



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4121802/2018

Held at Aberdeen on 3, 4 & 5 June and 27 September 2019

10

**Employment Judge
Tribunal Member
Tribunal Member**

**I A McFatridge
E McCall
A N Atkinson**

15

Mr B Cochrane

**Claimant
In Person**

20

25

Inspire (Partnership Through Life) Ltd

**Respondent
Represented by:
Ms Hughes,
Trainee Solicitor**

30

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

35

**The majority decision of the tribunal is that the claim under s47B of the
Employment Rights Act 1996 does not succeed. The claim is dismissed.**

40

E.T. Z4 (WR)

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had suffered a detriment as a result of making public interest disclosures and that he had been automatically unfairly dismissed in terms of s.103A of the Act because he had made protected disclosures. The respondents submitted a Response in which they denied the claims. They raised a preliminary issue that the claimant was not an employee and therefore could not claim automatic unfair dismissal under s.103A.
5
10
2. A preliminary hearing took place on 7 March 2019 to determine this preliminary issue and following this Employment Judge Kemp issued a Judgment on 10 March 2019 in which he held that the claimant was not an employee under s.230 of the Employment Rights Act 1996 and dismissing the claim under s.103A of the Employment Rights Act. The only remaining claim which the claimant had was a claim of detriment and this was heard over three days of 3, 4 and 5 June 2019. Following this the Tribunal met again in the absence of the parties to consider their decision on 27 September 2019.
15
20
3. At this hearing the claimant gave evidence on his own behalf. Evidence was led on behalf of the respondents from Archie Campbell, a Support Manager with the respondents based in Peterhead, Mrs E M Allan, a Manager with the respondents based in Ellon, Ms Susan Bracken, Regional Manager with the respondents and Toni Smith, a Support Manager with the respondents based at their unit in Caroline's Crescent, Ellon.
25
4. By previous arrangement the claimant gave his evidence-in-chief by means of witness statement. The other witnesses gave their evidence-in-chief orally. The parties agreed a Statement of Facts which was lodged. During the course of the hearing the claimant indicated that he did not agree with paragraph 7 of the Agreed Statement of Facts. The Tribunal made its decision on this point based on the evidence. The parties lodged a Joint Bundle of Productions. On the basis of the evidence, the Agreed Statement of Facts
30
35

(under excision) and the productions found the following essential facts relevant to the claim to be proved or agreed.

Finding in fact

5

5. The respondents are a charity and provide support to adults with learning disabilities in the North East of Scotland. The respondents operate a number of units which provide care usually on a residential basis. They employ a substantial number of care workers. These tend to be employed on one of two bases. Some are employed as full-time permanent care workers who are allocated a particular role within a particular service. They generally have allocated hours which they work all the time. Others are designated "relief workers". They will usually be allocated to a particular service but they may also work for other services as and when suits them. They do not have fixed hours but will have hours which vary depending on the needs of the service. Given the usual profile of staff requirements the respondents run an almost permanent advert for care staff. One particular feature of recruitment is that the respondents have to bear in mind that their service users have learning difficulties and will usually experience problems in adapting to new staff. For this reason the respondents try to limit new staff starts over a period so that their service users do not become too distressed at having to deal with a lot of new faces at the same time.

10

15

20

25

30

6. The claimant had a background in health and safety. However, over recent years has experienced difficulty in obtaining work in this field. Due to the downturn in the North Sea operations there are fewer jobs available and greater competition for those jobs which do exist. In 2017 the claimant took up a full-time University course studying a Bachelor of Nursing at Robert Gordon University. In or about May 2018 the claimant applied for a job with the respondents as a care assistant. During the course of the interview process the claimant discussed his bachelor of nursing course with the respondents. He advised the respondent of his study commitments. This included a lengthy placement where the claimant would not be able to work for the respondents. At other times of the year the claimant would be able to

work varying numbers of hours depending on what the actual study commitments were. The claimant agreed that due to his study commitments he was best suited for the role of a relief worker. During the course of the interview the claimant was advised that there was usually a fair amount of work available for a relief worker and that this could potentially be at multiple locations. At that time the claimant was studying at the University and he could only commit to a maximum of about 16 hours per week. He would then be going on placement but on return from placement he might have been able to work in excess of 16 hours per week depending on his study commitments for the next academic year. The claimant was advised that potentially he could work as many hours per week as he was available.

7. Following discussions it was agreed that the claimant would be allocated initially to Caroline's Crescent. This is a small unit which looks after individuals with learning difficulties. As a first step the respondents arranged for the claimant to carry out a service visit. The reason for the service visit is that the respondents believed it to be very important that the claimant was a "good fit" in the unit. He would be working as part of a very small team and would require to get on with his colleagues. People with learning difficulties tend to be troubled by change and the respondents wished to minimise any possibilities of unnecessary staff changes by someone starting to work in a unit and then leaving after a short time if they did not find it congenial. The claimant was shown around Caroline's Crescent by Toni Smith who was the Manager and responsible for day-to-day running of the services. He was introduced to the staff. He was left with the staff and following the meeting Ms Smith asked them for feedback. They advised that they considered the claimant had been overfriendly and "a bit flirty". Ms Smith did not seek feedback from the service users since most had communications difficulties.

8. Following this the claimant attended an induction process with the respondents between 21 and 28 May. During this process the claimant took the course leader to task over what he perceived to be health and safety shortcomings. During hot weather the course leader re-opened a window which the claimant believed should have been kept closed. Following this

induction, the claimant was allocated to do a shift at Caroline's House on 15 June. This was the first and only shift he worked at Caroline's House. Following the shift, he e-mailed Juliet McCheyne-Robb of the respondent's HR Department asking for a meeting with senior management. The claimant then met with Eileen Allan, Regional Manager on 19 June 2018. During this meeting the claimant raised a number of issues relating to the shift carried out at Caroline's Crescent. It was the claimant's position that these were protected disclosures. Eileen Allan took a note of the meeting which was lodged (page 110-111). As part of case management of the case the respondents indicated that he considered that the matters raised by him which amounted to protected disclosures were as set out at pages 63-72 of the bundle. There were essentially seven issues raised by him. They ranged from a complaint that he had smelled smoke in the building through to a complaint of food hygiene and a complaint of verbal and physical abuse to a resident. The respondents accepted that one of the matters raised namely disclosure 4, the allegation of verbal and physical abuse to a resident was a protected disclosure. The respondent's position was that they accepted that this was a protected disclosure in that the claimant had a reasonable belief that one or more of the six specified types of malpractice had taken place, was taking place or was likely to take place namely that the health and safety of an individual had been, is being or was likely to be endangered. The respondent's position was that as a matter of fact this was not the case but they accepted that the claimant had a reasonable belief in this regard and that all of the other characteristics which would allow the matter to be a protected disclosure were present. The Tribunal therefore proceeded on the basis that this one matter was a protected disclosure. The respondents did not accept that any of the other matters raised were protected disclosures and given that the claimant did not lead any evidence in this regard the Tribunal did not make any findings in relation thereto.

9. At the meeting with Ms Allan the claimant also said that he felt very unwelcome at Caroline's Crescent. He said that he had been left on his own a lot. Ms Allan got the impression from the claimant that the shift had not gone well. By this time Ms Allan had also received feedback via Ms Smith

that from the point of view of the other staff the shift had not gone well. The other staff had repeated their complaints that the claimant was overly friendly and “flirty, with the female staff”. Ms Allan indicated to the claimant that following the various complaints raised by him she would require to carry out a fact find. The claimant was due to return to Caroline’s House to do another shift within a few days. Ms Allan and the claimant discussed whether he should return whilst the fact find/investigation was still going on. The claimant agreed with Ms Allan that this would not be a good idea. At that time the claimant had only one shift scheduled and this shift was cancelled. Ms Allan discussed with the claimant the fact that he would be able to find work in other units if he wished. The claimant agreed to this and his reaction to the suggestion that he would not be returning to Caroline’s House was that this was really not an issue.

10. The majority of the Tribunal believed it was Ms Allan’s understanding that during the induction the claimant would have been advised how to go about finding shifts in other units. The process for finding other shifts is fairly ad hoc. Most managers are usually looking for additional staff to cover shifts. They will try to ensure that for each unit there are, in addition to the core staff allocated to that unit, a number of relief workers who are used to the residents in that unit and who the residents are used to. They will be allocated shifts first. The respondents have to work to very strict staff/resident ratios and generally the rota for most units involves a number of relief workers having to be allocated shifts every month. Most managers will therefore be preparing a rota which will include their core staff who are working much the same hours and shifts every month together with their “usual” relief workers who will be asked at the start of the month what shifts they are able to do and will be allocated shifts accordingly. In addition to this there will also be a requirement for relief workers to cover additional shifts. These may be planned shifts where there are simply not enough core workers or regularly allocated relief workers to cover all of the shifts. They may also be ad hoc shifts due to staff shortages for maternity leave or illness or annual leave.

11. As one can imagine the preparation of such a rota is often more of an art than a science. Managers will often wish to ensure that they have enough shifts to give their regular relief workers sufficient work to ensure that they don't want to go and work somewhere else. There will also be some shifts that are easier to cover than others. A further issue common throughout the respondent's business is the desire not to foist too many new faces on the service users within a short period of time.
12. Ms Allan's understanding of the position was that the claimant wished to have shifts which he could travel to easily from his home in Ellon. At that time Ms Allan was responsible for managing a number of units in Huntly, Ellon, Aboyne, Banchory and Aberdeen. The Aberdeen services included two services in Cults and in Mastrick in Aberdeen city. She was aware that apart from Caroline's Crescent in Ellon none of her other services outwith Aberdeen had any requirement for relief workers at that specific time. She did have a requirement for relief workers at the services in Cults and in Mastrick but, having discussed matters with the claimant, she understood that the claimant did not wish to go to work in Aberdeen city.
13. Ms Allan was in irregular contact with other support managers. From one of these contacts she understood that Mr Archie Campbell, a Support Manager in Peterhead would be very likely to have some shifts available. Peterhead is fairly close to Ellon. She suggested that the claimant should try phoning Mr Campbell. She said that she would e-mail Mr Campbell to let him know to expect the claimant to call.
14. Following this meeting Ms Allan spoke briefly to Mr Campbell on the telephone. She said that she had a relief worker who wished to transfer from Ellon. She said that the reason for this was a relationship breakdown at his previous allocated service. She did not go into any further details than this. In particular she did not advise Mr Campbell that the claimant had raised any health and safety issues or made any allegations of abuse or indeed say anything at all in relation to any potential protected disclosure. All Mr Campbell took from the conversation was that Ms Allan was advising him

about a relief worker based in Ellon which is only a few miles from Peterhead who may be able to do shifts and would be contacting him in due course. When Ms Allan spoke to Mr Campbell she did not advise Mr Campbell that in fact the claimant had still to complete a second shadow shift.

5

15. Such conversations are not uncommon. At the same time as Ms Allan phoned Mr Campbell, she also phoned the Manager of a neighbouring group of services in Pitmedden to ask if she would likely to have anything for the claimant and was told that she did not want to take on anyone new for a shadow shift.

10

16. Following her conversation with Mr Campbell, Ms Allan sent him an e-mail on 20 June. This e-mail was lodged (page 140). It simply says:

15

“Hi Archie, Barry Cochrane is the relief member of staff I was telling you about. That’s his contact number [.....].”

She gave the claimant’s two contact telephone numbers.

20

17. Mr Campbell tried to telephone Mr Cochrane on a couple of occasions with no success. Shortly thereafter Mr Cochrane telephoned himself and spoke to Mr Campbell. By this time Mr Campbell had checked his resourcing situation with his resources manager Mr Ross Hutchinson.

25

18. Mr Campbell’s understanding of his staffing situation was that at that point he had around 13/14 contract members of staff and another 10 or 11 relief workers who were in his regular pool and would regularly be offered shifts. Some weeks previously he had identified that he would be needing to recruit additional workers and he had been advised that this was in hand.

30

19. The respondent’s recruitment processes take some time. Individuals have to be assessed and then require to be checked. These checks take a bit of time. Mr Campbell’s understanding at the time was that three new contracted staff had been recruited and he was “waiting for them to come online”. His main

purpose in speaking to the recruitment manager was to see if these individuals were still in the pipeline or whether, as sometimes happened, they had pulled out in the period between being offered a job and completing all of the respondent's checks so as to allow them to start. Mr Campbell had been advised that all three were still on track to be starting and that there were no call offs. As a result of this when Mr Cochrane called to speak to Mr Campbell, Mr Campbell said he could not help him as he had no vacancies in his area.

10 20. A list of the support workers recruited for Peterhead was lodged (page 148). This shows four support workers being recruited and starting on 25 July, 30 July, 20 August and 27 August respectively. Two others were recruited in October/November for services other than those run by Mr Campbell. Another support worker was recruited in November for Mr Campbell's services. This was an individual who had previously worked there but had left temporarily.

15
20 21. The claimant was somewhat nonplussed at having been told by Mr Campbell that there were no vacancies when his understanding from Ms Allan was there were vacancies.

25 22. On 1 July the claimant contacted Juliet McCheyne-Robb of the respondent's HR Department by e-mail. This e-mail was lodged (page 142-143). He referred to two issues. One related to pay and was resolved. The second was:

30 "After a meeting with Eileen at the Inverurie office she asked me to contact Archie Campbell for shifts. Archie has stated that he has a full complement of staff and has recently taken on three additional staff – so there are no shifts available at Peterhead for me. Could you please pass this on to Eileen – as I do not have her e-mail address? Maybe there is an alternative option for me?"

23. Ms McCheyne-Robb responded ten minutes later. She referred to the issue regarding pay and how this would be resolved. She then went on to say:

5 “Which services did you specify on relief worker preference form? As relief, you can pick up shifts at any of the services as long as you received all the required induction training for the service you wish to go to. However, if you want to discuss with Eileen her e-mail is[e-mail address]”.

10 24. There was no evidence to suggest that Ms Allan had advised Ms McCheyne-Robb about the claimant’s meeting with her on 19 June or what had transpired there.

15 25. Ms McCheyne-Robb e-mailed the claimant again subsequent to this confirming how he should deal with the query regarding his pay.

26. On 4 July Mr Cochrane also emailed Ms McCheyne-Robb stating:

20 “Just to clarify, the training took place in May and I then started with Caroline’s Crescent on 15 June. On this first shift I handed in both my training expenses form and travelling expenses form. Thereafter I had a meeting with Eileen and it was agreed I would not do anymore shifts at Caroline’s Crescent so to date I have only worked one shift for Inspire.”

25 27. On 6 July the claimant e-mail Ms Allan at 16:55 he stated:

30 “Hi Eileen
I have contacted Archie from Peterhead but he says they are fully staffed at the moment. Is there an alternative workplace?
Thanks,
Barry (page 141)”

28. Ms Allan responded on 9 July stating:

“Hi Barry,

I don't have any vacancies in my region just now that wouldn't need you driving to Cults or Mastrick which would cost you a fortune in fuel costs. I would check Inspire's web page for vacancies in the other regions.”

5

29. In the meantime, Ms Allan had carried out a fact-find in relation to the claimant's allegations. A copy of the fact-find check-list which she prepared was lodged. It bears to have been finally completed on or about 16 June. It was finally signed off on 17 July. The actions taken are summarised (page 113):

10

“Eileen met with Barry and listened, recorded his concerns and told him she would be looking into the them.

15

Eileen met with Toni Smith, Support Manager to discuss his long list of concerns. Toni took notes of the key points and addressed with staff.

Barry's shift was briefly discussed at the team meeting, where Eileen heard staff's side of events during Barry's shift. Not too much time was spent talking about the shift as Toni was going to talk to staff concerned on their own as staff support.

20

There is evidence of repairs needed at Caroline's at the time. These had been reported and waiting for someone to action.

All repairs to service highlighted by Barry at our meeting have since been actioned.

25

Staff have a very different version of the shift, Barry was quite flirty with some members of staff and they all felt intimidated by him. As a result of this the shift was very strained.”

30. The outcome is stated at page 113 as being “no evidence to support Barry's claims of abuse at Caroline's.”

30

31. On 14 July the claimant e-mailed Eileen Allan. The e-mail was sent at 00:14. He said:

“Hi Eileen

Done a search and didn't see any vacancies. Looking for work in other regions which you suggest (which look significant travel) and there are none. I feel as if I have told you the negative stuff and abuse that's going on at Caroline's Crescent, this has now stopped me from gaining work within Inspire.

Could you please advise the shifts available for me in Ellon areas or elsewhere nearby.

Thanks

Barry.”

32. Ms Allan did not respond to the claimant's e-mail of 14 July. She did try to contact him on the telephone on several occasions but was unable to do so. On 26 July at 21:47 the claimant e-mailed Ms Allan again. He stated:

“Hi Eileen,

Could you please let me know what happened re-the investigation at Caroline's Crescent?

You told me to contact Archibald Campbell at Peterhead but I have been told by him directly that there are no vacancies but Inspire Peterhead still advertised today for staff at Peterhead.”

33. Ms Allan responded at 10:23 the next morning stating: “Hi Barry, I will give you a call later for a chat.” That was on the Friday morning. She tried to telephone the claimant later on on the Friday but was unable to get hold of him. On Sunday 29 July at 19:08 the claimant e-mailed Ms Allan stating: “Please accept this as my resignation from Inspire.”

34. The respondents lodged a calculation of the average hours worked by relief staff at Caroline's Crescent in the period July to September 2018. There were a total of 375 hours of relief worked however 123 of them were worked by one particular relief worker individually who has 25 years' service and works a significant number of relief shifts. Deducting the hours worked by that individual gives a total of 250.15 hours worked in total by 8 relief workers over

the three month period. This means that if the claimant had continued to work at Caroline's crescent and been included in the rota with the same frequency as the other relief workers he could have been expected to work 28 hours in the three month period or an average of 9.33 hours per month. This equates to 2.15 hours per week. The claimant was paid at the rate of 8.75 per hour gross which equates to £7.63 per hour nett. His net weekly wage loss would therefore be £16.40. The Tribunal accepted that had the claimant continued in employment he would have been able to earn around £16.40 per week from working shifts at Caroline's Crescent.

10

35. Following his resignation, the claimant decided that he no longer wished to work in the care sector. He decided to change his career path and withdrew from his course in nursing. He has decided that he wishes to obtain a post in the health and safety sector in which he previously worked. He has applied for a number of posts but has been unsuccessful. During the course of correspondence with the respondents he indicated that he would be happy to drop his current claim if they gave him a post of head of health and safety. The claimant expressed the view that the person who currently carries out this role for the respondents on a contractor basis was not properly qualified or competent to do so. The respondents declined his offer.

15

20

36. The findings in fact as set out above are the findings of fact made by the majority in the Tribunal. The view of the minority dissenting member was that whilst he agreed with the majority in most respects he did not accept Ms Allan's evidence as to her motivation for failing to engage with the claimant in the period between 1 July when the claimant emailed Ms McCheyne-Robb to say that he had been told Mr Campbell had no shifts available and 29 July when the Claimant resigned. The dissenting member felt that Ms Allan protested a little too much that it was the sole responsibility of the claimant to find shifts. He felt that, for reasons given later there was an obligation on Ms Allan to find shifts for the claimant and she had not given an adequate explanation as to why she failed to act.

25

30

Observations on the evidence

37. As can be seen the claimant's involvement as a worker for the respondents was comparatively brief. He only attended one shift. He had one meeting with Ms Allan and one telephone conversation with Mr Campbell. He met Ms Smith when he was shown around the facility at Caroline Crescent prior to his induction. His e-mail correspondence with Ms Allan was extremely brief. Much of the evidence at the hearing was taken up with the respondents setting out their position regarding the background. The claimant's own witness statement does not devote a great deal of space to the events which led to the claim but rather concentrate on his views regarding what he sees as the respondent's various health and safety deficiencies. Nevertheless, despite the somewhat limited scope of the evidence the Tribunal found this a difficult case. There was a clear divergence in the evidence given by Mr Campbell and Ms Allan in relation to the issue of whether or not there had ever been any vacancies in Peterhead which the claimant could have received. Ms Allan's position was that she believed there were vacancies in Peterhead. She said that when she spoke to Mr Campbell he accepted this or at least did not demur. Mr Campbell's evidence on the other hand was quite clear to the effect that he did not have any shifts available. He made reference in his evidence to the fact that at this point in June some staff had recently been recruited but were still going through the checking process. He also referred to checking to make sure that they were still on track to start in July and had not dropped out. Somewhat confusingly Ms Bracken who was Mr Campbell's manager said that she had had a conversation with Mr Campbell at around this point in time regarding not recruiting any more people. It was her position that Mr Campbell was a relatively new manager and that for this reason she oversaw his recruiting. Her position was that in the run up to June they had been relatively short staffed but had just recruited three new staff plus a new relief manager. She was aware that these people were due to be coming in soon and had spoken to Mr Campbell about her preference that there be no more than two or three new staff coming in at a time. She had again made reference to the respondent's general view that since they were dealing with users with learning difficulties they didn't want

too many. It was her position that when Mr Campbell had recruited three new staff plus a new assistant manager she had had a conversation with him along the lines of saying that this was actually a bit too many and he should be careful as this was a lot of staff at one time. She said that this conversation had taken place at some point in June or July in the period when the claimant would have telephoned. Mr Campbell on the other hand made no reference to this conversation with his manager. Ms Bracken then went on to say that she had had a brief conversation with Mr Campbell about the claimant. She said that this was before the claimant telephoned. She said that all Mr Campbell told her was that he had been offered a relief worker from Ellon who was looking for shadow shifts. Her position was that she told Mr Campbell to "put a hold on everything until the new staff get started".

38. The key issue in relation to the claimant's claim was essentially whether or not the reason that he had not been offered shifts by Mr Campbell nor by anyone else was related to his protected disclosure or not. On this key issue the evidence of the three respondent's witnesses who had been involved was, frankly, all over the place. Ms Allan was aware of the disclosures but stated that she understood Mr Campbell did have vacancies and she was acting in good faith when she referred the claimant to him. Mr Campbell and Ms Bracken on the other hand say they were unaware of the disclosures but that as a matter of fact the decision was taken not to take on anyone else. Ms Bracken refers to her conversation with Mr Campbell which Mr Campbell does not refer to. At the end of the day both were agreed that the decision was not to take on new staff when there were others in the pipeline. The view of the majority was that this was one of these cases where the fact that the three witnesses were not in agreement added to their credibility rather than reduced it. This was not a case of a carefully rehearsed story. The majority felt that the somewhat confused explanation had a ring of truth about it in that each witness was giving truthful evidence as they saw it and as they now recollected matters some year and a bit later. The minority member did not hold this view. The view of the tribunal was to treat their evidence as being credible albeit subject to a degree of unreliability due to their naturally imperfect recollection. It is also of course entirely possible that any

differences were simply due to the fact that they were each remembering their own specific part in matters without necessarily seeing the whole picture. It is entirely possible for example that Mr Campbell agreed with Ms Allan that there were vacancies and then decided actually there weren't when he subsequently discovered that none of the people who were in the course of recruitment had dropped out and that they were all due to start in July and that his own manager did not want him to take anyone else on.

5

10

15

20

39. With regard to the claimant the view of the tribunal was that much of his evidence was uncontroversial and simply followed the agreed course of events. A great deal of time in cross-examination was spent showing that many of his attitudes were simply unrealistic and that he had been jumping to conclusions. Generally the view of the majority were that these criticisms were well-founded. The claimant's evidence to the effect that he had decided to withdraw from his nursing course and to forever forego getting any other job in the care sector we found to be somewhat overstated. It was clear to us that the claimant still sees himself as a health and safety officer. His preference is to get a job in this sector. Whilst we accepted his evidence that he has decided to stop seeking work in the care sector we did not accept his evidence that this was due to the events which formed the basis of this claim.

25

30

40. Toni Smith, the manager of Caroline's Crescent service gave limited evidence. The claimant took particular umbrage with the suggestion that he had been flirty with staff. Ms Smith had not been present when the claimant worked his one and only shift at Caroline's Crescent. Her position was that she was simply reporting what other staff had said. It is noteworthy that similar words were used by Ms Allan in her investigation report which appears to have been completed prior to the respondents having knowledge of these proceedings. Ms Smith is of course only passing on what she had been told by others. The Tribunal were happy to accept her evidence to the effect that this was something that other staff members had said. We did not make any findings at all in respect of whether or not this allegation was justified.

41. There is some difference between the evidence of Ms Allan and the claimant regarding what he had said regarding travel. The tribunal accepted Ms Allan's evidence to the effect that the claimant had indicated that he wished work close to Ellon. The claimant's evidence on this point was somewhat contradictory and confused. The claimant's position was that he had not specifically said that he was not happy to travel. When this was put to him his answer was "I got the hint she wanted me out". He then said it was not his place to try and untangle the situation. He accepted there was a limit to where he was prepared to travel for £8.75 per hour but confirmed that he had not advised Ms Allan what his limit was and his final position was that the matter had not been discussed. He denied that Ms Allan had told him there were positions available in Cults or Mastrick. His position was that the email from Ms Allan which, in the view of the Tribunal, clearly shows her referring to vacancies in Cults and Mastrick, was not taken by him as meaning that there were potential vacancies there. Overall, his position is regarding where exactly he would be prepared to work was somewhat vague.

42. The claimant's evidence was to the effect that he was so traumatised by his experience with the respondents that he had decided to give up completely on the care industry. It was his position that he was being prevented from getting another job in health and safety because he had to tell people that he had left his employment with the respondents. The Tribunal found this explanation totally incredible.

25 **Issue**

43. The sole claim remaining for the Tribunal was the claim under s.47B of the Employment Rights Act 1996. This states:

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

44. In this case the respondents accepted that the allegation of abuse made by the claimant to Ms Allan on 19 June amounted to a protected disclosure. The claimant's position was that having made this disclosure he suffered a detriment in that he had not been offered any further shifts in the period
5 between 19 June when he made his disclosure and 29 July when he resigned. The claimant sought compensation which he calculated on a loss of career basis. He produced a schedule of loss in which he claimed a total of £659,420. The respondent's position was that if the claimant was successful in his claim he was due compensation on the basis of what he
10 would have earned in the period up until 29 August 2018 by which time he would have easily have been able to have obtained another job paying £8.75 per hour. They calculated injury to feelings at £1,000 giving a total compensation of £1164.83.

15 **Discussion and decision – majority view**

45. Both parties made submissions. The respondent's position was that the facts of the case did not in any way support the claimant's claim that he had suffered any detriment as a result of the disclosure which he had made. The
20 respondent's representative set out her view of the facts with which the majority essentially agreed. These were that the claimant's shift on 15 June did not go well either from his perspective or from the perspective of others in the unit. Elizabeth Allan agreed to carry out an investigation and did so by interviewing a number of staff and the manager. Ms Allan then tried to contact
25 the claimant by telephone on a number of occasions to discuss matters but was unable to get in touch with him. Prior to the claimant's meeting with Ms Allan on 19 June he had one more shift scheduled at Caroline's Crescent. The outcome of the meeting was an agreement between the claimant and Ms Allan that he would not be going back there whilst the investigation was
30 ongoing. In addition she considered significant that only one more shift had been scheduled and suggested that this was due to the fact that the claimant had ongoing University commitments and in addition was going to be going on his six placement when he would be unable to do any shifts at all. At this stage the claimant had completed his general induction. He was aware that

he could apply for work as a relief worker anywhere. He was on the respondent's general list. He was also partly through his local induction for Caroline Crescent at the time of his meeting with Elizabeth Allan. He would have been accepted to do local induction at any other service he was interested and would have been accepted in the same way as any other relief worker who moved service. Despite Ms Allan's view that the onus was on the claimant, she contacted two managers after the meeting to find out if they had work for the claimant. Her understanding was that Mr Campbell had work. Both of the managers she contacted had services which were near to Ellon where she understood the claimant wished to work. One felt the claimant didn't have enough experience to join their service. With Mr Campbell there appeared to be some confusion as to whether there were shifts available. At the end of the day Mr Campbell checked to find out if the staff who were in the pipeline were still coming and when he discovered they were he considered he had no shifts available and told the claimant this. Mr Campbell advised the claimant that he had no vacancies. The reason for this was that he was having multiple new starts in July and did not wish to take on anyone new for the sake of the service users. This accords with what the claimant says he was told in his email to HR on 4 July. Subsequent to this the claimant contacted Ms Allan who told the claimant that she only had work in Cults and Mastrick. The claimant did not ask any more information about these posts. Ms Allan's understanding was that the claimant was a student and didn't want to travel far. If the claimant had followed up with Ms Allan regarding the post in Cults or Mastrick he would have been able to work straight away. As noted above, the claimant contradicted himself at various times. He gave particularly contradictory evidence in relation to his distance restrictions. At no time did he give an explanation as to why he didn't follow up with Elizabeth Allan about the shifts in Cults or Mastrick. His answers to questions were evasive and contradictory.

30

46. The claimant did not contact Ms Allan again looking for shifts.

47. Mr Campbell who made the decision not to offer the claimant shifts at Peterhead was unaware of the disclosure. All that he had been told was that

there were relationship problems. The only people that were aware of the disclosure were Ms Allan, Ms Smith and Ms Allan's line manager together with the HR members who had access to the fact find report. Mr Campbell and Ms Bracken who were the only ones involved in the decision not to give work at Peterhead were not aware of the disclosure and did not see the fact finding report.

5

48. Generally speaking the majority agreed with the respondent's analysis of the evidence. The claimant's position on the other hand was much less specific. In submission and indeed in his questioning of witnesses he made the point that the contract which he signed stated that relief workers would get offered work. He said that every other relief worker was offered work and he was not offered work. The respondent's representative pointed out that what the document actually says is "may be offered work". More importantly the view of the Tribunal was that the claimant's interpretation of this document was ingenuous. The respondents have a very large number of relief workers. It is simply not the case that every relief worker is phoned up and offered work at every service. The majority accepted Ms Allan's evidence to the effect that relief workers are expected to be proactive. She was absolutely clear in her evidence that in her view the principle onus for finding other work lay on the claimant. She expected him to phone around any services he was interested in until he found work. Her view was essentially that there were always going to be shifts available and that the reason the claimant didn't get shifts because he was not proactive enough. In any event she had gone beyond what she felt she was required to do and made the arrangement with Mr Campbell which, at the time she made it, she had every reason to believe would result in the claimant being offered work. The tribunal accepted this. In order to succeed in his claim the claimant has to show that the detriment suffered by the claimant i.e. not being allocated shifts was "on the ground that he had made a protected disclosure". The protected disclosure has to be the reason or one of the reasons for the detriment. In this case the tribunal felt that there were several points in time which we should be looking at.

10

15

20

25

30

49. The first related to the fact that the second shift at Caroline's Crescent was cancelled. The respondent's position was that the claimant had already conceded in the agreed statement of facts that this was by agreement. The view of the tribunal was that this indeed the case. That having been said the tribunal decided that having heard the evidence ourselves and taken our own decision on the matter, as a matter of fact the reason for the shift being cancelled was indeed that this was what the parties agreed. The shift had not gone well. Ms Allan was going to have to carry out an investigation. She suggested that whilst she was doing this the claimant would not wish to be doing a shift there. Even the claimant's evidence made clear that whilst the original suggestion came from Ms Allan this was something that he agreed to. The Tribunal believed that Ms Allan's evidence was probably more accurate in that she clearly said that the claimant did not appear bothered by this. The second shift was cancelled on the ground that both the claimant and the respondent agreed to it. The second point in time related to the claimant not being offered work in Peterhead. The Tribunal accepted Mr Campbell's evidence that this was on the ground that having looked closely at his requirements going forward he did not have any vacancies and did not want to take on any new relief staff so as to avoid bombarding the service users with new faces. The Tribunal were quite clear that this decision was not made on the ground of the claimant having made a protected disclosure not least because neither Mr Campbell nor his manager knew that the claimant had made a protected disclosure.

25 50. The third point in time related to the period between the claimant contacting Ms Allan and his resignation.

51. During this period the position is that the claimant was told that there were vacancies in Cults and Mastrick. Although his position at the Tribunal hearing was that he would have taken them he did not make any attempt at the time to investigate this further. In addition he did not take any of the steps which Ms Allan felt he should have taken to obtain other work himself. He did not attempt to telephone Ms Allan and the evidence suggests that all he really did was send a total of three e-mails the third less than 48 hours before his

resignation. Ms Allan's position over this period is that she normally prefers to speak to people directly rather than by e-mail. Her position is that she tried to telephone the claimant over this period but was unable to get hold of him. The claimant's evidence was that he had no missed calls from her. The Tribunal was then left in a similar position to that in relation to Mr Campbell where Mr Campbell said that he had tried to telephone the claimant but the claimant's position is that he had no missed calls from Mr Campbell either. Even leaving aside the position of the phone calls what the tribunal considered we were required to look at was whether Ms Allan's failure to do anything about finding the claimant work was on the ground that he had made a protected disclosure.

52. With regard to the disclosure itself Ms Allan's evidence was that the disclosure and indeed the other matters raised by the claimant were things which the respondents took in their stride. They act in a highly regulated industry. Many of the structural defects mentioned by the claimant were already in the list of things to be done and those that were not already on the list were actioned during the fact find. Ms Allan carried out a fact find which was a fairly routine matter and the matter was addressed. Her evidence and that of Ms Smith was that the resident who had allegedly been abused had a very good relationship and close relationship with the member of staff accused of abusing him and that having investigated the matter the respondents had no further concerns. The majority of the Tribunal accepted Ms Allan's evidence to the effect that disclosures did not put her up nor down one bit. On the other hand her clear evidence was that she believed that there would be plenty of work available and that the claimant could have accessed this by doing what he had been told to do at induction and simply contacting the various managers in the area where he would be happy to work. Her understanding at the time was that he wanted to work within easy commuting distance of Ellon. This is backed up to some extent by the fact that when she told the claimant that there were jobs in Aberdeen City he did not explore the matter further. The view of the majority therefore was that the claimant's claim did not succeed.

53. Even if we had been persuaded that the failure to offer shifts was due to the protected disclosure we would have found that the claimant was not entitled to the career long loss which he was seeking. Any compensation could only be based on those losses which flowed directly from the failure to offer him work. We agreed with the respondent's representative that the claimant was being paid marginally above the rate of national minimum wage and that an alternative job would have been very easy for him to find if he had wished to do so. His decision to leave the care industry was not one which could be laid at the respondent's door and the idea that they were required to compensate him for lifetime career loss at the rate for a health and safety manager was ludicrous.
54. The view of the minority was that he felt that more should have been done by the respondent to enable the claimant to get further shifts. He saw their failure to do so as a deliberate failure to act and felt that on the balance of the evidence the respondents had not overcome the burden of proof on them to show that the non-allocation of work was not done on the ground that the claimant had made a protected disclosure.
55. As noted above, the dissenting member did not accept Ms Allan's evidence to the effect that the onus was always on the claimant to try and find shifts. He accepted that whilst, as a general rule, the respondent may not have been responsible for actively seeking out relief shifts they were responsible, in the case of a new employee like the claimant, for arranging a familiarisation visit and shadow shifts. They had initially done so by arranging a familiarisation visit and two shadow shifts at Caroline's Crescent.
56. The dissenting member felt that by doing this Caroline's crescent was therefore the claimant's designated place of employment and Toni Smith as service manager of that home was therefore his manager. She agreed in evidence that as the claimant was linked to her service she was his manager. She also agreed in evidence that she was responsible for his ongoing training and supervision and his readiness to undertake unsupervised shifts. When

she was asked by the claimant why his training had not been completed she said "I am not really sure".

57. The dissenting member also noted the agreed statement of facts also refers
5 to training and supervision and the induction process.

58. Furthermore, the dissenting member considered it highly relevant that
Ms Allan gave evidence to the effect that once the investigation process was
over then the claimant could have gone back and completed further shifts at
10 Caroline's Crescent. He felt it was significant that although the investigation
process appears to have been signed off as completed by 17 July the
claimant was not told that he could go back to Caroline's Crescent at any
point between then and his resignation on 29 July. He felt she had the
opportunity to do this. Toni smith's evidence was to the effect that she did not
15 know the claimant could come back as Ms Allan had not told her. She was
clear that the claimant would not have known that he could ask for shifts at
Caroline's Crescent if nobody told him.

59. The dissenting member considered it relevant that the email Ms Allan sent to
20 Mr Campbell referred to the claimant being "temporarily redeployed" from
Caroline's Crescent which would also imply that the plan was that he could
return for shifts there once the investigation was complete. The dissenting
member felt that this was important given that in his email of 26 July the
claimant asked about the investigation and also the fact that the claimant had
25 previously (on 14 July) stated that the issues he had raised appeared to be
stopping him get further work with the respondent.

60. The minority member felt there was merit to Mr. Cochrane's statement that
he felt "she wanted him out".

30

61. The minority member's analysis was that the detriment was not getting
another shift. If Ms Allan had told the claimant he could get shifts at Caroline's
House then he would have got one as there were shifts available

62. He felt that it was deliberate. He also felt that neither Ms Allan nor Tracey Smith had given any good reason for not offering shifts. They were both aware of the protected disclosure.

5 63. All of the above matters led the dissenting member to the view (contrary to the majority) that Ms Allan's and Ms Smith's failure to take active steps to find work for the claimant was deliberate and therefore amounted to a deliberate failure to act in terms of s49B.

10 64. He also felt that there were matters not fully explained in evidence. There had been some reference to shifts being available at services in Inverurie. This is no further from Ellon than Peterhead. The matter was not explored by the parties or indeed raised in evidence by the claimant but the dissenting member felt it could be relevant. He also felt that there was no explanation
15 for the differing evidence between the parties relating to telephone calls. There was a divergence between the evidence of the claimant and Mr Campbell regarding how often the claimant had tried to get in touch with him. There was also a divergence between the claimant and Ms Alan with Ms Allan saying she had tried to contact the claimant but couldn't get through
20 and the claimant denying he had any missed calls.

65. Finally, although the dissenting member would have found that the claimant had suffered a detriment as a result of making protected disclosures he rejected the claimant's position in relation to remedy. The claimant would only
25 be entitled to compensation for the shifts he would otherwise have worked for the claimant for a short period until he could reasonably have been expected to find other work in the care sector. He would not have been entitled to lifelong loss of earnings at the salary of a health and safety officer.

30 POSTSCRIPT

66. As noted above all three members of the tribunal found this to be a difficult case. All three members were agreed that the management and record keeping of the respondents fell short of what we would expect. Whilst the whole tribunal rejected most of the claims and the majority rejected that part

of the claim (accepted by the minority) relating to the period after 1 July the respondent may consider whether in future they should do more to remain in contact with workers in the position of the claimant and be more transparent to them as to exactly how the process of allocating shifts is carried out and what is expected of the worker.

5

10

15

20

25

30

Employment Judge:**Date of Judgment:****Date sent to parties:**

35

Ian McFatridge**04 October 2019****08 October 2019**

40

