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EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Mark Ward **v** **Dimensions (UK) Limited**

Heard at: Watford **On:** 10 – 13 and 17 - 20 June 2019

Before: Employment Judge Bedeau
Members: Mr D Bean
Mr K Rose

Appearances:

For the Claimant: Ms Z Ivankovic, Fianceé
For the Respondent: Mr C Crow, Counsel

JUDGMENT having been sent to the parties on 25 June 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In his claim form presented on 5 April 2018, the claimant alleged that he had been unfairly dismissed from his employment as a Support Worker. On 23 May 2018, in the response presented by the respondent, it averred that he was dismissed for gross misconduct. A fair procedure was followed, and dismissal fell within the range of reasonable responses. Further conduct came to light and that if he was not dismissed, disciplinary proceedings in respect of the later disclosure of alleged misconduct would have been invoked with the outcome likely to have been his dismissal.

The issues

2. At a preliminary hearing held on 19 July 2018, before Employment Judge Henry, the parties clarified the claims and some of the issues. The claims were: unfair dismissal, section 98 (4) Employment Rights Act 1996; public interest disclosure detriment section 43(B) ERA 1996; and public interest disclosure dismissal section 103(A) ERA 1996. The claimant was ordered by the judge to provide further information in relation to the qualifying disclosures and detriments. He later served a Scott Schedule, and subsequently, further amended Scott Schedules. The one we were invited

by the parties to consider was the amended schedule dated 15-20 May 2019 and updated on 3 June 2019. It has nine alleged protected disclosures and detriments. From our discussion with the claimant's representative, Ms Ivankovic, numbers one to three and five to seven, were withdrawn. The protected disclosures we had to consider were numbers four, eight and nine.

3. In relation to number four, this relates to an alleged qualifying disclosure or disclosures made on 14 April 2016 to Ms Siobhan Tipper, Locality Manager, and a meeting the claimant had with her to discuss a number of his grievances. He asserted that the detriment he suffered, as a consequence, was the delay on the part of the respondent in processing his grievance to its final conclusion. That delay was two and a half years.

4. Number eight was an alleged protected disclosure on 7 September 2017. The qualifying disclosure being that Ms Tipper did not carry out mandatory vehicle checks on a service user's car. The detriment being that there was a conspiracy involving four of the claimant's work colleagues who alleged that he had threatened another worker, Ms Jessica Bennett, Lead Support Worker, by claiming that he had said to her that he had a gun with her name on it. As a result, he was subsequently suspended and later dismissed.

5. In relation to number nine, on 19 September 2017, the claimant alleged that he had made qualifying disclosures and protected disclosures to the Information Commissioner's Office about the respondent's handling and storage of confidential records. The detriment he suffered was being suspended and later dismissed.

6. The tribunal has to consider whether or not the claimant made qualifying disclosures and whether those disclosures were protected disclosures. If those requirements are satisfied, whether or not the detriments, he alleged he suffered by the respondent's treatment of him were materially influenced by the protected disclosures.

7. In relation to the automatic unfair dismissal claim, section 103(A) whether the principal reason for the claimant's dismissal was that he had made protected disclosures?

8. The unfair dismissal claim, section 98(4), brings into play the well-known guidance given in the case of British Home Stores v Burchell [1980] ICR 303.

The evidence

9. The claimant gave evidence and did not call any witnesses.

10. On behalf of the respondent, the following witnesses were called: Ms Ros Hamilton-Smith, Interim Performance Coach for London and East; Mr Charles Collier, Locality Manager; Mr Barrie Ellis, Operations Director; Ms Nicola Sidgwick, Human Resources Business Partner London and East; Mr Sam Shepherd, Operations Director Norfolk and Lincolnshire, and Ms Jessica Bennett, Lead Support Worker.

11. The parties adduced joint bundles of documents, comprising of 923 pages, some further documents were adduced during the course of the hearing.

Findings of Fact

12. The respondent is a charitable Industrial and Provident society which supports people with learning disabilities, including autism, to live the life they choose. It employs approximately 7,000 members of staff and delivers a range of services to approximately 3,500 individuals across the United Kingdom. It is Care Quality Commission registered and must ensure that its services are safe, effective, responsive and well-led.

13. The claimant commenced his employment with the respondent on 17 October 201, as a Support Worker, working 37 ½ hours a week. He had, during his employment, worked at various sites but at all material times relevant to the claims, he was based at the respondent's Linden Court site in Bedfordshire. This is a supported living scheme with 24 hour support. It has a mix of one-to-one support, shared support and night cover. His role was to provide care and support to the users.

14 April 2016

14. In relation to the purported protected disclosure on 14 April 2016, the claimant had a meeting with Ms SiobhanTipper, Acting Locality Manager, to discuss the concerns he raised about his working conditions; the Christmas rota; his tooth that had been punched out by a service user; being required to engage in sleep-ins; attending a family funeral abroad; cancelling shifts at short notice; safeguarding issues; records not properly kept or records not kept; alleged falsification of records; breach of contract; being performance managed; missing his anniversary; staff not collecting a service user, and his work colleagues not following 'AK's', a service user's dietary plan.

15. It was agreed by Ms Tipper that she and the claimant would meet with Mr Sam Shepherd, Operations Director, to discuss his concerns and a meeting was held on 27 April 2016. (pages 654-656 of the bundle)

16. Mr Shepherd, the claimant, and Ms Nicola Sidgwick, Human Resources Business Partner attended on 27 April during which it was agreed that the notes taken by Ms Tipper at the meeting on 14 April, would form the basis of Mr Shepherd's discussion with the claimant. (657-661)

17. On 15 June 2016, Ms Sidgwick e-mailed the claimant acknowledging that he had sent, as he had promised in the meeting with Mr Shepherd, 23 e-mails on 24 May 2016. On 11 July 2016, she sent him a copy of the notes of the meeting on 27 April and in a later e-mail she suggested that the meeting scheduled on 12 July 2016, be postponed as the content of his e-mails raised further issues. The claimant agreed. (674-675, 685)

18. The claimant was invited on 20 August 2016, to a meeting scheduled to take place on 25 August but he asked whether it could be rescheduled for the following week as he had been given short notice of it. (695)

19. On 26 August, Ms Sidgwick suggested 20 September as the date for next meeting date, to which, on 30 August 2016, the claimant agreed and asked that Ms Tipper be present to take notes. This was not objected to by Ms Sidgwick in her response on 1 September. Although Ms Tipper initially agreed to be present at that meeting, she had forgotten that she had booked annual leave. The meeting was, therefore, cancelled. (692, 697)

20. The claimant was then on leave from 23 September to 4 October 2016 and suggested that a meeting should take place on 8 November 2016. This was agreed to and the meeting went ahead as planned. On 16 November 2016, an outcome letter from Mr Shepherd was sent to the claimant who was informed that he had seven days in which to appeal Mr Shepherd's findings. Although not relevant to the claims and issues, Mr Shepherd upheld, partially upheld, and dismissed the claimant's grievances. (715-720)

21. On 11 December, Ms Tipper sent him notes of the meeting. (722, 706-713).

22. On 14 December he decided to appeal.

23. Mr Shepherd agreed to meet with the claimant to go through the daily records and some other documents. On 23 January 2017, the claimant sent a list of documents in support of his concerns. Mr Shepherd wanted some clarification and on 25 January he wrote to the claimant inviting him to link the documents to the 12 points he, Mr Shepherd, had listed. (749, 751)

24. On 9 February 2017, Mr Shepherd e-mailed the claimant referring to 19 e-mails he, the claimant, sent to Ms Sidgwick without any narrative as it was difficult drawing any links or connection with them and his concerns. He invited the claimant again to link the documents to his 12 points. (747)

25. On 11 May 2017, Mr Shepherd waited for a response from the claimant in relation to the documents the claimant wanted to view. (749)

26. In or around June 2017, Ms Tina Panting, London & East Performance Coach, took over the support aspect of the claimant's grievance and on 28 June, she wrote to him proposing a meeting on 7 July, but he was on holiday on that date. She held a meeting with him on 22 August 2017, the notes of which were signed by both of them. Various issues were discussed. The claimant felt that he had been treated unfairly and had been singled out. He said that he was liaising with ACAS and that he had a solicitor. Potential employment tribunal proceedings were raised by him, but the preferred course of action was to resolve matters amicably. (769)

27. The claimant later wrote to Ms Panting thanking her for the meeting which he described "as very encouraging". He stated that he would inform his lawyers that he and the respondent would like to move forward in a collaborative manner. (772)

28. On 30 August 2017, Ms Stella Cheetham, Group Director of People and Organisation and Development, acknowledged the claimant's e-mail and wrote that they would be working towards arranging a grievance appeal hearing. (773)

29. On 30 August, Ms Jocelyn Alderson, Regional Manager, who had recently joined the respondent, e-mailed Ms Cheetham stating that she advised Ms Panting not to have any further contact with the claimant who had alleged that he had been unfairly dismissed 4 years earlier. (776)

30. Ms Sidgwick wrote to the claimant on 1 September to inform him that his discussion with Ms Panting was not a grievance appeal meeting and that one would be arranged with Ms Alderson. (780)

31. At 1:49pm 5 September 2017, Ms Sidgwick e-mailed the claimant inviting him to view the documents at the respondent's Disability Resource Centre, on 7 September 2017. Later that evening, at 10:51pm, the claimant replied stating that he was meeting with his legal team on 7 September and had an appointment with a consultant some time in the following week. He requested access to his personal records under the Freedom of Information Act. Ms Sidgwick replied on 7 September, attaching information relevant to a subject access request. (785)

32. On 8 September Ms Alderson wrote to the claimant stating that Ms Sidgwick was trying to arrange a grievance appeal meeting.

33. The claimant was due to meet with Mr Shepherd on 19 September 2017, but he, the claimant, had concerns about the alleged absence of certain documents. He turned up at the Disability Resource Centre on that day but did not meet with Mr Shepherd to go through the documents as Mr Shepherd believed had been arranged. Thereafter, the claimant was on leave on 24 September to 3 October 2017. Ms Sidgwick informed him of a possible grievance appeal date, namely the 11 October, but he engaged in correspondence in relation to his subject access request. He was, however, invited on 13 November, to a grievance appeal meeting. In the invitation letter sent by Ms Alderson, she wrote in the first two paragraphs, the following:

> "Further to previous correspondence regarding your appeal, I understand that Sam Shepherd had agreed to discuss with you your request to have access to daily records, for a specified time period, and to Mr X's service prior to arranging your appeal. You were invited to attend the DRC on 19 September 2017 to view these records which you did not attend. Following this, on 6 October, Nicola Sidgwick advised that you contact Deanne Sampson to arrange to view the documents by 11 October 2017. To this date, she has not been contacted by you to arrange this.
>
> Therefore, in accordance with the grievance procedure, I now invite you to attend a meeting to discuss your appeal. The meeting has been arranged for Monday 20 November 2017 at 1pm."

34. The claimant was advised of his right to be accompanied by either a fellow worker or a trade union official. (839-840)

35. The grievance meeting went ahead on 20 November, the claimant

attended with his colleague, Ms Lucinda Lindsay. From the notes of the meeting, a wide variety of matters were discussed. Some of his concerns were upheld by Ms Alderson, the rest were not. On 22 November, her decision was confirmed in writing. We are not concerned with the 'ins' and 'outs' of the various issues the claimant raised and discussed during the appeal hearing as those matters are not germane to the issues in this case. (869-872)

36. The claimant raised concerns about the delay in dealing with his grievance. It can, however, be seen from the above chronology given, that the fault could not be laid entirely at the respondent's door. Ms Sidgwick had family issues which took up some of her time. There was no evidence that any delay on her part was motivated or materially influenced by the claimant's grievances or alleged disclosures.

<u>7 September 2017</u>

37. On 7 September 2017, the day of the claimant's second alleged protected disclosure, he e-mailed Ms Tipper, copying Ms Panting, in which he stated that there had been concerns about Ms Tipper's checks on a vehicle. He wrote,

> "Perhaps this is already under investigation and I am simply "out of the loop"? however, given that the record in question is the weekly vehicle safety check and if my suspicions are correct, it would mean that this was last carried in by Theo in February which given that would mean risk to PWS, staff and other members of the public would happened to be an innocent bystander at the time, please could I request attention be given to this?" (797-798)

38. The matter was investigated by Ms Tipper who issued Ms Bennett, on 20 September 2017, an improvement notice for signing off vehicles checks when she did not carry them out herself as she was on annual leave at the time. Ms Tipper concluded that Ms Bennett had not falsified the records but was worried that the checks, which had been done, had not been properly recorded. It was, according to Ms Tipper, "bad judgement". She introduced and implemented a new system of recording vehicle checks.

39. The claimant did not speak to Ms Bennett about the vehicle checks. Had he done so he would have been made aware that the checks were done but not by Ms Bennett. However, she signed them off instead of the person who had done the checks. The claimant was not disclosing facts but his "suspicions".

<u>The claimant's suspension</u>

40. On 19 September 2017, Ms Tipper conducted an investigation into matters relating to the claimant's work which were raised by some of his work colleagues. Her investigation was recorded in writing entitled "Fact-find and Investigation Initiation document". She wrote in the first two paragraphs, the following:

> "In relation to the initial allegations changing the pads and clothes of a person who you support in a public space. Failure to follow support plans (including activity

> planner and food planner) with the person we support: failing to prepare a lunchtime meal for the person you support on 12 September 2017. Repeated failure to follow the activity planner, specifically in terms of variety and providing choice and control and providing external activities.
>
> Staff raised verbal concerns to HV regarding issues within house why HV visited house, on 12 September 2017 to audit the files and also look into those concerns further and she discovered issues regarding failing to follow support plans for other people working for the service, including the daily logs and in the form of further concerns verbally raised to her by staff. Siobhan met with MW on 17/9/2017 to discuss these allegations and during the meeting it was raised that he has changed the person we support's clothes and pads in public where there aren't other facilities available." (83)

41. The matter came before Mr Barrie Ellis, Operations Director, who was of the view that the claimant "posed a probable risk to the people we support" and suspended him on 21 September 2017, on average pay. The claimant was required to respond to two allegations which were to be investigated, namely (1) changing a service user's pads in a public space, and (2) failure to follow support plans. He was sent a copy of the manager's guide to suspension, together with the suspension letter. (90-91)

42. The investigation into the two allegations was undertaken by Ms Ross Hamilton-Smith, Interim Performance Coach, who was not aware of the claimant's grievances and there was no evidence to suggest that she was while she conducted her investigation. On 30 October 2017, Ms Jessica Bennett, Lead Support Worker, was interviewed by Ms Hamilton-Smith, who gave an account of the concerns raised about the claimant. During questioning she revealed a matter unprompted. In question 11 of the notes, she was asked to name the person whom she had concerns about. She replied that is was the claimant and that she had raised her concerns a few times with Ms Tipper. In question 12, she was asked the length of time she worked with the claimant and her working relationship with him. She responded by saying;

> "Since I have started in January, we had a good working relationship in the beginning and would chat and have a laugh, then the more I raised issues with him and Siobhan about things like C not going out, our relationship went downhill from them on. He was never rude to me or horrible but said things like 'I have guns and one with your name on it if you want it', he smirked when he said it but that was quite normal, I felt I didn't want to be there when he said this and I had half an hour left of my shift, I had to leave the house and went to another Linden House, the garden of house and cried, I called Siobhan and said I can't keep working with him." (178)

43. On the same day, Ms Heidi Vardon, Assistant Locality Manager, was interviewed by Ms Hamilton-Smith and gave an account of her concerns regarding the claimant. In relation to the claimant's threatening behaviour towards Ms Bennett, Ms Vardon said in response to the following:

> "I caught the conversation mid-on, M said something like I have a gun and could shoot you.
>
> Heidi – Jessica came to me about it, she was concerned that people wouldn't believe her, I can't recall reporting it on but I will check my e-mails to see if Siobhan had

received anything from me.

This was around August 2017, it was a few weeks after Jessica had issued an improvement note about the daily records being taken out of the house by M."

44. References to "M" were to the claimant. (175)

45. Another worker by the name of Taylor Marie, her surname was not disclosed, was interviewed on 30 October 2017. She said, amongst other things, that she raised another matter of concern,

> "I have a slight concern for A, that is that M and A's family don't get on, I don't know what happened and why this is the case, there is a dislike there, A understands what is said to him, and M will talk about A's family and that he may have had to go out of the house because they were coming, M has commented on his dislike of A's family in front of A. A doesn't have the capacity to tell M how he feels about this and I don't think that is right, A can't tell M to go away from his house if he doesn't like the comments."

46. "A" was a young vulnerable resident who had mental health issues. (185)

47. On 22 November, the claimant was interviewed. He said that he did not have a relationship with Ms Bennett, Ms Vardon and another worker by the name of Jennifer as they were 'recent arrivals'. He said he tried to separate work from his private life. He denied the allegations. (198-213)

48. Arising out of the accounts given by Ms Bennett, Ms Vardon, and Taylor-Marie, the claimant was written to again by Mr Ellis who informed him that two further allegations would be investigated, allegations three and four. Allegation number three was "making inappropriate comments regarding service user's family in earshot of the service user and that if established breached the respondent's code of conduct".

49. Allegation four was "making a threatening comment to a colleague". That was breach of the respondent's Code of Conduct and also its Dignity at Work policy. In the Disciplinary policy "threat of violence or offensive behaviour" constitutes gross misconduct entitling the respondent to dismiss without notice or pay in lieu of notice. (104-105, 371-381)

50. On 20 December, he was again interviewed in relation to allegations three and four. He was asked to describe his relationship with A's family, the allegation being that he made comments about A's family in A's presence, he replied:

> "Not good at all. Have supported and got on with them for a long time. Then A's step-father installed CCTV and did not disclose there was an audio element. It transpired that this picked up the sounds from the toilet which invades privacy. It could also zoom into the bedrooms of vulnerable adults living in the bedrooms next door. I raised this issue and this was where the relationship with the step-father broke down and step-father requested for me to no longer support A."

51. He was asked whether he had discussed his thoughts about A's family with others, to which he responded by saying, "Probably yes". The following were the questions and answers:

"Do you recall ever saying to another member of staff while in the house and with AK [A] present that you would need to leave the house because his parents were coming? yes.
In front of A?
Yes.
Do you believe A would have heard you say that?
I am not entirely sure.
Do you think that A might feel upset or annoyed to hear somebody say that they are not happy that his family is coming?
No.
If it was said about your family would that upset you?
No.
What was tone and manner?
Direct and honest, no malice, just a simple state of fact. It is very hard to judge A's cognition. A has strong ways that he will express unease and unhappiness in a situation and in this case, never did he express any of those.
How many occasions have you had to do this?
Two.
Have you had any other conversation regarding how the relationship with the family works in front of A?
No, not that I can recall".

52. The interview then moved on to threatening comments, the fourth allegation. The following is the recorded dialogue:

"Do you own guns?

No.

Do you recall ever talking about owning guns to a colleague?

Yes. I wanted to buy an air pistol. My cat was being bullied by another neighbourhood cat and so was looking to hang balloons and shoot them with an air pistol to drive the other cat away.

Who was the colleague that you discussed this with?
Taylor.

Have you ever discussed with a colleague things that have been left to you by family?

Yes. I forget who the conversation was with. I had three great uncles who were all missionaries in other countries who had firearms who had kept them in the family and was supposed to be left to me. An uncle had told Mark that he had thrown them in the Thames but in fact he had sold them to a registered licensed company.

Who was that conversation with?

Siobhan Tipper.

When was this?

A couple of years ago".

53. He was then asked:

"Do you recall telling a colleague that you had to go to France to sort out a vineyard and weapons that had been left to you by family?

No I have had discussions regarding a vineyard but that was not in France. We have a couple of houses and vineyard in Croatia. There was a farm in France, not a vineyard. It was something bequeathed to the family as a whole.

Just to be clear, we believe that the discussion was with Siobhan to sort out a farm in France? And at no point did you have weapons left to you by your family? Do you recall telling a colleague that you had guns, and one with that person's name on it?

No. If I do not own any guns, why would I then have somebody else's name written on it?"

Was there anything you would like to add to this?

No". (198-213)

54. On 4 December 2017, Ms Siobhan Tipper, Locality Manager, was interviewed by Ms Hamilton-Smith. She said that Ms Vardon had contacted her to say that Ms Bennett had some concerns about the claimant making a threat to her. She was asked what had Ms Vardon said about the claimant. Ms Tipper responded by saying that Ms Vardon said that the claimant had said something to Ms Bennett about "having a gun, and he could shoot her". She had overheard this and "the perception was that it was a threatening comment made towards Jessica". She was asked when did this happen? She replied that she was not sure, "probably late summer". She was asked what did she do following the conversation, she responded by saying she spoke to Ms Bennett and was advised to put this in writing in order that it be investigated. Ms Bennett, however, had strong reservations about raising the matter as she was really concerned that there would be repercussions from the claimant. She was asked why did she not take it further, she replied that it was "because she felt so strongly about any potential repercussions. I had asked her to put it in writing and I never received anything. When I followed it up with her she was still nervous". (223)

55. We are satisfied that Ms Hamilton-Smith conducted further interviews and obtained additional documents as part of her investigation. Although her management report is not dated, we find that it was either presented to Mr Ellis in late December 2017 or in January 2018. She concluded that there was evidence in respect of all four allegations to be considered at a disciplinary hearing.

56. Mr Ellis e-mailed Ms Sidgwick on 19 January 2018 stating that he was content for the allegations to proceed to a disciplinary hearing. (222)

<u>Disciplinary hearing</u>

57. On 19 January 2018, Mr Charles Collier, Locality Manager, Norfolk, who had no prior dealings with the claimant, was instructed to conduct the disciplinary hearing. He invited the claimant to attend the disciplinary hearing on 25 January 2018 and informed him of his right to be accompanied. Enclosed with the letter were the investigation report and the employee guide to disciplinary hearing. The letter repeated the four

allegations to be considered by Mr Collier. (225-227)

58. On 22 January, the claimant wrote to Mr Collier requesting a postponement of the hearing as he had concerns about the evidence and Ms Hamilton-Smith's report. Mr Collier responded on the same day stating that the request had been considered, but that the disciplinary hearing would go ahead. (236-237)

59. We make this finding, during the course of the hearing, in the policy documents relating to suspension and disciplinary proceedings, they disclose two inconsistent provisions. In the guide to managers on suspension, it states that seven working days' notice would be given to the employee prior to a disciplinary hearing. In the disciplinary policy it states 48 hours. These two statements are likely cause some confusion in the mind of an employee who is the subject of disciplinary proceedings, as they did with the claimant.

60. The claimant, however, said in evidence that he received a copy of the disciplinary policy and had at least three days to prepare for the hearing.

61. The hearing went ahead on 25 January 2018. In attendance were Mr Collier; the claimant; the claimant's colleague, Ms Lindsay; Ms Hamilton-Smith, who attended to explain her report and the basis for the allegations; and Ms Katherine Dixon-Lack, who took notes. Ms Lindsay also took notes. It is recorded that Ms Dixon-Lack asked the claimant whether he was content to proceed, he replied in the affirmative and, although he said that he had a lot to read in "three days", he did the best he could. He did not apply for the hearing to be adjourned. The allegations were then put to him and his responses were recorded. We focus on the third and fourth allegations as the first two were not found by Mr Collier to have been proven and they do not form part of the claimant's case against the respondent.

62. In relation to allegation three, he referred to the service user's step-father and the installation of the CCTV equipment with audio recording facility which was the cause of the problem and repeated what he said during the investigation.

63. In relation to the fourth allegation, he said that he had mentioned that he did not own a gun, therefore, why would he refer to a gun. He had a cap gun and cowboy outfit, but at age 7, he had disposed of them. He had uncles who were missionaries. He had no idea why Ms Bennett would make the statement about him. He did, however, witnessed her crying as her childhood best friend had passed away and, at the time, she and her husband's dream house purchase had fallen through. He asserted that there had been attempts to remove him from his job through various means and that Ms Bennett, Ms Vardon, and Ms Tipper had conspired to remove him. (250-253)

64. The hearing lasted four and a half hours after which Mr Collier did not give his decision as he wanted to make further enquiries.

65. On 30 January 2018, he telephoned the claimant to inform him of his

decision. He found that there was no case to answer in relation to allegations one and two. In relation to allegation three, he found that there was a case to answer but it required the issuing of a first written warning. As regards allegation number four, he found proved it and that it constituted gross misconduct. Consequently, he decided to dismiss the claimant. He told the claimant that all matters would be confirmed in writing.

66. His outcome letter dated 2 February 2018, was sent to the claimant and is very detailed, covering 8 pages. In relation to allegations three and four, Mr Collier wrote:

> "Allegation 3
>
> In regard to the allegation that you made inappropriate comments regarding the family of the person we support within earshot of the person we support.
>
> It was reported by a fellow support worker, Taylor, that although a period of unspecified time, you "fairly often" made comments about the family of a person we support in front of him. She said this included comments from you such as "I don't like A's family, and they don't like me…." when you were leaving the house because A's family were visiting. She said that A could not communicate how this made him feel and she noticed that he was more active in his behavior when these comments were being made or sometimes he would leave the room.
>
> You said that you had already made comments about having to leave the house because A's family were visiting in front of him. You then stated that comments regarding the family would have been made when A was away with his family and due to return so would not have been in front of him. You explained that the relationship had previously broken down between yourself and A's step-father. You have been consistent in stating that your tone and manner is direct and honest with no malice and is factual. You say "A has a very strong ways that he will express unease and unhappiness in a situation and in this case, never did he express any of those".
>
> Allegation 4
>
> In regard to the allegation that you made threatening comments to a colleague.
>
> Jessica stated that herself, Heidi and you were in the garden of YLC having a cigarette in July or August 2017. She said that during the conversation you said to her "I have guns and one with your name on if you want it", smirking while you said it. Jessica said she felt she didn't want to be there after you saying this and had to leave the house. She went to another house, LC and cried. She then phoned the Locality Manager, Siobhan, and said to her in "I can't keep working with him". Jessica said that this comment had frightened her and she felt wary to be around you on her own.
>
> Heidi said she had caught this conversation mid-on and you had said something like "I have a gun and could shoot you". She also said that Jessica was concerned that no-one would believe her.
>
> Siobhan has stated that Heidi had made her aware of this comment and she said that she had also spoken to Jessica since the incident.
>
> You have stated that you did not make this comment to Jessica and you have no idea

> why she would come out with this comment. You said that you did not own guns. You said that you had wanted to buy an air pistol to shoot balloons to scare a neighbourhood cat away. You said you had talked to Siobhan about your three great uncles who were missionaries in other countries who had firearms who had kept them in the family and was supposed to be left to you."

67. In mitigation Mr Collier considered the claimant's length of service; experience; the impact of a disciplinary sanction; his career within social care; and his employment history, in that, he did not have any previous formal disciplinary warnings. Alternatives to dismissal were considered, such as a transfer or demotion but Mr Collier was of the view that there was no alternative other than to dismiss the claimant with immediate effect without pay or pay in lieu of notice. The claimant was advised of his right of appeal to Mr Ellis. Mr Collier said in evidence that as Ms Bennett was frightened of the claimant he could not allow the claimant to return to work. (279-286)

68. The claimant appealed on 7 February 2018. He stated that he had not received the documents he had requested on 23 January 2018 and was not provided with a copy of the notes of the disciplinary hearing. He again denied he had behaved as set out in the third and fourth allegations and as found by Mr Collier. He asked in respect of the fourth allegation, who informed the police, and what was the crime reference number?

69. Although Mr Ellis said that he did not receive the claimant's grounds of appeal, he was prepared to accept them on 23 February 2018, outside of the time imit. (295)

70. In the course of his evidence, Mr Ellis told the tribunal that following the disclosure to Ms Hamilton-Smith by Ms Bennett, of the alleged threat, he wanted to speak to Ms Bennett to find out what support the respondent could offer her. He said that she had been in a potential threatening situation and as Operations Director, he felt obligated to speak to her, not about the case, but about support. In his discussion with her, he advised her to consider reporting the matter to the police. He did not make a note of their conversation because it was not to discuss her evidence. He also told the tribunal that he formed the impression, having discussed the matter with her, that she had experienced "something serious".

71. It seems to this tribunal that having been involved in sanctioning the claimant's suspension; having added the two further allegations; having formed the view that the four allegations should proceed to a disciplinary hearing; and having advised Ms Bennett to consider reporting the matter to the police, another Operations Director should have conducted the appeal or instructions could have been given to Human Resources to speak to Ms Bennett. This is the tribunal's observation, however, we will come back to this in due course in our conclusion.

72. In the invitation letter sent by Mr Ellis to the claimant on 9 March 2018, scheduling the appeal hearing for 20 March 2018, he informed the claimant of the following:

> "As you are aware, during the administration of your subject access request, it came

to light that through inappropriate use of work e-mail, you had committed a data breach. If we had been aware of this during your employment, this would have been dealt with under our disciplinary procedure as this is deemed gross misconduct. If your appeal is successful, then we will immediately invite you to a disciplinary hearing to obtain your response to the allegation of inappropriate use of work e-mails, leading to a data breach". (326)

73. We are satisfied that the respondent's appeal procedure is not a re-hearing but a review. It went ahead on 20 March 2018 and was chaired by Mr Ellis. Also in attendance were Mr Mike Shreeve, HR Officer; Deanne Samson, Regional Administrator; Mr Collier; the claimant and his colleague, Ms Lindsay. The claimant repeated his concerns about the lack of evidence in support of the two allegations. He accused Ms Bennett of not carrying out the vehicles checks before signing off the records. He alleged that the records were "doctored" which would have provided her with the motivation for making the allegation against him that he had threatened to shoot her. He said that he had been interviewed by the police and the officers read out her witness statement, but he just laughed at the content of it. He said that one officer appeared to be confused while the other accused Ms Bennett of being a "fantasist". He said that there was a DVD of his interview with the police. He was then advised by Mr Ellis that if there was further evidence the police could provide, it should be forwarded to the respondent.

74. Mr Collier was questioned and gave the reasons for his decision including the mitigating factors in the claimant's favour, such as his length of service, his years in support work, and his ability to bring problems to the attention of management.

75. At the conclusion of the hearing, Mr Ellis decided to delay his outcome decision as the claimant wanted him to consider additional information, in particular, the police interview recording. Mr Ellis gave up to 26 March to present any further evidence. Although the claimant was given time to submit the recording of his police interview, it was not sent to Mr Ellis and Mr Ellis did not give his decision on 26 March but some three days later affording the claimant more time. (340-346)

76. In his outcome letter dated 29 March 2018 and sent to the claimant, Mr Ellis dealt with the points raised by the claimant but upheld Mr Collier's decision. There was no evidence presented to show that Mr Ellis, in his outcome decision, was in any way influenced by the claimant's alleged protected disclosures. He wrote in paragraph 28 of his witness statement that he was not aware of the substance of the claimant's grievances, but was aware of the fact that he had submitted grievances. (354-358)

<u>Information Commissioner's Office</u>

77. In relation to the claimant's disclosures to the Information Commissioner's Office, we were not shown any disclosures made by the claimant to the ICO. During the course of the hearing we were handed documents by him but they were responses to approaches made by him to the ICO and nothing in them disclosed what the claimant had disclosed to the ICO coming within the qualifying and protected disclosures provisions in the

Employment rights Act 1996. (917-923)

78. As we have already referred to, the claimant had access to legal advisers and told us that he had access to them at least since 2016.

Submissions

79. We have taken into account the submissions by Ms Ivancovic, on behalf of the claimant and by Mr Crow, on behalf of the respondent. We have also considered the relevant statutory provisions and authorities. We do not intend to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

The Law

80. In relation to public interest disclosure, we have taken into account sections 103A and 47B Employment Rights Act 1996 on dismissal and detriment.

80. Section 47B(1), Employment Rights Act 1996 provides,

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

81. A protected disclosure means a qualifying disclosure as defined under section 43B made by a worker in accordance with sections 43C to 43H, ERA 1996, section 43A.

82. Section 43B defines what is a qualifying disclosure. It provides,

> "(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, or is likely to be deliberately concealed."

83. What is a detriment under section 47B is not defined in the legislation. In this regard the judgments of their Lordships in the case of <u>Shamoon-v-</u>

Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, will apply. It is whether or not the worker was put at a particular disadvantage having made a protected disclosure? The disadvantage could be either physical, such as being instructed to engage in degrading work; or denying them benefits such as a company car, medical cover or membership of a sports or social club; being denied the opportunity of promotion, or a delay in addressing an issue. It may also be psychological, financial or not being offered employment, amongst other things.

84. The qualifying disclosure must be a disclosure of information, that is conveying facts, Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, a judgment of the Employment Appeal tribunal.

85. A reasonable belief is assessed objectively taking into account the particular characteristics of the worker in determining whether it was reasonable for him/her to hold that belief, Korashi v Abertwe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT.

86. In the case of Fecitt and Others and Public Concern at Work-v-NHS Manchester [2011] EWCA Civ 1190, the Court of Appeal held that the causal link between the protected disclosure and suffering a detriment under section 47B, is whether the protected disclosure "materially influenced", in the sense of being more than a trivial influence, the employer's treatment of the whistleblower.

87. In a breach of a legal obligation case, the tribunal should identify the source of the legal obligation and how the employer failed to comply with it. Actions could be considered wrong because they were immoral, undesirable or in breach of guidance without being a breach of a legal obligation, Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT.

88. Section 103A ERA provides that, "An employee who is dismissed shall be regarded for the purposes of the Part as unfairly dismissed if the reason or principal reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure." It is for the employer to prove the reason for the dismissal. Where the employee lacks the relevant qualifying period of service the burden will be on the employee to prove the reason for the dismissal was by reason of making a protected disclosure, Kuzel v Roche Products Ltd [2008] ICR 799.

89. A claim under section 47B must be presented within three months beginning with the date of the act or the failure to act, section 48(3).

90. This time is extended under section 207B where there has been conciliation before the presentation of the claim, section 48(4A).

91. Section 48(3) provides that the claim must be presented within three months from the date of the act or failure to act. Time could be extended if it was not reasonably practicable to present the claim in time, Section 48(4) states,

> "For the purposes of subsection 3 ---

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on."

92. In the case of Arthur v London Eastern Railway Ltd [2006] EWCA Civ 1358, the Court of Appeal held, Mummery LJ giving the leading judgment, that,

> "Section 48(3) is designed to cover a case which cannot be characterised as an act extending over a period by reference to a connecting rule, practice, scheme or policy, but where there is some link between the acts which makes it just and reasonable for them to be treated as in time and for the claimant to rely on them. In order for the acts in the three-month period and those outside to be connected, they must be part of a "series" and acts which are "similar" to one another."

93. If a detriment claim is well-founded the tribunal can make a declaration to that effect and award compensation, section 49(1) Employment Rights Act 1996. The claimant is under a duty to mitigate, section 49(4), and the tribunal can consider whether the claimant either caused or contributed to the act complained of, section 49(5). Compensation is assessed on the same basis as a discrimination claim and can include an injury to feelings award, Virgo Fidelis Senior School v Boyle [200] IRLR 268.

94. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and 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 employees 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."

95. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following has to be established:

a. First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,

b. Second whether that genuine belief was based on reasonable grounds,

c. Third, whether a reasonable investigation had been carried out?

96. Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case, that is, was the decision to dismiss within the band of reasonable responses?

97. The charge against the employee must be precisely framed, Strouthos v London Underground [2004] IRLR 636.

98. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

99. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.

100. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT.

101. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's supermarket Ltd v Hitt [2003] ICR 111 CA.

102. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.

103. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.

104. The Court of Appeal acknowledged that employment tribunals are entitled to find whether the dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was in an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, "It's been a few months since I have been in this position with a man underneath me" was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, the comment made. The employment tribunal found by a majority that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677.

105. The level of inquiry the employer is required to conduct into the employee's alleged misconduct will depend on the particular circumstances, including the nature and gravity of the case, the state of

the evidence and the potential consequences of an adverse finding to the employee. "At the one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.", Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

Conclusion

Public interest disclosures

106. In relation to the alleged qualifying disclosure on 14 April 2016, claim number four, the claimant relies on the failure to comply with a legal obligation and the health and safety of individuals is being or is likely to be endangered. The concerns raised by him as set out in paragraph 14 above were more relevant to him and the workplace rather than having wider public interest implications. Even where he had referred to health and safety and falsification of records, these were relevant to the workplace.

107. We acknowledge that in raising concerns about the management and operation of a care home, will attract some public interest, but that is not the issue we have to address. It is whether there was "disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest", section 43B(1).

108. The claimant did not give evidence regarding whether his belief was a reasonable belief that the 14 April 2016 disclosure was made in the public interest. As we have made reference to, he had raised a number of issues, some of wider import but there were others more relevant to him, such as his working conditions; the Christmas rota; his tooth that had been punched out by a service user; being required to engage in sleep-ins; attending a family funeral abroad; and cancelling shifts at short notice. Viewed objectively, what the claimant disclosed to Ms Tipper was a list of his concerns without establishing that he held a reasonable belief that they were made in the public interest. We, therefore, do not conclude that the 14 April 2016 disclosure was a qualifying disclosure.

109. Even if the disclosure was a protected disclosure as it was made to Ms Tipper, Acting Locality Manager, in relation to the delay there was no evidence to show that Nicola Sidgwick, Sam Shepherd, Tina Panting and Jocelyn Alderson were in anyway materially influenced by the alleged protected disclosure.

110. Even if there was a protected disclosure, the detriment relied upon by the claimant is the delay, in that he asserted that the process had been "strung out for two and a half years."

111. There were various reasons for the delay: a meeting was held on 27 April 2016; the claimant agreed to the postponement of the July 2016 meeting and requested a delay of the meeting scheduled to take place on 25 August 2016; there were then leave dates and the meeting arrange for 20

September 2016, did not take place; the claimant took a month to appeal the grievance outcome, thereafter, the respondent allowed him to peruse various documents; Mr Shepherd requested between January to May 2017, that the claimant clarify certain documents but he failed to respond; he also did not attend the meeting arrange for 19 September 2017; the respondent, therefore, scheduled an appeal hearing which took place on 20 November 2017. Ms Sidgwick told us that she had family issues to attend to. We, therefore, have come to the conclusion that both parties were responsible for the delay. Further, there was no evidence that the respondent's managers, including Ms Sidgwick, were in any way materially influenced by the 14 April 2016 disclosure, in their conduct of the grievance.

112. In any event this claim is out of time. The outcome of the grievance appeal was conveyed to the claimant on 20 November 2017. He, however, notified ACAS on 28 February 2018, but the three months expired on 19 February 2018. He had access to lawyers from April 2016 to the outcome to his grievance appeal as he had made reference to them in correspondence and in evidence before us. A timeous claim was not presented to the tribunal and he did not apply for an extension of time. It was reasonably practicable for him to have taken legal advice on the presentation of his claim.

113. As regards the 7 September 2019 disclosure, claim number 8, this is the complaint raised by the claimant with Ms Tipper and Ms Panting and was in relation to Ms Bennett allegedly falsifying the vehicle checks. We have come to the conclusion that the claimant did not have a reasonable belief that the vehicle safety checks records were falsified. Had he conducted a reasonably enquiry he would have discovered that the checks were done but not signed off. Ms Bennett genuinely felt that there should be a record and signed them. It was a misunderstanding as to who should sign off the checks. This was acknowledged by Ms Tipper in evidence who initiated a new and transparent procedure.

114. Having regard to the claimant's own 7 September 2017 email, he only had a suspicion which is less than a reasonable belief.

115. The claimant alleged that Ms Bennett and Ms Vardon conspired against him to make up allegations including the gun threat. Having heard the evidence and having considered the documents, there was no evidence of a conspiracy. The gun threat was revealed during the investigation by Ms Hamilton-Smith "unprompted" by Ms Bennett.

116. Even if the disclosure was a protected disclosure, there was no evidence and we did not make any findings of fact that the decisions to suspend and dismissed the claimant was in any way materially influenced by the protected disclosure. Accordingly, this claim is also not well-founded and is dismissed.

117. In relation to claim number nine, there was simply no basis for the claimant to assert that he had made qualifying disclosures to the ICO as there was no evidence adduced in support of this.

118. As regards the automatic unfair dismissal claim, section 103A, we must be satisfied that there was or were protected disclosures which materially influenced the decision to dismiss and was the principal reason for doing so. As we have not found that there were protected disclosures, this claim falls away and is not well-founded. We also conclude that the principal reason for the claimant's dismissal was that he had threatened Ms Bennett by saying he had a gun with her name on it. There was no evidence adduced that the decisions to suspend and to dismiss the claimant, were materially influenced by any alleged protected disclosures. Accordingly, this claim is dismissed.

Unfair dismissal

119. In relation to the unfair dismissal claim, the reason for the claimant's dismissal was set out in the dismissal letter. It was that he, according to Mr Collier, based on the evidence before him, had threatened Ms Bennett by saying that he had a gun with her name on it. Mr Collier was satisfied notwithstanding the absence of a specific date, that the threat was made.

120. Was there reasonable investigation? Ms Hamilton-Smith interviewed those who had raised concerns about the claimant's conduct and performance. She also interviewed the claimant as well as other individuals and presented her report. The claimant was given the opportunity to give his account at the investigation, disciplinary and appeal hearings. He was aware of the allegations against him. He was also given time to submit further evidence such as the police DVD recording but did not take advantage of it. We are satisfied that the respondent had undertaken a reasonable and fair investigation into the allegations.

121. Were there reasonable grounds for genuinely believing in the claimant's guilt? Although there was the absence of a specific date of the threat, it did not negate the finding that a threat had occurred. Ms Bennett's account and that of Ms Vardon's, were very significant. Ms Bennett felt threatened and reluctant to take it any further due to possible repercussions. This was supported by Ms Vardon who came part way through the conversation between Ms Bennett and the claimant. Ms Tipper, recorded a recent complaint of threatening behavior. The claimant acknowledged that at one time he had possession of at least a gun.

122. There was no evidence in support of either a conspiracy or collusion on the part of Ms Bennett, Ms Vardon and Ms Tipper.

123. There is no challenge to the genuine belief held by Mr Collier and Mr Ellis. Those were the grounds upon which they formed that belief, not motivated for any ulterior reasons.

124. According to the respondent's disciplinary policy, threatening behaviour constitutes gross misconduct. The respondent considered alternatives to dismissal but felt that the claimant could not safely be accommodated anywhere on its sites and the interests of Ms Bennett was a concern. It is not our function to put ourselves in the position of the reasonable employer. All we can say is that another reasonable employer may well have issued a final written warning or some other sanction short of

dismissal, another may well have dismissed. Applying the judgment in the case of Newbound, dismissal does not fall outside the range of reasonable responses.

125. We referred earlier to the role of Mr Ellis, who conducted the appeal, observing that he was close to the disciplinary process. We are satisfied he was not influenced by what Ms Bennett said to him when he spoke to her about what support the respondent could provide for her. There was no evidence that he had been motivated by malice towards the claimant or was involved in a conspiracy or collusion. We found that he had a genuine belief in the claimant's guilt on reasonable grounds. Had another Operations Director conducted the appeal and having been presented with the same evidence and having considered the respondent's disciplinary policy with regard to threatening behaviour constituting gross misconduct, the outcome would have been the same.

126. Accordingly, we have come to the conclusion that the claimant's section 98(4) ordinary unfair dismissal claim, is not well-founded and is dismissed.

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Employment Judge Bedeau

Date: 26 September 2019

Judgment sent to the parties on

23 September 2019

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For the Tribunal office