Case No: 1403356/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Thomas**

Respondent: **Waypoints Care Group Limited**

Heard at: **Southampton**

On: **26, 27, 28 November 2019, 4 December 2019 (in chambers)**

Before: **Employment Judge Dawson, Ms A Sinclair, Mrs C Earwaker**

Representation
Claimant: In person
Respondent: Miss Bell, counsel

RESERVED JUDGMENT

The claimant's claim is dismissed.

REASONS

Introduction and Background

1. Mr Thomas brings claims of being subjected to detriments for making public interest disclosures contrary to section 47B of the Employment Rights Act 1996 (the detriment claim) and constructive unfair dismissal for the automatically unfair reason that he had made a public interest disclosure. Between the close of the claimant's evidence and the commencement of the respondent's evidence, the claimant informed us that he no longer pursued an assertion that he was an employee.

2. Two Preliminary Hearings have taken place in this case, one on 12th February 2019 and one on 13 June 2019. The latter hearing led to a Case Management Summary which appears at page 303 in the bundle and sets out a list of issues..

3. The claimant's witness statement asserted a wider number of detriments to which he says he was subject than were identified at the hearing on 13 June

2019. The respondent resisted the application by the claimant to widen the issues. Having heard argument we concluded that if the claimant was to pursue the allegations made in his statement (ultimately, he sought only to pursue the allegation in paragraph 17 of his witness statement), he would need to amend the claim. The allegation did not form part of the claim form. For reasons that we gave orally, we did not permit that amendment and decided the case in accordance with the list of issues. In particular, we accepted that if that allegation was to be pursued, further disclosure would need to take place and the hearing would have to be vacated. It was not in the interests of justice, having regard to the overriding objective, to permit the amendment in those circumstances.

4. The hearing was listed for 3 days. Regrettably, on the first day of the hearing counsel for the respondent was ill and unable to conduct the case. Having discussed the matter with the parties, the tribunal read the case papers on the first day and started the hearing with the parties on the 2nd day. We were able then, giving the parties the time in set out in the timetable set at the hearing on 13 June 2019, to conclude the evidence and submissions by the end of the 3rd day. The tribunal members then met to reach a reserved decision in the following week.

5. For the purposes of determining the claim we heard from Mr Thomas, his witness Ms Forster, and, for the respondent, Mrs Blake, Mr Baxendine and Mr Harrison. We were provided with a bundle of documents and references to page numbers in this judgment are to that bundle except where stated.

<u>Background</u>

6. The respondent operates nursing homes, particularly, for the purposes of this case, one in Upton. The claimant is a qualified paramedic.

7. On 23 November 2016, the claimant was offered a post of Lifestyle Assistant (page 8). The Lifestyle Assistant role is, perhaps, more commonly known as a carer.

8. On 23 December 2016 the claimant signed a contract. It was headed "Terms Of Appointment For Bank Workers". Immediately above Mr Thomas' signature are the words "I hereby confirm my acceptance of the terms of appointment on the Company's bank system as set out above." At the outset the terms state "this statement sets out the terms of your appointment to the bank register… Bank workers can refuse work offered by the Company and the Company is not obliged to offer work to bank workers. Bank workers only receive payment of those hours worked. Bank workers are not employees and, as such, have no entitlement to guaranteed or continuous work. Bank workers have no right to complain of unfair dismissal… You may be removed from the bank register by the Company at any time and for any reason without notice." (Page 9). The claimant was to be based at the Upton home.

9. On 12 June 2017 a letter was sent to the claimant headed "Confirmation of Successful Probation". It's stated "your probationary period counts towards your continuous service with the company and all terms and conditions of

employment set out in your original contract will continue to apply to your ongoing position…" (Page 35).

10. The claimant's partner, Amanda Forster, also worked for the respondent. She started work as a Lifestyle Assistant in August 2017 at the Upton home.

11. Working at the Upton home was not the claimant's main job and we accept the evidence of Mr Baxendine that during his 15 months at Upton, the claimant's gross pay was £5215.50, he had worked 580.5 hours of which 47% were worked in 3 of the 15 months.

12. Ms Forster worked on the night shift of the 23rd/24th December 2017. The claimant was not working on that night. He attended at the respondent's premises on the morning of the 24 December 2017 to pick the claimant up. There was, at times in the evidence, a suggestion that the claimant attended at the respondent's premises in order to assist Ms Forster to make entries into the computer. We do not need to decide whether the predominant purpose of his attendance was to pick up Ms Forster or to make entries in the computer.

13. Upon arriving at the respondent's premises, the claimant logged on to the respondent's computer system using his own credentials. He then made entries on the computer system which, he says, were based on what he was told by Ms Forster. He also made entries on the hand written resident records based on what Ms Forster told him and initialled those records using her initials. Ms Forster explained to us that the reason for the claimant doing so was that she had been unable to log on to the system to complete her notes and so the claimant was logging on for her. She states that she was then going to enter the hourly check details herself but was called away to deal with a resident. She then passed the details of the checks to another worker, Steve, who was going to enter them but he also got called away and so the claimant completed the notes. That is largely consistent with a letter from the claimant dated 9th of May 2018 to Mr Harrison stating "as soon as Mandie had finished with a resident they both got called to deal with resident MF, I completed the paperwork for her and as she was the person who made the checks it was her initials that were used. It may have confused matters using my initials as that would look like I had done the checks." (Page 190).

14. As is apparent, each staff member was issued with their own unique login details for the computer system. The respondent has a written policy in respect of the computerised records including

    a. "all entries in a record must be dated… and signed", page 86

    b. "records must never be falsified", page 86

    c. "if a member of staff login fails then they should enter under a group login but ensure that they have written their name after entry.", Page 87.

15. Ms Forster's evidence was that she had not been properly trained on how to use the computer system and was not confident in using it. Her evidence

was also that it was common practice for staff to enter records on behalf of other staff members who were busy; if one Lifestyle Assistant was moving from one patient to the next due to pressure of work, somebody else might record their observations. An example of that appears at page 44 of the bundle where, in respect of the note at 23:21 hours, the observations recorded were Ms Forster's but the person who entered the notes was her colleague, Kim.

16. Moreover, Ms Forster told us that the practice was well known – common knowledge- and extended to making entries on handwritten records on behalf of another Assistant.

17. We find that the practice of one person being logged onto the computer and that person entering the details of observations made by another Assistant was common place. We also find it was common place for one person to enter the observations of another onto the handwritten records. We find that Ms Blake was aware of that practice. Moreover, whilst we note that Ms Blake suggested that where an Assistant could not access the computer through his/her own login he/she should use a group login, when it was suggested to her, in cross examination, that at the meeting on 19 January 2018 she had not known where the group login details were, her answer was "I cannot exactly remember". We find that evidence to be indicative of the fact that the group login details were not regularly used, and there was a practice of staff making entries on behalf of others. It was because the group login details were not used regularly that Ms Blake was unsure of where the login details were in the meeting on 19 January 2018.

18. We also find it likely that Mr Harrison, Director of Operations at the time would have been aware that the practice was commonplace. It was not, however, common place for people who were not on shift (even if they were bank staff) to make entries on behalf of others.

19. On 27th of December 2017 both the claimant and Ms Forster raised written concerns about another member of staff (hereafter, the nurse). The complaint related to the events of 23/24 December 2017 stated that in respect of 2 residents, ED (also referred to in the evidence as TD and patient B) and KR (also referred to in the evidence as patient A) the standard of care provided by the nurse had fallen short (page 90). That is the first alleged protected disclosure and is admitted by the respondent to amount to such.

20. Following receipt of the claimant's written statement, on 28 December 2017 Ms Blake of the respondent emailed the claimant "with regards to the statement… I would need to organise a meeting with you to discuss the matter. Can you please let me know your availability and we can agree the date and time that is more suitable." (Page 97). It took some time to arrange the meeting through no real fault of the respondent or claimant, so that the meeting did not take place until 19 January 2018.

21. In order to consider the concerns raised by the claimant, Ms Blake had reviewed the care records and noticed certain discrepancies between what they showed and the statements from the claimant and Ms Forster. She discovered that the claimant had completed electronic entries in the records

despite not being on shift or responsible for care. She noted that records indicating that one of the residents was not in pain (the entry of a 0) had been altered to a tick. She also discovered that most day and night staff were aware that statements had been made about the nurse by the claimant and Ms Forster which she regarded as a lack of confidentiality regarding a fellow member of staff.

22. Ms Blake sought a medical opinion from a Registered General Nurse and the respondent's Head of Care who both confirmed that the medication and dosage given by the nurse to KR would not have affected that resident's mobility (one of the concerns raised by the claimant).

23. Ms Blake collected various evidence which she felt showed that the nurse had acted appropriately in respect of pain relief for the other resident, ED.

24. At the meeting on 19 January 2018 Ms Blake discussed with the claimant that he had logged into the computer system and stated that Amanda Forster should have asked somebody who was on shift to log in for her. She also stated that he should have noted that he was recording what he had been told by somebody else and went through some of the resident's notes with the claimant. She warned the claimant that if matters happened again he would be disciplined. She did not intend to take further action. We find that the meeting was part of the investigation into the claimant's concerns raised in respect of the 2 residents as well as, in part, being to admonish the claimant.

25. The claimant asserts, in his witness statement although not in the issues he identified with Employment Judge Gray, that this meeting was an act of detriment. We find there was nothing inappropriate in this meeting taking place. Whilst it is apparent that, prior to the meeting taking place, Ms Blake had largely concluded that there was no substance in the claims against the nurse, it was not wrong for her to meet with the claimant in circumstances where he had raised written concerns of a serious nature. There was nothing inappropriate, in that meeting, in Ms Blake exploring with the claimant why he had logged on and completed the records and her telling him that she thought Ms Forster had done the wrong thing. The meeting was a normal management response to matters as they arose.

26. By email dated 12 February 2018, Ms Blake wrote to the claimant setting out her conclusions in respect of the investigation. She concluded stating "the nurse in question has been talked to and as you are aware she does not work here as she decided to resign. The CCG is aware of the incident… and has no concerns with the care provided to ED as some follow-up information was provided. Please let me know your feedback on this as I have to follow the disciplinary and whistleblowing procedure…" (Page 108).

27. By reply on the same day the claimant sent a lengthy letter in which he accused the nurse of using a false name or not being registered with the NMC and stated that he did not hesitate to say that the nurse was incompetent. He made complaints about the treatment of Ms Forster and stated that she was suffering a detriment as defined in the Public Interest Disclosure Act 1998. He made complaints about his treatment stating "you called me into a meeting, not about the incident as purported, but to tell me

that how I entered the notes on the computer, and how that was wrong, you are already aware I had only drawn the incidents to your attention and could provide no further information than I had already given because I had informed you of this in an email. If notes are entered on a computer under my name they will be my notes, because we could not log on under Amanda's login and we did not know about the agency account… I can see that if I had written that the notes were passed from Amanda that it would have helped, but I do not accept that it, in any way, made your investigation more difficult. I must point out that I have not received any training on the electronic note keeping…" (Page 110).

28. On 13 February 2018 the claimant sent a letter to the Dorset Adult Safeguarding Triage Team. He stated that on the 24 December 2017 he had gone into work "purely to assist Amanda Forster to enter notes onto the computer…" He then set out his concerns in relation to the nurse. (Page 112). That is the 2nd alleged protected disclosure and is admitted by the respondent to amount to such.

29. In February 2018 the claimant ceased to do any work for the respondent. It is not suggested that he was in any way prevented from doing shifts but he simply chose not to.

30. On 19 February 2018, the claimant wrote to Mr Harrison, Director of Operations for the respondent. He informed Mr Harrison that he had made safeguarding concerns to Dorset County Council against Ms Blake and that he had raised concerns with the Nursing Midwifery Council concerning the nurse. He stated that he would like to make a formal complaint against Mrs Blake and stated "with good leadership from Director level the good name of Waypoints (Upton) Ltd can be saved from heading into a downward spiral, would also boost the moral of your hard-working staff, which has been damaged since May as hinted at earlier" (sic, page 134).

31. By email of the same day Mr Harrison stated "please except this email is acknowledgement that I will investigate this matter…" (Sic page 135).

32. On 16 March 2018 Mr Harrison wrote to the claimant stating "this is just a courtesy email to inform you that I am still in progress with investigating your complaint regarding Mrs VB, as you are aware your complaint came to me the day that Mrs VB went on leave for over 2 weeks, this time extended…" (Page 137).

33. On 11 April 2018 there was a Safeguarding Adults Enquiry Planning Meeting between representatives of Dorset County Council and representatives of the respondent. The minutes are at page 160. In the part of the meeting which dealt with the resident ED, a representative from Dorset County council queried why the claimant was making the allegations when he was not on duty. The minutes record that Mr Harrison "reported that John Thomas will be receiving letters from Waypoints. 1. For gross misconduct for falsifying records 2. Response to a complaint against VB. [Mr Harrison] stated that a disciplinary hearing will take place re-gross misconduct and John Thomas is not allowed to enter the building in the meantime." (Page 167).

34. Following the meeting, on the same day, Mr Harrison sent 2 letters to the claimant.

35. The first was stating that he did not uphold his complaint against Mrs Blake which he described as having been raised under the company's whistleblowing policy. He concluded the letter "on an entirely separate note, you will be receiving a further letter from me in relation to a different matter that has come to my attention during the course of the above investigation" (page 158). The letter did not reveal any detailed investigation into the complaint against Ms Blake simply stating "having looked into the circumstances of the case, and reviewed notes and records as well as the actions that the manager undertook, my findings are that Mrs Blake followed the correct procedure…" (Page 158).

36. The 2nd letter sent on that day was an invitation to the claimant to attend an investigatory meeting. Mr Harrison stated that he had regrettably found evidence to suggest that the claimant may have committed misconduct. The misconduct alleged was a falsification of company documentation and that the claimant may have discriminated against other members of staff based on their ethnicity by lodging unfounded complaints against them. The letter stated that "this is purely a fact-finding meeting" and stated that the claimant were suspended from work while matters were investigated. The letter stated "you should not consider this suspension or the investigation process itself as being in any way tantamount to dismissal, or an indication that a decision has already been made…" (Page 156).

37. According to Mr Harrison, the 2nd letter was sent because in the course of his investigations, he had inspected various care documents including the hourly check forms for the 2 residents that the claimant had raised safeguarding concerns about. He noted that on the handwritten forms a different "backwards tick" was used which did not match the way in which other ticks had been inserted by the person using the same initials earlier in the form. Upon further investigation Mr Harrison discovered that the backward tick appeared to belong to Mr Thomas as it matched his signature. He said, in evidence, that he had spent half a day discovering that the backwards tick belonged to Mr Thomas. In his witness statement Mr Harrison also said that the tick issue "coupled with some discrepancies that Mrs Blake had found earlier seemed to indicate that the claimant had not been on duty at the time the alleged safeguarding concern had been raised but had appeared to have completed some of the care paperwork on behalf of his girlfriend Ms Amanda Forster" (Paragraph 7). However, it was not the case that discrepancies Mrs Blake had found *seemed to indicate* that the claimant had not been on duty at the time, the claimant had already admitted that he was not on duty at the time. The witness statement, in this respect, does not appear to us to be a straightforward rehearsal of events. Further given, as is evident, that Mrs Blake had told Mr Harrison that Mr Thomas had not been on duty but completed some of the paperwork on behalf of Ms Forster, it is difficult to see why he would need to spend half a day working out who the backwards tick belonged to. This evidence was not persuasive.

38. Moreover it is striking that, suddenly, in the invitation to the investigatory meeting, one of the allegations is that the claimant may have discriminated against other members of staff based on their ethnicity by lodging

unfounded complaints against them. This is a serious allegation (even at an investigatory stage) and yet it is unclear where it came from. The only possible basis for the allegation was that the nurse and Ms Blake were not British. However, neither of them had complained of discrimination and there was no evidence to suggest that the claimant had been motivated by race. When asked about it, Mr Harrison stated that representatives of Dorset County Council asked why the claimant would have made the allegations when they could not find a reason for them. He told us "ethnicity came up and so I asked the question". The minutes of the meeting, however, do not make reference to ethnicity. Again this evidence was not persuasive.

39. Having heard Mr Harrison give evidence, we find that there was more than one motivation for an investigatory process in respect of the claimant. Representatives of Dorset County Council had raised their concerns about the claimant's conduct and he wanted to be able to show to Dorset County Council that was a matter he took seriously. However, we find that he was also irritated by the fact that the claimant had made his original complaint and then doggedly pursued it, both by making complaints to Dorset County Council and by making a complaint about Mrs Blake to him. Whilst we do not find that, at this stage, Mr Harrison had decided to impose a disciplinary sanction on the claimant, his irritation at the disclosure was part of the reason for deciding to investigate him. It was more than a trivial influence. To approach matters in another way, had Mr Harrison been made aware of the allegations against the claimant in circumstances where there had been no protected disclosures, we do not think he would have pursued an investigation. The allegations, when understood against day-to-day operations were not particularly serious.

40. In summary, given

    a. the fact that Mrs Blake had already decided to take no further action against the claimant,

    b. the unpersuasive evidence referred to in paragraphs 37 and 38 above,

    c. the fact that the actions of the claimant on the day were not particularly out of line with general practice (and were only out of line to the extent that he was not on shift when he made the entries),

    Mr Harrison has not persuaded us of the reasons why he chose to start an investigation against the claimant and we find, on the balance of probabilities, that it is likely the decision was materially influenced by the fact of the disclosures.

41. By email on 13th of April 2018 the claimant requested a copy of the original notes taken during the meeting on 19 January 2018 (page 173). The request was made to Karen Cowie who forwarded the email to Mr Harrison asking "please let me know Andrew if it's okay to send them" (page 173).

42. On the same day the claimant wrote to Ms Cowie resigning with immediate effect. She forwarded that email to Mr Harrison stating "… Shall I just send

the company standard acceptance of resignation? Also I have attached the notes from the meeting that John had with Veronika on 19.01.2018, unsure if we need to send them due to resignation which followed a few hours after." (Page 174)

43. On 20th of April 2018 Mr Harrison sent a lengthy letter to Mr Thomas stating, in the course of it that, "I would be clear that there is no pressure or obligation to resign and I would ask that you reconsider this and attend an investigation meeting so that I can explore the allegations (and any relevant evidence with you) fully and fairly, and obtain your account of events." He went on "… I would like to be clear that while the allegations of potential misconduct are linked to the complaint that you made, the reason for investigating the disciplinary process is not because you made a protected disclosure." (Page 175).

44. On 23 April 2018, Mr Thomas withdrew his resignation and again requested the minutes of the meeting of 19 January 2018 (page 178). He also requested notes from the night of 23/24 December for the residents in question including electronic notes, manual notes including fluid and food charts, better off together and a copy of the medications record. He stated that the request was to show that the complaint was made in good faith. We will return to the latter request below.

45. On 30 April 2018, Mr Harrison wrote to accept the withdrawal of resignation and stated that he was happy to send notes from the meeting on 19 January and the safeguarding procedure but was not willing send information for the residents due to data protection issues. He invited the claimant an investigatory meeting on 8 May (page 179).

46. The claimant complained that the notes that he had been sent did not reflect the meeting of 19 January (page 181). He stated "I saw notes being made and the notes supplied do not reflect the meeting the 19th, that is fact". In cross examination the claimant was asked about the notes and accepted that Ms Blake had, in the meeting on 19 January, discussed KR's situation with him and her medication, that there had been a discussion about resident TD[1] also. He also accepted that she showed him some of TD's notes.

47. No other minutes have been disclosed in the course of these proceedings. The emails set out above do not suggest there was any attempt by the respondent to avoid sending the minutes to the claimant or check or amend the minutes before they were sent. Ms Cowie simply asked Mr Harrison if it was acceptable for her to send the notes. There is no suggestion that he prevaricated and, once the claimant's resignation had been withdrawn, minutes were sent.

48. We find that the minutes which appear at page 100 of the bundle are the entirety of the minutes which were taken at the meeting of 19 January 2018. It is not disputed that those minutes do not record everything that was said in the meeting but they are the complete minutes. Whilst Mr Thomas makes the point that a version at page 102 of the bundle differs, in the sense that

[1] the pseudonym being used for ED at that point.

it has a signature at the bottom, that signature is simply the signature of the person taking the minutes. Whilst we accept it was added later, that does not alter the fact that the minutes of the meeting are those which appear at page 100. Those were the minutes which were sent to the claimant.

49. In those circumstances we do not find that the claimant was denied access to the complete minutes from 19 January 2018. Although those minutes are clearly not verbatim, that is not the same as saying that the claimant was denied access to the complete minutes.

50. As stated, on 23 April 2018 the claimant had requested "the notes from the night of 23rd/24th December for the residents ED and KR, in the openness and honesty framework, I would like this to include electronic note as well as manual notes including food and fluid charts, better off together and a copy of the medications record for both residents on the night in question, these notes are just for the meeting and will not be copied. The request should prove that the complaint was made in good faith and that I still believe it to be true." (Page 178).

51. On 30 April 2018 Mr Harrison replied stating that he was happy to send the safeguarding procedure but he could not send information in respect of the residents that had been asked for due to "data protection breaches". He went on "again, I would like to be clear that the allegations of potential misconduct are linked to the complaint that you made, the reason for instigating the disciplinary process is not because you made a protected disclosure." (Page 179).

52. That was a reasonable stance for Mr Harrison to take. The investigation was into the claimant's behaviour, whether the concerns raised in December were made in good faith was not in issue and the requests by the claimant were for extensive personal data. Whilst the claimant suggested in his submissions to us that it could have been redacted, that would not have dealt with the point because he was still aware of the identity of the residents and the respondent would lose control of the data.

53. The investigation meeting eventually took place on 8th of May 2018. It lasted for one hour. The minutes appear page 184 of the bundle. According to those minutes, in the meeting the claimant stated that he had been discriminated against and that the meeting was linked to the fact that he had blown the whistle. He stated that he had no intention of returning to Waypoints but had withdrawn his resignation to see the process through. In relation to the hourly check sheets for the 23rd and 24th of December, the claimant confirmed that the writing was his but he could not remember putting the initials of Ms Forster on either record. He may have done so. At that point he stated that he had no idea why he did not initial the form himself and use own name. He admitted that he should have recorded his own initials. The claimant disputes the accuracy of the minutes and, in particular, that he said he had no idea why he did not initial the form himself or that he admitted that he should have recorded his own initials.

54. We must decide whether the minutes are accurate. We find that they are. The handwritten version of the minutes is at page 184 the bundle. They appear to be a contemporaneous record of the meeting and the section

which the claimant says is inaccurate (at page 186) is written as a continuous part of the minute. We do not find, on the balance of probabilities, that the minute taker went wrong at that point, particularly in the absence of any other record. Moreover, even if the minutes are inaccurate, there is no basis for suggesting that the notetaker was in any way influenced by the protected disclosures. It is much more likely that any mistakes are a simple error.

55. On 18 May 2018, Lee Griffiths, Group Financial Controller of the respondent, wrote to the claimant stating "I am writing further to the company's investigation which I confirm has now been completed. Following the completion of this investigation, I would like you to attend a disciplinary hearing on 25 May 2018… I, Lee Griffiths, Group Financial Controller will be present to chair this hearing." (Page 194). The process was now only in respect of the alleged falsification of company records in relation to 3 clients of the respondent. Mr Harrison's evidence is that he had advised that the matter should progress to a formal disciplinary hearing.

56. The claimant again requested documentation on 20th of May 2018, firstly requesting a copy of handwritten notes of the meeting 8 May 2018 and also requesting "copies of the hourly checks for the other residents on the unit for the same times as those supplied for KR and ED" (page 199).

57. By reply on 30 May 2018 Mr Harrison stated that he would send the handwritten notes of 8 May and attached them but that he could not see the relevance of the rest of the request and asked why. He referred to unnecessary data transfer. He stated "I do not understand the relevance of the documentation you have requested. If you would like to call me to discuss further to assist you that would be beneficial in order to ascertain exactly your requests and if there is actually the need for them, if so then obviously happy to accommodate where possible and viable." (Page 203)

58. The claimant replied stating "the reason for the request for the redacted documents are to put forward my defence against these false accusations, I cannot answer for your confusion, but I should be allowed to put forward my defence and as they would be redacted of any information of the residents there is no data protection issue and as for unnecessary data transfer, it is a few photocopies." (Page 204)

59. On 19 June 2018, the claimant resigned. In his witness statement he states "no documents were forthcoming, and I resigned on 19 June 2018 because I believed that dismissal was the inevitable outcome. The failure to disclose documents by my resignation date were I believe a continuance of the fraudulent case and detriment against me." (Paragraph 15).

60. Whilst we have found that the investigation into the claimant's behaviour commenced because, in part, Mr Harrison was irritated by the protected disclosures that he had made, we do not find that the outcome of any disciplinary hearing was preordained. It is possible that had the claimant attended the disciplinary hearing the outcome would have been that either no further action would be taken against him or he was admonished in the way that Mrs Blake admonished him on 19th of January 2018.

Law

61. In this section of our judgment we set out the relevant law, excluding the law on whether a claim was presented in time or not. We deal with "time" separately below.

62. The law is found in different sections according to whether a person is alleged to have been subjected to a detriment or unfairly dismissed. S.103A Employment Rights Act 1996 provides that

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

63. S.47B Employment Rights Act 1996 deals with detriments on grounds of making protected disclosures and provides that:

    a. 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

    (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

    (a) by another worker of W's employer in the course of that other worker's employment, or

    (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

    (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

    (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

64. In respect of a claim of detriment, Harvey on Industrial Relations states "The term 'detriment' is not defined in the ERA 1996 but it is a concept that is familiar throughout discrimination law … and it is submitted that the term should be construed in a consistent fashion. If this is the case then a detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. In order to establish a detriment it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of"

65. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"

Conclusions

66. We state our conclusions by reference to the list of issues at paragraph 12 and 13 of the Case Management Summary following the hearing on 13th of June 2019, at page 305 of the bundle.

67. In respect of paragraphs 12.1.1 and 12.1.2, the respondent admits that the disclosure in writing to Karen Cowie on 27 December 2017 was a protected disclosure. The respondent also admits that the letter to the safeguarding team at Dorset County Council on 13 February 2018 was a protected disclosure. We understood the claimant to be satisfied with that concession and not to be seeking to rely upon any other disclosures. There was no assertion put before us of any other disclosures.

68. In those circumstances we do not need consider paragraphs 12.2 and 12.3 any further.

69. In respect of the allegation of detriment in paragraph 12.4.1 of the Case Management Summary, we find that the letter from Mr Harrison placing the claimant under investigation was materially influenced by the disclosures. For the purposes of clarity, it is the decision of Mr Harrison to subject the claimant to an investigatory process that was materially influenced by the protected disclosures.

70. In respect of paragraph 12.4.2, we find that Mr Harrison had not already decided to discipline the claimant before the investigation had taken place. Mr Harrison's irritation with the claimant extended only to deciding to investigate him. There was no preordained outcome.

71. In respect of paragraph 12.4.3 the claimant was not denied access to complete minutes from the meeting of 19 January 2018, to the contrary he was given those minutes.

72. In respect of paragraph 12.4.4, we do not find that the minutes of 8 May 2018 were inaccurate and, in any event, any inaccuracies not because the claimant had made a disclosure..

73. In respect of paragraph 12.4.5, whilst it is accurate to say that the claimant was denied access to the documents he requested and that could be seen as a detriment by a reasonable worker, the reason for that denial was not because of the protected disclosure. It was because Mr Harrison was, justifiably, concerned about data protection issues. His concerns could not be assuaged simply by redacting the names of the residents because the claimant was aware of which data related to which residents. In the absence of the documents being relevant to the claimant's defence at the disciplinary hearing there was no basis for disclosing them. The claimant did not provide their relevance and, in those circumstances, Mr Harrison's actions were justified. More particularly, for the purposes of this issue, Mr Harrison's decision was not materially influenced by the fact of the protected disclosures.

74. In respect of paragraph 12.4.6 the claimant may have believed that he was going to be dismissed, or his contract terminated, by the respondent

regardless of what he said. However, we do not think that that belief was reasonable or well-founded. The claimant was not subjected to a detriment in the sense that he was going to be dismissed regardless of what happened and, therefore, the resignation was not because of such a detriment. Moreover even if the issue were to be widened to take account of paragraph 15 of the claimant's statement, the failure to disclose documents was not a continuance of a fraudulent case and detriment against the claimant- for the reasons which we have given. Thus the claimant's resignation was not because of any detriment by the respondent.

75. In respect of issue 12.5, given that the claimant no longer asserts that he was an employee of the respondent, the claim of automatically unfair dismissal cannot succeed.

Time

76. That leaves the question of whether the claimant presented his claim form in time where the only act of detriment which has been proved is the decision of Mr Harrison to place the claimant under investigation.

77. In respect of early conciliation, date A and date B are both 14 September 2018. The claim was presented to the tribunal on 15 September 2018.

78. Thus any act prior to 14 June 2018 is, on the face of matters, out of time. The decision to place the claimant under investigation was made on or before 11 April 2018.

79. Section 48(3) Employment Rights Act 1996 provides:

> An employment tribunal shall not consider a complaint under this section unless it is presented—
>
> a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
>
> b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

80. Section 48 (4) Employment Rights Act 1996 provides

> For the purposes of subsection (3)—
>
> where an act extends over a period, the "date of the act" means the last day of that period,

81. The primary question for us is whether the decision to commence an investigation in respect of the claimant was a one-off act with continuing consequences, or an act extending over a period.

82. In Hale v Brighton and Sussex University Hospitals UKEAT/0342/16/LA, the Employment Appeal Tribunal held "42. By taking the decision to instigate disciplinary procedures, it seems to me that the Respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the Respondent would subject the Claimant to further steps under it from time to time." That case would point to the investigation continuing until, at least, the conversion into a disciplinary process.

83. However, in the recent decision of South Western Ambulance Service NHS Foundation Trust v King UKEAT/0056/19/OO, Choudhury J, re-visited that decision and explained it. He said "39. The judgments in Richmond and Hale do not support Ms Hart's contention. She submits that in those cases there was a continuing discriminatory state of affairs by reason of the instigation of a disciplinary procedure by the employer with various steps taken from time to time in accordance with that procedure. Ms Hart says that the same should apply in respect of a grievance procedure notwithstanding the fact that it is the employee who instigates that by lodging a grievance. The difficulty with that submission is that in neither Richmond nor Hale was the EAT dealing with the precise issue here of whether there can be a continuing act regardless of some of the constituent acts, including those that are in time, not being proven"

    "43. In my judgment, Hale is not authority for the proposition that there is a continuing discriminatory state of affairs whenever a disciplinary process is instigated regardless of whether any subsequent constituent acts are proven. As is evident from the passages above, the primary issue in Hale was whether the Tribunal was correct to focus on the initial instigation of the disciplinary procedure without properly considering the pleaded case that that was merely the start of a process that led ultimately to dismissal. What is said in paragraph 44 of my judgment in Hale was in relation to "situations such as this", i.e. those that prevailed in that case. In any event, there was no analysis in Hale of the specific circumstances arising in the present case, whereby the Tribunal concluded that there was a continuing act extending to the final constituent act notwithstanding the fact that the last four of the constituent acts relied upon were not proven to be discriminatory".

84. Applying South Western Ambulance Services to the present case, whilst we have found that the decision to instigate the investigatory process was influenced by the protected disclosures, we have not found that any of the other steps within that process were so influenced. That includes the provision of minutes, the non disclosure of documents and the alleged predetermination of the outcome of any disciplinary process.

85. Using the language South Western Ambulance Services, since the decision to commence the investigation, no subsequent constituent acts have been proven.

86. In the circumstances we have come to the conclusion that there cannot be said to be a continuing act in this case. Even if we were to find that the advice by Mr Harrison to move to a formal disciplinary hearing was influenced by the protected disclosures, that advice must have been before

18 May 2018 and was, also, before the relevant date of 14 June 2018. Thus, even then, there could be no part of a continuing act within the relevant 3 month time limit. In this respect we make plain that we did not, in fact, consider the question of whether the advice by Mr Harrison to move to a formal disciplinary hearing was influenced by the protected disclosures since that was not a point that we understood to be argued before us. We have simply considered the point out of concern to ensure that the claimant's case has been fully considered, given that he is acting in person.

87. The final consideration for us, therefore, is whether it was not reasonably practicable for the complaint to be presented within the period of 3 months from the act which we have found proved. In this respect the claimant produced no evidence to suggest that it was not reasonably practicable for him to present the claim and we have observed no evidence to that effect.

Overall Conclusion

88. We find that the respondent did subject the claimant to a detriment when it subjected him to an investigation on 11 April 2018. It did so because he had made a protected disclosure. However, the Claimant failed to present his claim to the Employment Tribunal within 3 months of that date and so the tribunal is unable to consider it, because it lacks jurisdiction to do so.

89. In those circumstances the claim must be dismissed.

Employment Judge Dawson

Date: 11 December 2019

……………………………………

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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