfair dismissal claim under section 103(A) of the Act.

39. In the first place I find that the claimant made four protected public interest disclosures. The respondent concedes that the claimant made the four disclosures set out in detail above, namely the letter dated 15 December 2017 to Mr Riley; the further letter dated 23 December 2017 to Mr Riley; the letter dated 29 December 2017 to Ms Hipkin; and the fourth letter dated 27 January 2018 concerning health and safety. In each case the claimant set out information relating to a potential breach of legal obligations and/or concerning dangers to the health and safety of others. These disclosures were made to the claimant's employer.
40. The respondent disputes that these were protected public interest disclosures because it asserts that they were not made in the public interest. I do not accept that. I do not accept that the disclosures were made purely for reasons of self-interest on the part of the claimant, particularly as at that stage she was unaware of the pending disciplinary proceedings for other reasons. Matters of potential MRSA infection of elderly residents in a care home, and the suitability and safety of a stairlift in such a home, are in my judgment matters in the public interest. In addition, the respondent has not discharged the burden of proof to suggest that these disclosures were not made in good faith by the claimant.
41. Accordingly, I conclude that the statutory provisions in sections 43B1(b) and (d), and 43C(1)(a) are met and that these four disclosures amount to protected public interest disclosures which were made by the claimant.
42. The next question to determine is whether these disclosures were the reason, or if more than one the principal reason, for the claimant's dismissal. I accept Ms Varney's evidence that she was unaware of these disclosures at the time when the claimant was already being investigated for separate allegations of gross misconduct, and that the dsiclosures played no part in her decision to dismiss. Both allegations of gross misconduct against the claimant are serious matters which the respondent was entitled to address, and then to conclude did amount to gross misconduct. I accept Mr Varney's evidence that these allegations were the only reason she dismissed the claimant, and the protected public interest disclosures were not considered and were not relevant. Similarly, I accept Mr Clarkson's evidence that he declined to pursue an appeal because the appeal was submitted late, and he considered it to be frivolous, rather than because the claimant previously made the protected public interest disclosures in question.
43. I therefore find that the reason for the claimant's dismissal, or if more than one the principal reason, was because of her gross misconduct, and not because she raised protected public interest disclosures. I therefore dismiss the claimant's unfair dismissal claim.
44. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 25; a concise identification of the relevant law is at paragraphs 27 to 35; how that law has been applied to those findings in order to decide the issues is at paragraphs 36 to 44.

Employment Judge N J Roper

Date: 29 July 2019

Judgment sent to Parties: 28 August 2019

For the Tribunal Office