



EMPLOYMENT TRIBUNALS

Claimant: Miss K A Jardine

Respondent: Hawthorne Care Limited

Heard at: Nottingham **On:** Wednesday 2 October 2019

Before: Employment Judge Blackwell (sitting alone)

Representatives

Claimant: Mr D Gray-Jones of Counsel

Respondent: Mr W Lane, Peninsula

RESERVED JUDGMENT

The decision of the Employment Tribunal Judge is that:-

1. The Claimant's claim of unfair dismissal pursuant to Section 103A of the Employment Rights Act 1996 (the Act) fails and is dismissed.
2. The Claimant's claim of breach of contract in respect of a failure to pay notice pay fails and is dismissed.
3. The Claimant's claim of unlawful deduction from wages fails and is dismissed.
4. All of the remaining claims of the Claimant are dismissed on withdrawal by the Claimant.

RESERVED REASONS

1. Mr Gray-Jones ably represented the Claimant and he called her and her mother Ms Smithurst to give evidence. Mr Lane represented the Respondents and he called Ms Green the Service Manager, Ms Cox the Cook, Mr Walton a Care Assistant and Mr Sudera the Director and owner of the Respondents.

Issues and the Law

2. Mr Gray-Jones made clear that the only claim being pursued in relation to Ms Jardine's dismissal was pursuant to Section 103A of the Act:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.]"

3. In that regard the protected disclosures being relied upon for the purpose of Section 103A are as follows:-

a. That on 16 November 2018 and repeated in writing in a grievance letter dated 19 November that she did not have moving or handling training so that she could not safely deliver care to elderly residents.

b. That in the same grievance letter she disclosed that her training record was inaccurate in regard to whether or not she had undergone moving and handling training. It is common ground that the training record at that time was inaccurate.

4. The relevant law as to what is a protected disclosure is set out in Sections 43A and 43B are as follows:

“Section 43A Meaning of “protected disclosure”

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

“Section 43B Disclosures qualifying for protection.

(1) In this Part a “ qualifying disclosure ” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [F2 is made in the public interest and] tends to show one or more of the following:-

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

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

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

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

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

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

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

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

5. Ms Jardine also pleads that she was not paid her notice pay and/or that unlawful deductions were made from that notice pay such as the cost of a CRB certificate. However Ms Jardine gave no evidence as to the sums claimed, nor was there such a claim in her schedule of loss.

6. Turning again to the issue of dismissal it will be necessary for Ms Jardine to establish that she had made one or more protected disclosures and that as a consequence of doing so that was the reason or if more than one the principle reason for her dismissal which it is common ground was effected by Mr Sudera’s letter of 20 November giving an effective date of termination of 27 November 2018.

7. In summary Ms Jardine’s case is that she was never trained in manual handling/moving or handling and that was why she refused Ms Green’s instruction on 16 November 2018. She also relies on the inaccuracy of her training records and states that the training certificate now produced in respect of training which was alleged to have taken place on 16 February 2018 (actually 8 February 2018) is a fabrication. The Respondent’s case is that Ms Green was present and underwent the same training on 16 February 2018 and thus Ms Jardine’s assertion that she was not trained is false and that the real reason she refused to work with the elderly was because she did not wish to do so. The Respondents also assert that Ms Jardine had been guilty of disruptive behaviour twice, firstly on a night shift in October and again on 16 November.

Findings of Fact

1. Ms Jardine worked with Ms Green at the Chestnuts Residential Home which is next door to the Respondent’s property Highbury. Ms Green moved to Highbury in June 2018 and Ms Jardine followed her beginning a period of employment with the Respondents on 10 September 2018 on a probationary basis. Paragraph 6 of her contract of employment reads in part as follows:

“Probationary Period

New employees are subject to the satisfactory completion of a six month probationary period. The home reserves the right to extend this period at its discretion. The home will assess and review your work performance during this time and reserves the right to terminate your employment at any time during your probationary period.”

2. Next door to Highbury were premises also owned by the Respondents known as Cedar House. It was the Respondent’s intention to open Cedar House as a residential home for those with learning difficulties after a period of refurbishment. It is common ground that Ms Jardine was employed with the intention of her working as a Care Assistant at Cedars.

3. Unfortunately there were delays in completing the refurbishment at Cedars and in the meantime Ms Jardine was mainly employed as an Administrative Assistant at Highbury.

4. Ms Jardine accepts that she worked one shift at Highbury caring for the elderly residents. The Respondent's evidence is that she worked a number of such shifts during October and November 2018. I am satisfied on the evidence of Ms Cox and Mr Walton that she worked at least two such shifts caring for the elderly residents.

5. It is clear that one of those shifts ie the one that Mr Walton also worked on ended in a disagreement between Ms Jardine and her colleagues and I am satisfied that she threatened to go home but was persuaded to stay.

6. It is common ground that on 16 November 2018 Ms Green asked Ms Jardine to do a further shift caring for the elderly. It is also common ground that Ms Jardine refused citing a lack of manual handling training. Ms Green asserts in addition Ms Jardine stated that she did not wish to work with elderly residents. Ms Jardine denies such a statement.

7. At the heart of this dispute is whether or not Ms Jardine was trained in respect of manual handling. I shall return to that issue in my conclusions.

8. It is common ground that Ms Jardine left on 16 November and performed no further work though she did return to the home on 19 January and looked at amongst other things her training records. Those training records showed that she had done manual handling on 20 August 2018 ie before her employment with the Respondents began. Ms Green accepts that that entry was inaccurate but now asserts that the training in fact occurred on 16 February 2018 and that she, Ms Green also underwent that training alongside Ms Jardine.

9. On 19 November (see page 55) Ms Jardine wrote a formal letter of grievance to Mr Sudera. The main essence of the grievance was set out as follows:

"The issue which has led to me lodging this grievance concerns elderly care and began on 16 November 2018. I am being forced to either do elderly care which I am not trained for or give in my notice.

I have previously tried to resolve these problems at work informally.

The manager Emma Green raised this issue with me on 16 November 2018 that I will be going on elderly care. I said I do not wish to do elderly care as I was under the impression I signed up to be a Support Worker for learning disabilities at Cedar House and I shall not do elderly care as I am not trained to do this task required. I was basically left with the choice I either do elderly care or give in my notice. I have no moving or handling training but yet in my file at work it stated 20/08/18 but I never attended training that day due to being at my previous job the Chestnuts even though I have no moving or handling I was still made to do elderly care in October."

10. In receipt of that letter Mr Sudera spoke to Ms Harris and I find as a fact that Ms Harris told Mr Sudera that Ms Jardine had been trained in manual handling alongside herself. We also find that contrary to Mr Sudera's evidence in chief which he retracted in cross examination he did not himself in November 2018 examine Ms Jardine's training records but relied upon what he was told by Ms Harris.

11. His response to the grievance is contained in a letter of 20 November at pages 56 and 57. He asserts in that letter that Ms Jardine had carried out care shifts and that the instruction issued by Ms Harris on 16 November was a reasonable management request. He rejects Ms Jardine's proposal that she work in the kitchen or at some other task and terminates her employment with effect from 27 November 2018.

Conclusions

Did Ms Jardine make protected disclosures?

12. The first such potential disclosure is whether or not Ms Jardine had been trained in manual handling. I have found this a difficult issue to resolve. Ms Jardine was a convincing and straightforward witness. Ms Green's evidence was a times confused but as to the central issue of whether or not Ms Jardine was trained alongside her on 16 February 2018 she too was convincing.

13. The Respondent's also advance the documentation principally the certificate at page 44 issued by Shaw Training Services and the subsequent e-mail trail between Mr Sudera and Ms Green which began only after this litigation was initiated. If Ms Jardine is right and the certificate is a forgery then either all of the contents and e-mail trail advanced by the Respondents are concocted by them or Ms Shaw has entered into a dialogue with the Respondents with the purpose of providing a false certificate. I accept that there are anomalies, in particular that on page 84 in that in respect of one course ie "legionella awareness" each attendee signs for their attendance whereas in respect of "moving handling" the attendees ie Ms Green and Ms Jardine do not. I also note that the certificate itself is dated 15 February and Ms Green explains that the training in fact occurred on 8 February 2018 but the certificate was created on 15 February. On balance I prefer the Respondent's evidence and that the relevant training did take place on 8 February 2018. I do not believe that Ms Jardine was deliberately misleading the Tribunal. I accept that she genuinely believes that she was not trained on 8 February 2018 or at all. She may have been misled by her inaccurate training records that she examined shortly before her dismissal. However in the context of whether this is a protected disclosure, in my view it does satisfy the definition set out in Section 43B subsection 1 of the Act in particular Section 43B(1)(b) and (d).

14. As to the second disclosure, clearly the training records in November 2018 were inaccurate and that is a serious matter. The fact is that Ms Green kept the records of those of her staff whether employed at the Chestnuts or latterly at Highbury at home. I express no view as to Data Protection issues because this is not a matter for me but the second disclosure made in the grievance letter as to the training records in my view does satisfy the Section 43B subsection 1 definition in particular Section 43B(1)(b) and (d).

15. Did the making of that disclosure lead to Ms Jardine's dismissal ie was it the reason for her dismissal or if more than one the principle reason for her dismissal? As I found above Mr Sudera did not himself look at the training records but relied upon information verbally given to him by Ms Green. It is clear that at the time that he wrote the letter of dismissal he genuinely believed that Ms Jardine had been properly trained, that she had prior to 16 November worked shifts caring for the elderly and that she had prior to 16 November had one altercation with her colleagues in which she had threatened to go home as indeed she had also on 16 November but in that case had carried out the threat.

16. There is no evidence that the error in the training record was in the mind of Mr Sudera nor did he check the training record itself because he believed Ms Green's evidence that Ms Jardine had been properly trained.

17. I am therefore of the view on balance that the reason for dismissal was that Mr Sudera believed that Ms Jardine had refused a reasonable instruction, had on two occasions had altercations with colleagues and that he did not consider that it was appropriate for an employee to seek to dictate what work she could or could not do. Accordingly Ms Jardine's claim under Section 103A of the Act must fail.

18. The claims of failure to pay notice pay and unlawful deduction from wages appear on the pleadings to be linked. However Ms Jardine has advanced no evidence as to the sums that she says she has lost either in her witness statement or in her schedule of loss. She has not therefore proved her case and those claims are both dismissed.

Employment Judge Blackwell

Date: 07 November 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE