**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107281/2019**

**Held in Glasgow on 27 and 28 January 2020**

**Employment Judge L Doherty**

| | |
|---|---|
| **Mr J Reid** | **Claimant**<br>**In Person** |
| **South Lanarkshire Council** | **Respondent**<br>**Represented by:**<br>**Mr S O'Neill -**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgement of the Employment Tribunal is that;

(1) The claimant was not automatically unfairly dismissed and his claim under section 103A of the Employment Rights Act 1996 (the ERA) is dismissed.

(2) The Tribunal does not have jurisdiction to consider the claim of detriment under section 47 B of the ERA on the grounds that it is brought out with the statutory time-limit for the presentation of the claim.

(3) The claimant was not unfairly dismissed and his claim under section 98 of the ERA is dismissed.

**REASONS**

1. The claimant presented a claim on 9 June 2019, claiming unfair dismissal contrary to section 98 of the ERA; automatically unfair dismissal contrary to

section 103A of the ERA; and having suffered a detriment on the grounds of having made a protected disclosure under section 47B of the ERA.

2. A hearing was fixed over a period of three days to determine merits only. The claimant represented himself and the respondents were represented by their solicitor, Mr O'Neill.

3. The issues for the tribunal were as follows:

(i) Firstly, whether the claimant made a protected disclosure. The claimant identified two alleged disclosures, in emails dated 4 May 2015 and 21 January 2016. These are said by the claimant to be disclosures in terms of section 43B(1)(d) of the ERA in that they disclosed information which tended to show that the health or safety of an individual had been endangered or was likely to be endangered. It is not accepted by the respondents have these emails constitute protected disclosures. Whether the claimant made any protected disclosures will therefore be an issue for the tribunal

(ii) The claimant's position is that he was automatically unfairly dismissed contrary to section 103 A of the ERA. The respondent accept that the claimant was dismissed; it is their position that the claimant was fairly dismissed by reason of capability. In the event the Tribunal is satisfied that the claimant made a protected disclosure, the reason for the claimant's dismissal will be an issue, and the Tribunal will have to consider whether the reason or principal reason for dismissal was that the claimant made a protected disclosure.

(iii) The claimant also presents a claim of having suffered a detriment under section 47 B of the ERA. The detriments are said to be injury to feelings, and *'being forced to work additional days because of removal from nights to days'*. There is an issue of time bar which the Tribunal has to consider. Thereafter if the Tribunal is satisfied that it has jurisdiction to determine the claim it will have to consider whether the claimant was subjected to the detriments alleged, and if so whether that was on the grounds that he made a protected disclosure.

(iv) The claimant also presents a claim of ordinary unfair dismissal under section 98 of the ERA. The issues for the Tribunal will be to determine the reason for dismissal, and if it is satisfied that there was a potentially fair reason for dismissal, whether or not dismissal for that reason was fair in terms of section 98 (4) of the ERA.

4. The respondents presented their case first, and evidence was given by;

(i) Ms Devlin, who at the relevant time was the External Manager for Local Authority Care Centres for Older People with the respondent.

(ii) Ms Blessing, the dismissing officer, and who at the relevant time was the Service Manager for the Estate Hospital for Social Work Services.

(iii) Caroline Murray, HR officer.

5. The claimant give evidence on his own behalf.

6. The parties produced a joint bundle of documents, and the claimant supplemented this with his own bundle of documents.

**Findings in fact**

7. The respondents are a local authority of considerable resource, who have a responsibility, among other things, for the provision of social work services within the area of South Lanarkshire. The provision of that service involves the respondents in operating a number of residential centres which accommodate vulnerable service users. Such centres are subject to the regulation to ensure the protection of service users, including regulation by the Care Commission.

8. The respondents have a number of policies and procedures in place for the management of staff, including a Confidential Reporting Procedure (B184), which set out the procedure for reporting concerns internally on a number of matters, including a danger to the health and safety of an individual. The policy provides that if an employee wished to report a matter which falls into one of the categories identified in the Section 43B of ERA as a public interest disclosure, then they should contact their Head of Service, Executive Director,

the Councils Monitoring Officer, the Audit and Compliance Manager, Trade Union representative, or if it was not appropriate to, the Chief Executive.

9. The respondents also have a Maximising Attendance Procedure, which deals with among other things incapability support and redeployment.

10. The respondents also have a policy by the name of Switch 2, which applies where an employee is displaced from their current employment or is unfit to return to their substantive role. The Switch 2 policy provides that vacancies will be considered for employees who require alternative employment as a result of ill health or disability, once all Resource specific options have been exhausted, but if no suitable vacancies arise, the Incapability Procedure will continue.

11. The claimant, whose date of birth is the 14/08/1961, was employed by the respondents as a Senior Social Care Worker Nights. He commenced employment with the respondents on 2 September 2013. His contract of employment is produced at B 28/29. Clause 3 of the claimant's contract provided that his work location was David Walker Gardens, which is a residential care home, but provided that his work was on a peripatetic basis and he may be required to cover other areas within the South Lanarkshire. His contract provided that his hours of duty would be the 33.5 per week to be worked in accordance with a roster.

12. The claimant's competence-based job profile provides that one of the responsibilities of the post is to ensure that key health and safety matters are investigated and reported as per the Health and Safety Policy . It also provides that the role involves ensuring that prompt and appropriate action is taken to remedy defects or deficiencies are reported to the employee.

13. The claimant had initially worked on a peripatetic basis but had latterly was assigned to work at David Walker Gardens.

14. David Walker Gardens is a residential care home comprising of six separate multi bed units across three floors. It accommodates a number of vulnerable service users, including service users who suffer from dementia.

15. In his role as Senior Social Care Worker Nights, the claimant had first line management responsibility for the night shift duty at David Walker Gardens. There were 16 members of the night shift staff in total.

16. The claimant's immediate line manager was Julie Glenn, who was the overall Unit manager.

17. On 5 May 2015 the claimant emailed Ms Glenn in the following terms:

*'I have just found out that (resident) from Skye was found in the sluice room helping himself to cleaning materials within that room.*

*It is very important that we ensure all staff including housekeepers know the dangers of the cupboard been left open and the consequences for David Walker Gardens and South Lanarkshire Council if a service user with the consumer any contents stored within the cupboard.*

*I have constructed a briefing that all staff must read and sign about the room being locked at all times when not in use.*

*I will ensure appropriate signage is in each of the storage areas ASAP.*

*I hope you don't mind I have added the news clip for the care home that was found guilty of H&S breaches.'*

18. The claimant then included in that email and extract about a care home which had been fined after a resident died after consuming cleaning materials.

19. On 21 January 2016, at 23.58, while working on night shift the claimant emailed Ms Glenn, Copying Miss Devlin in the following terms:

*'I feel sad that you continue to instruct back shift senior to inform on night shift team that they do not need to contact the senior when you leave the units.*

*It makes me look foolish and a complete idiot in front of staff.*

*The reason I asked for this to happen was staff are leaving the unit for excessive amounts of time. Both Yvonne and myself have discussed this with*

*you and the additional reason was for the health and safety of the service users of LEWIS UNIT and SKYE UNIT and BARRA UNIT.*

*I have detailed below my concern below*

*LEWIS UNIT*

*Three service users are a concern to me*

*--------- room 46 – walks about you all night does not sleep.*

*---------- room 47 again does not sleep well and normally evacuates smearing excrement over the room and corridor.*

*-------- room 40- this lady was found behind the door she had removed her pendant and was very distressed so if staff had not been in the unit the lady would have been even more distressed.*

*BARRA*

*----- this lady is out of sorts and has been for a few weeks not sleeping very well and up all night wondering as you know we had an adult and support protection with this lady last year on the Friday and Saturday I was in Barra's unit all night and did not leave because of my concerns.*

*SKYE*

*----this gentleman has been out of sorts for the last couple of weeks not sleeping staying awake all night if you remember --- was caught taking cleaning materials from the sluice last year.*

*I am trying to minimise the risk of harm with the well-being of service users in mind and protection of staff though this was part of my job.*

*I am sure if you ask staff they will agree Lewis unit is getting more demanding and dependency levels are higher.*

*I have cc Evelyn into this because I am sure she is aware of the situation.*

20. Ms Glenn responded to the claimant by email on 22 January at 13;06 stating:

*The reason I instructed the back shift senior to inform night staff is that, despite my instruction to you, you continue to ignore this and contradict the information I have passed to staff in nightshift meetings and in several conversations including supervision with you.*

*I am fully aware of the risks associated with individual service users, however our Care Inspectorate staffing schedule states that six members of staff are required to be on duty or nightshift, and of course there are occasions where staff are required to spend, for example considerable amounts of time with individual service users in their apartments, resulting in them being unable to constantly able to observe all service users. Over and above this, staff are required to leave the unit to replenish essential supplies for service users, again, being unable to constantly observe all service users.*

*Whilst we must aim to minimise risk to service users, it is impossible to fully eliminate risk. I will not go into detail over the service users you have mentioned in your email as many of these issues are historical and no longer present any risk. I would, however stress to you that I have reviewed the night hand over reports for these individual service users, and find that the information recorded, does not correspond with the information you have provided in your email. However I must remind you, that if the service users are such a risk, that you, as a senior social care worker, are responsible for ensuring that all means supportive assistive technology are in place including laser beams, pressure mats and pendants, as well as routine nightly checks, as detailed in individual support plans.*

*With regard to your comments about staff leaving units for excessive amounts of time, I would again, remind you that this is your responsibility as a senior social care worker to manage the situation, but you also required to establish the reason for staff being out of the unit for any length of time; are they assisting colleagues with high dependency service users, or for another reason? As Senior Social Care worker, you also required to carry regular checks of the building, make yourself available to support staff, and address*

*any practice or performance issues should staff continue to give you cause for concern, despite your instruction to them, then you require to consider implementing Performance Management procedures, ensuring that you have for the guidance and can fully support your decision to implement this.*

21. At the beginning of February 2016 eight of the night staff who worked alongside the claimant complained about issues arising from the claimant's management of them to the effect that they felt intimidated and bullied by him. These complaints were brought to the attention of Ms Devlin, as a senior manager. Ms Devlin was appointed as the Nominated Manager under the respondent's disciplinary procedures. In that capacity, she instructed a fact-finding investigation to be carried out into the allegations. At the commencement of the fact-finding process a decision was taken by Ms Devlin to remove the claimant from David Walker gardens to another residential unit, by the name of Dewar House in order to allow that process to take place.

22. On the advice of the assisting Personnel Officer, the employees making the complaints were granted anonymity at the fact-finding stage.

23. After the fact-finding investigation was concluded a report was provided to Ms Devlin, who considered given the issues raised, the matter should proceed to a disciplinary hearing.

24. The claimant attended a disciplinary hearing which was chaired by Michelle McConachie. The claimant faced seven charges, three of which were upheld. The charges which were upheld where failure to follow recognised procedures, failure be contactable whilst on duty, and that these actions breached the South Answer Code of Conduct and Social Work Resources Code of Conduct.

25. In the course of the disciplinary hearing, the disciplinary officer took the decision that the witnesses should not to be granted anonymity, and their identity was disclosed to the claimant. The claimant had the opportunity to question some of the witnesses in the course of the hearing.

26. The claimant had the benefit of Trade Union representation at the disciplinary hearing.

27. The conclusion of the disciplinary hearing was that the claimant was issued with a final written warning. This was issued on 5 December 2016 and remined in place till 28th November 2017.

28. The claimant appealed against that on the 15th of December and the statement of appeal drafted by his Trade Union representative is produced in the claimant's bundle and document 2. The grounds of appeal were extensive but did not include that the claimant had made a protected disclosure relating to the health and safety of service users and it was for this reason he had been disciplined.

29. The claimant attended an appeal hearing on 18 January 2017, which was rescheduled for 27 February. He received the appeal disposal on 6 March 2017, and the appeal was rejected.

30. Part of the disposal of the disciplinary hearing was that the claimant would continue to work and would receive further management and support for a period of three months, and that following this, review would take place with a view to his returning to duties at David Walker Gardens.

31. The claimant's working pattern at Dewar House was a different to that of his working pattern at David Walker Gardens, to the extent that at Dewar House he worked 10 days over 14, and worked day shift and in David Walker Gardens, he worked 7 nights over 14, albeit his contractual hours of work did not change.

32. On 7 November 2017 two members of staff at Dewar House, who were junior to the claimant, submitted dignity at work complaints about their perceived bullying and harassment at the hands of the claimant.

33. A fact-finding investigation commenced on 13 November 2017 which was conducted by Mr Drew Patterson. Mr Patterson obtained statements from the claimant, the two members of staff who complained, two witnesses to the alleged incidents, and the Unit manager. The fact-finding report is produced

in the respondent's bundle at B 72 /77. The fact finder made findings of inappropriate behaviour when the claimant discussed the feeding of residents within Dewar house, and inappropriate behaviour when the claimant discussed the use of slings.

34. The claimant was invited to attend a disciplinary hearing in a letter dated 27th of March 2 018. He was advised that the reasons for the hearing where that it was alleged that he had shouted at Lynne Stewart and Lauren Docherty and acted in an aggressive manner towards them during two separate incidents; that he had continued to behave in a bullying manner in the weeks following these incidents by referring to them a demeaning manner even when Ms Stuart asked him not to and was visibly upset; and that his actions in relation to the above breached the relevant policies.

35. Ms Tedford took the decision to dismiss the claimant for the conduct identified in the letter calling him to a disciplinary hearing.

36. In her letter of disposal, she set out the facts which she had found. These included that the claimant had offered an apology to the employees at the hearing, (which he had done) and stated it was not his intention to undervalue them or make them feel anxious.

37. The claimant was advised of the right to appeal against the decision to dismiss him, and he did so assisted by his Trade Union representative from Unison. The grounds of appeal included that the claimant accepted that he behaved inappropriately, and he had apologised to the two colleagues, and that he had reflected on this and recognised the issues. The basis of the appeal was that the decision to dismiss was too harsh.

38. An appeal hearing took place on 5 September 2018 before elected members of the Council. The appeal panel decided to overturn the decision to dismiss the claimant and substituted in its place a sanction short of dismissal which was a demotion to the post of Social Care Work. This was communicated to the claimant on 5 September 2019.

39. The claimant was unhappy with the assistance he received from Unison. The claimant had asked Unison to lodge a claim on his behalf with the Tribunal, but they were not prepared to do so. The claimant then joined Unite was supported in his subsequent capability procedure by a Trade Union representative from Unite

40. The claimant was relocated to McKillop Gardens in East Kilbride as of 24 September 2018 in his demoted role. He reported absent from work on 24th September 2018 and submitted a statement of fitness for work from his GP giving as the reason for his inability to work 'work related stress'. The claimant continued to submit GP statements of fitness to work giving this as a reason for his inability to attend work.

**Capability Dismissal**

41. The claimant did not return to work from 24 September 2018 until his dismissal under the respondent's Maximising Attendance Policy on 14 May 2019.

42. The claimant began receiving half pay from 23 March 2019

43. As a result of the claimant's continued absence, the respondent invoked its Maximising Attendance Policy.

44. The claimant was asked to attend a medical assessment with the respondent's Occupational Health Adviser, Dr Herbert on 11 December 2018. The OH report is produced at B120/123. The claimant was provided with a copy of this.

45. Dr Herbert provided the following advice:

*'I saw Mr Reid at your request on 11th December having seen him back in April. The issues in April and today at essentially the same. He describes having Whistelblown about when he highlighted bad practice two years ago. He feels he is being victimised by Management since who have not taken his side and believed in his report, essentially I understand that he was dismissed from work around April but was later reinstated after review by the Councillors*

*although his reinstatement is to a downgraded post and he feels somewhat aggrieved by this. In addition you have located him away from his previous workplace in the Dewar House to McKillop Gardens in East Kilbride and when I pressed him as to why that remained an untenable opportunity for him (which he stated) it was because he would be working essentially for 'the same managers' and this is his point of reference and difficulty.*

*He has a very fixed idea then about the situation in which he finds himself. He feels that having done is best to highlight issues by drawing them to the attention of management he's been punished for Whistleblowing. He has clearly lost all confidence with his direct line management structure and is adamant he cannot return to work for them. He is further adamant that he could only contemplate work if moved to alternative duties within the care service and for him means a move out of Residential Care which is the same management contacts that he has been finding so difficult and perhaps into Homecare or a different aspect of the care in the Community Service.*

*In medical terms he is fit for work. He has sufficient concentration motivation and confidence to do so, that said he has recently been commenced on some antidepressant medication and I think that this is because he has reached an impasse finding it impossible to see himself working in the fashion that has been offered by management. Essentially then I would judge that this boils down to an issue that has to be addressed through a management route as he is capable of work in a general sense but is very focused upon the circumstances and situation in which he finds himself.'*

46. The claimant was invited to attend support meetings on 20 November 2018; 18 December 2018 (which he was unable to attend); 4 January 2019; 13 February 2019; and 4 March 2019. These meetings were conducted by Louise Mercer, a Unit Manager, assisted by an HR officer. Ms Mercer wrote to the claimant after each meeting, recording what has been discussed. On each occasion, the claimant indicated he was unable to return to work.

47. At the Attendance Support meeting on 4 March, which the claimant attended accompanied by his Trade Union representative, it was explained to him that

the purpose of the meeting was to discuss his absence which commenced on 24 September 2018 due to stress, and to explore options of assistance and support to facilitate a return to work. The claimant indicated at that meeting that the issues he had raised previously had not been dealt with properly, and he felt he had been targeted for reporting bad practice. By this point the claimant had raised a grievance, and he was still waiting for a response from, Ian Beattie the Head of Service.

48. There was a discussion of internal positions at that meeting, which included the post of Day Centre officer, Home Carer and Administrator. The claimant indicated he would not accept any of these posts as he did not wish to remain in the same management structure that he was currently in. He stated that he had been already placed on a salary detriment following the previous disciplinary appeal and therefore would not accept anything at a lower salary.

49. Ms Mercer advised the claimant that his absence from work could not continue to be sustained in the long term, and if a return to work date could not be identified this may result in an incapability hearing being arranged and that the outcome of this could be his dismissal.

50. The claimant advised Ms Mercer that he had never had any support, and the only thing which he could be offered was a return to his previous role of Senior Social Care worker. Ms Mercer asked the claimant to clarify this because as a Senior Social Care Worker he would be returning to the same management structure that he had raised concerns about returning to. The claimant told her that he would not mind returning to the management structure if he was allowed to return in his previous role. Ms Mercer advised the claimant that the respondents were not in a position to move him into a senior position as this would be a promotion and that his demotion to the post of social care worker was a decision made by Committee at appeal.

51. Ms Mercer also advised the claimant that as a return to work date could not be identified there was no alternative but to arrange an incapability hearing, which would be will be chaired by an independent manager and that the outcome could be dismissal.

52. This position was confirmed to the claimant a letter dated 18 March 2019.

53. Ms Mercer produced an Incapability Fact-finding report which was passed to Ms Blessing, the appointed Officer for the purposes of conducting a Incapability Hearing.

54. The claimant was invited to attend this hearing on 14 May 2019; the notes from the hearing produced and B136/141. The claimant attended with his Trade Union representative, Mr Buchanan.

55. In the course of the meeting at the claimant confirmed that he had been provided with reasonable support in terms of the respondents Maximising Attendance Policy and that he was aware of the support available to him. He also confirmed he had attended a series of meetings under the Policy.

56. The claimant maintained his position that he would not return to work under the same management structure, and for that reason he would not take up the Day Centre post. Nor was the claimant prepared to return to a Homecare post, which was going to result in him being paid a lesser salary.

57. The claimant again said that he would return to his Senior Social Care worker position. Ms Blessing asked him why that was the case; the claimant responded that he did not want people laughing at him. He said that if he came back to work in his senior post then he would feel that he could hold his head up. The claimant said he could not do the post of social care worker as this would have an effect on his mental health. The claimant said that his confidence went downhill after whistleblowing on other members of staff, and things seemed to turn on him.

58. In the course of the hearing there was a discussion about the respondents Switch 2 policy. It was explained that this did not apply, as the Occupational Health report confirmed that the claimant was fit to work.

59. In the course of the hearing, Ms Blessing provided the claimant again with details of the post and salaries for a Home Carer. The hearing was adjourned to allow the claimant to consider this, but he confirmed that taking up this post

represented too big a financial detriment to him, and he declined Ms Blessing's offer to look for a position for him in Homecare.

60. Ms Blessing then considered the position and took the decision to dismiss the claimant. In doing so, she took into account that the claimant refused to return to his substantive post of Social Care Worker and was unable to provide a foreseeable return date to work. She took into account that the claimant would not return to Adults and Old People due to it having the same external management structure that was involved in his disciplinary hearings. She took into account that the claimant would have returned to work in that management structure in the position of Senior Care Worker, which supported that he was fit for work, but that from Ms Blessing's perspective this was unachievable, as the claimant had been demoted as a result of a disciplinary procedure.

61. Ms Blessing took into account that the claimant did not qualify for Switch 2, as the occupational health report said he was fit to work as a Social Care worker.

62. She further took into account that the claimant had been offered a 20.5-hour post within Day Care, however the claimant did not consider this was acceptable due to financial detriment, and that the claimant would not consider a Homecare or administration work due to the financial implications of taking up these posts. Lastly, she took into account that the claimant had again been offered the possibility of working in a post in Homecare, in the course of the incapability hearing, but had declined on the basis that it represented too great a drop in salary.

63. In light of these factors, taking into account the length of the claimant's absence that there was no return to work date which could be identified, Ms Blessing took the decision to dismiss the claimant. Ms Blessing confirmed her decision to the claimant at the conclusion of the meeting, summarising he reasons for taking that decision. The claimant was advised of his right of appeal. The claimant appealed against that decision, but the appeal was unsuccessful.

64. On 25 September 2018 the claimant submitted a grievance regarding previous fact-finding and disciplinary processes. A grievance hearing took place on 25 January 2019 and the outcome was given by Mr Beattie the respondent's Head of service in a letter dated 1 March 2019. The claimant sought to appeal that outcome.

65. Mr Beattie's letter disposing of the grievance dealt with the claimant's concerns about the first disciplinary investigation, and in particular, the fact that employees had been granted anonymity. He noted that Ms Devlin has sought advice from a Personnel Adviser regarding anonymity, but that anonymity was subsequently withdrawn, and that management had called witnesses to the reconvened disciplinary hearing, and the claimant had the opportunity to question those witnesses. Mr Beattie however decided to uphold the claimant's grievance in part, in terms of overall timescales and lack of clarity regarding anonymity. The other elements of the claimant's grievance were not upheld.

66. In the conclusion of his letter dealing with the grievance Mr Beattie confirmed that the claimant was not eligible for a redeployment through Switch 2, but he explained that he would endeavour to explore any alternative rules within the Resource. He explained that a move to Children and Families was not a suitable match as the claimant did not have the necessary qualifications or experience, identifying the qualifications which were necessary. He confirmed that the roles available where Day Centre Officer, or Home Carer. Mr Beattie urged the claimant to reconsider returning to his own post, stating he would ensure that the claimant received appropriate supports to assist with his return.

67. The respondents, as they are required to, submitted a report to the SSSC regarding the disciplinary investigations against the claimant. No action was taken by the SSC and the claimant's registration with them was unaffected.

**Notes on Evidence**

68. In the main, the Tribunal found the respondent's witnesses to be credible and reliable. There was no significant challenge to Ms Blessing or Ms Murray's

evidence in cross-examination. Ms Blessing spoke to the incapability procedure, and the reasons why she took the decision to dismiss the claimant, and Ms Murray spoke to the meetings which had taken place between the claimant and Ms Mercer which she had attended, in particular the last meeting which took place before the incapability hearing.

69. The Tribunal accepted that Ms Blessing dismissed the claimant for the reasons which she gave in evidence, and which she summarised for the claimant at the end of the capability hearing. Her evidence was given in an entirely credible and straightforward manner and was consistent with the contemporaneous documentary productions. The claimant accepted that he refused to return to his substantive post, or any of the posts offered, but that he would have returned to the post of Senior within the same management structure. There was no reason to doubt Ms Blessings evidence as to the reasons why she dismissed the claimant.

70. Ms Devlin give evidence about her role in the initial disciplinary procedure which was instigated against the claimant commencing February 2016. On occasion, it was clear that the passage of time affected Ms Devlin's recollection of specifics, and from time to time this impacted on her reliability. For example, she could not recall the detail of all of the allegations which were contained within the initial Fact Finding report when it was produced to her, other than it involved a complaint from a female member of staff who said she was afraid to leave the Unit to get essential supplies of bed linen because of the claimant. That however did not impact adversely on the Tribunal's overall assessment of her credibility. It was satisfied that Ms Devlin's motivation for instructing a fact-finding investigation was that eight members of staff working alongside the claimant raised complaints about him and that on the advice of Human Resources, these staff members have been granted anonymity. Further, the tribunal was satisfied that the decision to move the claimant from David Walker Gardens was taken because of the number of complaints made against him by other members of staff, and the fact that a fact-finding investigation was being carried out into those complaints. It was entirely convincing that this was the reason for the claimant being moved.

71. It was put to Ms Devlin by the claimant that she had met secretly with members of staff at David Walker Gardens and encouraged them or colluded with them to bring complaints against him. Ms Devlin denied this, and the Tribunal found her denial to be credible. Ms Devlin accepted that she had met with staff members on one occasion, but that was after the disciplinary procedures have been completed, in order to advise them that the claimant would be returning to work at some point in David Walker Gardens. Ms Devlin accepted that she did not to give staff a date for the claimant's return, as she did not know when he would return, and the fact that she was prepared to make this concession, in the Tribunals' view enhanced her credibility.

72. Ms Devlin also accepted without difficulty that she had received a copy of the claimant's email in January 2019. The Tribunal found her explanation that she considered it raised an operational matter which dealt with by Julie Glenn in her email response of 22 January to be a credible one. Ms Devlin give evidence to the effect that Julie Glenn looked into the concerns raised by the claimant, by looking at the handover notes, and reminding the claimant of his own responsibilities in terms of user's health and safety.

73. The content of both the claimant's email, and Ms Glenn's response support the conclusion that this was the case. The operational concerns which the claimant raised in his email are responded to by Ms Glenn. The Tribunal was unable to draw an inference that Ms Devlin colluded with members of staff at David Walker Gardens to make complaints against the claimant because of the contents of this email.

74. The Tribunal did not form the impression that the claimant in any way sought to deliberately mislead. Indeed, the claimant was prepared on a number of occasions to make appropriate concessions. For example, he accepted that he was not prepared to return to the Social Work Resource in his substantive post because it involved him working within the same management structure, but that he would have returned to the management structure in the post of Senior. He also, for example, accepted that he had offered an apology to the two junior members of staff at Dewar House, and that the grounds of his

appeal against the decision to dismiss was on the basis that the discussion was too harsh.

75. There were occasions however with the Tribunal formed the view that the claimant' embellished matters, and that his interpretation of events was significantly influenced by his perception that he has been badly treated by his employer. For example, the claimant said in evidence that the respondents adopted a practice of getting residents up and dressed at 2 or 3 am in order to make the job of dayshift staff easier, and that the respondents were adopting practices which belonged to a bygone era of insane asylums. These however were not disclosures for which relied for the purposes of this claim and suggested a tendency to exaggerate the position on the part of the claimant in his evidence.

76. A great deal of the material evidence was not in dispute in this case, but where there was a material conflict which the tribunal had to determine, on balance it accepted the evidence of the respondent's witnesses.

**Submissions**

*Respondents submissions*

77. Mr O'Neill for the respondents took the tribunal to the relevant law in respect of each of the claims before it.

78. He submitted that the claimant had not made any protected disclosures, and that the emails of May 2015, and January 2016, did not qualify for protection. The respondents have a whistleblowing policy; the claimant had not followed that policy. The claimant had not made a disclosure which would qualify for protection in either of the emails upon which he relied.

79. Mr O'Neill submitted therefore that the dismissal was not automatically unfair. Nor, he submitted, was it unfair under section 98 of the ERA. Mr O'Neill submitted that the respondents had established the reason for dismissal which was capability. The respondents had adopted a fair capability procedure. He submitted that the respondents were entitled to rely upon the terms of their Occupational Health report, which provided more information

about the claimant's fitness for work that the GP fitness notes. It was reasonable for the respondents to rely upon the fact that their occupational health report confirmed that the claimant was fit for work. This, Mr O'Neill submitted, was not a medical dismissal. In this connection, he referred to the case of BS v Dundee City Council (2013) CSIH 91, in support of the proposition that the respondents were not obliged to make further medical enquiry prior to taking the decision to dismiss.

80. Mr O'Neill referred in general terms to the case of Spencer v Paragon Wallpapers Limited (1977) ICR 301 and the tests in that case. He also referred to East Lindsay District Council v Daubney (1977) ICR 566 in support of the proposition that it is not the function of the Tribunal to review advice received from medical advisers, and the decision whether or not dismiss an employee is not a medical question but has to be taken by an employer in light of the available medical evidence.

81. In relation to the claim of having been subject to a detriment, Mr O'Neill's position was that this claim was brought out of time. The claimant had been moved from David Walker Gardens to Dewar house, and it was accepted that he had not returned to David Walker Gardens. The claimant however had not worked at all since the outcome of his appeal and his demotion. Time for presentation of this claim would run from 24 September 2018, when the claimant had been relocated to McKillop Gardens, and form which data the claimant had not worked at all.

82. Mr O'Neill referred to the fact that the claimant had the benefit of trade union advice throughout, and no reason was advanced as to why he did not present his complaint of detriment within the statutory time limit. The claimant was not presented to the Tribunal until June 2019, some eight months later.

*Claimant's submissions*

83. The claimant referred the Tribunal in general terms to the evidence which he had given. He submitted that the respondents were focusing on the capability stage of the proceedings, rather than the real reason behind why he was dismissed. He submitted that he disagreed with this approach, and that his

was a mental health issue. He submitted that he had been attending doctors for three years because of the way he was treated.

84. The claimant submitted he knew the outcome would be dismissal.

**Consideration**

85. The first matter which the Tribunal considered was whether the claimant had made a relevant protected disclosure.

86. Section 43B of the ERA states:

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

*…….*

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

87. Section 43 C states:

*(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure*

*(a) to his employer*

*…….*

88. The elements of which must be present in order for a disclosure to qualify for protection are therefore firstly that the disclosure must convey facts. Secondly, the disclosure must, in the 'reasonable belief' of the worker, be made in the public interest, and in this case, tends to show that the health or safety of any individual has been, is being, or is likely to be endangered.

89. With that in mind, the Tribunal considered the content of the emails which are relied upon by the claimant as amounting to qualifying protected disclosures.

90. The terms of these emails are set out above in the findings in fact.

91. The tribunal was satisfied that the email of 4 May 2015 conveyed information. It stated that a resident from the Home was found in the sluice room help himself to cleaning materials.

92. The Tribunal then considered whether it was in the claimant's reasonable belief that this disclosure was made in the public interest and tended to show that the health or safety of individuals was endangered or likely to be endangered.

93. In considering this the Tribunal take into account that it is a subjective test which it has to apply. The Tribunal is not asking itself the objective question of whether the disclosure was in the public interest, rather whether the claimant believed that it was in the public interest.

94. The Tribunal was satisfied that the claimant did believe that disclosing this information was in the public interest, and that the information which he disclosed showed or tended to show that their health and safety of an individual was being or was likely to be endangered. The Tribunal is supported in this conclusion, in that albeit the email outlines the steps which the claimant has taken to deal with the situation which had arisen, he goes on in the email to emphasise what he considers to be the broader health and safety implications of the situation which he was reporting.

95. In reaching this conclusion the Tribunal take into account Mr O'Neill's submission to the effect that this did email not amount to a protected disclosure on the basis that it was not made under the respondents Whistleblowing policy. The Tribunal however was not persuaded that it was necessary for the disclosure to be made under the respondent's policy in order for it to qualify for protection. Section 43 C makes it clear that the requirement is to make the disclosure to the employer. The Tribunal did not conclude that the fact that the claimant made this disclosure to his line manager, and not under the terms of the respondent's policy, meant that it failed to qualify for protection in terms of the statutory scheme.

96. The Tribunal then considered the email of 21st January, the terms which again are set out in the findings in fact.

97. The Tribunal was satisfied that this email conveyed information. The email states that staff are leaving the Unit for excessive amounts of time and provides information about particular service users.

98. The Tribunal also considered whether it was in the reasonable belief of claimant that this information was disclosed in the public interest and showed or tended to show that the health and safety was of individuals was being endangered or was likely to be endangered.

99. The Tribunal was satisfied, again applying a subjective test, that it was in the claimant's reasonable belief staff leaving the unit for excessive amounts of time (regardless of whether or not as a matter of fact this was actually the case) meant that the health and safety of service users was endangered or likely to be endangered and that it was in the public interest to disclose this. Again, on this occasion, the claimant did not make the disclosure under the respondents Whistleblowing policy, but copied his line manager, and her manager into his email. For the same reasons are as set out above, the Tribunal was not persuaded that the fact that the disclosure was not made under the respondent's Whistleblowing Policy meant that it did not qualify for protection under section 43 B.

100. The Tribunal was therefore satisfied that the claimant had made qualifying disclosures in his emails of 4 May 2015 and 21 January 2016.

**Automatically Unfair Dismissal Claimant – Section 103 A of the ERA**

101. Having reached the conclusion that the claimant had made two protected disclosures, the Tribunal went on to consider the claim of automatically unfair dismissal under section 103 A of the ERA. That section states:

*'Any 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.*

102. In order for the claimant to succeed, the tribunal must therefore be satisfied on the evidence that the principal reason for dismissal was that the claimant made the disclosures relied upon.

103. The principal reason is the reason which operated in the employer's mind at the time of the dismissal. The causative exercise for the tribunal is a factual one, and the tribunal asked itself why did the respondents dismiss the claimant, and what consciously or unconsciously was the reason for this?

104. The Tribunal concluded in this case that the reason for the claimant's dismissal was capability. It was satisfied that at the point when Ms Blessing took the decision to dismiss the claimant she was faced with a situation where the claimant had been absent for a period of over seven months; she had an occupational health report which confirmed he was fit to return to work; the claimant refused to return to his substantive post or to any of the alternatives suggested to him; his position was he could have returned to his old post, which would have represented a promotion, and was therefore not an option available to her; and that no date could be identified for his return to work. The Tribunal was satisfied that these are all compelling reasons in the mind of Ms Blessing, and explained why she took the decision dismiss the claimant.

105. The Tribunal considered the claimant's submission that the respondents were focusing on the capability procedure, and not looking behind the reason why the claimant was in that situation. In submissions the claimant suggested that his was a mental health situation brought about by his having made a protected disclosure.

106. The Tribunal however was satisfied that the reason for dismissal was unconnected to either disclosures which the claimant had made. There was nothing to suggest that anyone, other than the claimant's line manager had seen the email of 4 May 2015. Albeit the Tribunal was satisfied this email qualified for protection in terms of the relevant statutory provisions, this was an email which dealt with an operational issue, which it appeared the claimant had himself resolved. The fact that this was the case rendered it extremely unlikely in the Tribunal's view that his employers would be motivated to take

disciplinary action against him or subject him to a detriment because he had made that disclosure.

107. While it was not put to Ms Devlin specifically by the claimant that the first disciplinary procedure was instigated against him against him because he had made protected disclosures, the Tribunal considered the reason why Ms Devlin instigated disciplinary procedures against the claimant in February 2017.

108. In doing so, the Tribunal take cognisance of the fact that the claimant's email raising issues about staff leaving the Unit was sent on 21 January, shortly before the fact-finding investigation was instructed. That however has to be balanced against the fact that the claimant's email dealt with operational issues which were responded to promptly by Ms Glenn. Further, and significantly the Tribunal accepted that respondents had received complaints from eight members of staff about the claimant's behaviour; there was nothing to suggest that these members of staff were aware of the terms of the claimant's emails; it was not unreasonable for the respondents to investigate complaints of bullying and intimidation; that there was a disciplinary procedure at which the claimant had the benefit of Trade Union representation; the anonymity of the complainants was removed; that three of the seven charges were upheld; and the disposal of a final written warning was given, which was upheld at an appeal process where again the claimant had the benefit of Trade Union representation. There was nothing to suggest that the disciplinary or appeal officers were aware of the disclosure emails. Furthermore, the claimant did not give evidence to the effect that part of his response to this disciplinary action at the time was that it taken against him as a result of his whistleblowing, and this formed no part of his written statement of appeal.

109. Taking all these factors into account the Tribunal was satisfied that the respondent's decision to commence a fact-finding in February 2019 and subsequently to instigate disciplinary action against the claimant, and to remove the claimant from David Walker Gardens to Dewar house at the commencement of that fact-finding investigation were taken because the

respondents had received a number of complaints about the claimant's behaviour, and not because the claimant had made a protected disclosure.

110. The Tribunal considered whether the claimant was subjected to the second disciplinary procedure on the grounds that he had made one or other of the protected disclosures which it found had been made.

111. Albeit the claimant had issues with the fairness of the decision to dismiss him and the decision on appeal overturning the dismissal but demoting him, he accepted that two members of staff had raised complaints, and that he had apologised to them for his behaviour. The claimant suggested that the members of staff had made the complaints just before his final written warning expired, and he suggested that the inference to be drawn from this was that this was deliberate, showing that he was a target for management. Such a position however is inconsistent with the fact that the claimant accepted that he had behaved to a degree inappropriately and was prepared to apologise for that behaviour. The fact that this was the case supported the conclusion there was a legitimate issue which the respondents were entitled to act on, and the Tribunal was satisfied that the second disciplinary procedure was wholly unconnected to the disclosures which the Tribunal found had been made.

112. The Tribunal was therefore satisfied that the respondents had made out the principal reason for dismissal, which was capability, and the claim for automatically unfair dismissal under Section 103 A is dismissed.

**Detriment claim under section 47 B of the ERA.**

113. Section 47B of the ERA states:

> *"(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 protected disclosure."*

114. The claimant identified two alleged detriments. These are:

(i) Injury to feelings, and

(ii) being forced to work additional days because of removal from nights to days.

115. In terms of 47 B detriment is *'an act or failure to act'.* 'Injury to feelings' is not of itself an act or failure to act by the employer and therefore is not a detriment, (albeit injury to feelings may be a consequence of having been subjected to a detriment). The claimants claim of detriment of 'injury to feelings 'cannot succeed on the basis that no detriment is identified.

116. The Tribunal considered the second detriment identified by the claimant.

117. The first issue for the Tribunal has to consider is whether it is a jurisdiction to consider this claim on the grounds of time bar.

118. Section 48 of the ERA provides:

*"(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of Section 47B.*

*…..*

*(2) 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 a tribunal considered 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.*

*……..*

*(4) For the purposes of subsection (3)-*

*(a) where an act extends over a period, the 'date of the act' means the last date over that period*

*(b) a deliberate failure to act should be treated as done when it was decided on;*

*and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do that failed act if it was to be done."*

119. The act complained of is being forced to work additional days because of removal from nights to days. The Tribunal was satisfied that the claimant continued to work a pattern of days as opposed to nights from the time when he was transferred out of David Walker Gardens into Dewar House, and that he continued in that work pattern until 24th of September, when he was relocated to McKillop Gardens as a result of outcome of his disciplinary appeal. From that date the claimant did not attend work, and therefore there was no ongoing act beyond 24 September. The 24th September 2018 was then was the date from which time runs for the purposes of assessing whether the claimant was presented in time under Section 48 of the ERA.

120. The claim was presented on 9 June 2019. The date of receipt of the EC notification on the ACAS certificate was 1 April 2019, and the date of issue of the ACAS certificate was 15 April 2019. The ACAS certificate was therefore sought after the expiry of the time limit of three months in Section 48 (3).

121. The Tribunal therefore considered whether it should extend time on the basis that it was not reasonably practicable for the claimant to present the claim within the three month time limit. The burden rests with the Claimant to satisfy the Tribunal that it was not reasonably practicable to present the claim on time. The claimant give evidence to the effect that he was supported by his trade union, initially Unison and latterly, Unite throughout the process. He was aware of the existence of employment Tribunals and had has sought advice from Unison, asking them to lodge a claim on his behalf. He explained that Unison declined to do so, and he disagreed with their opinion. The fact however that the claimant had the benefit of trade union advice, and had

asked them to assist him in presenting a claim, supported the conclusion that the claimant was aware of the existence of Employment Tribunal and the right to present a claim to them in connection with disputes with his employer. The claimant may have been ignorant of specific time limits however ignorance of time limits will not serve to justify a conclusion that it was not reasonably practicable for the claimant to present the claimant time, if that ignorance is itself unreasonable. This was not a case where was suggested that the claimant had been provided with inaccurate advice. The claimant impressed the Tribunal as an able individual, and he was clearly able to engage actively in a number of disciplinary and grievance procedures with the respondents, including during the period when he was certified as unfit for work by his GP. The claimant's grievance which was ultimately concluded by Mr Beattie, was ongoing during the claimant's period of absence, and the grievance hearing was conducted in January 2019. The claimant clearly had in mind that he wished to pursue a claim when he asked for Unison's assistance. When that was declined, he continued to pursue matters with his employer with the help of Unite. Taking these factors into account the Tribunal was unable to conclude that it was not reasonably practicable for the claimant to present the claimant within the three month time limit.

122. The effect of that conclusion is that the Tribunal does not have jurisdiction to consider the claim under section 47 B. The Tribunal notes that in any event, even if it had been satisfied that it had jurisdiction to consider the claim, for the reasons identified above, it would not have concluded that the decision to move the claimant to Dewar House, was taken because he had made a protected disclosure.

**Unfair dismissal – section 98 of the ERA**

123. Section 95 of the ERA provides for the right not to be unfairly dismissed.

124. Section 98 (1) provides that it is for the employer to show the reason for dismissal, and that it is a reason falling within section 98(2).

125. Section 98(2) states:

*A reason falls within this subsection if it-*

*(a) relates to the capability or qualifications of the employee for performing the work of the kind which he was employed by the employer to do.*

126. Section 98(4) states:

*'Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*

*(a) depends on whether in the circumstances (including the size and administer resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case.*

127. The burden of proof therefore falls on the employer to establish the reason for dismissal. The burden at this stage is not a heavy one. The reason for dismissal has said been described as a set of beliefs reasonably held by the employer. The Tribunal was satisfied that at the point when she took the decision to dismiss Ms Blessing has reasonable grounds upon which to conclude that the claimant was unable to return to his employment with the respondent's, and that no date for his return to be identified, and that she dismissed him on grounds relating to this capability. The Tribunal was satisfied therefore that the respondent had established the reason for dismissal, a reason relating to capability, and that was a potentially fair reason under section 98(2) (a) of the ERA.

128. The Tribunal then went on to assess the reasonableness of that decision under section 98(4), the terms of which are set out above. It reminded itself in doing so, the burden of proof is neutral, and that the Tribunal has to apply the objective test of a reasonable employer.

129. Prior to the claimant being dismissed he was assessed by the respondent's medical health advisor. He also attended number of meetings, where redeployment options were explored. No complaint is made about the procedure adopted by the respondents prior to the incapability hearing, and applying an objective test of reasonableness, the respondent acted reasonably in asking the claimant to attend a number of meetings over a period from September to May, having him a medically examined, providing him with a copy of the report, discussing matters with him with a view to ascertaining when he might be able to return to work, and exploding redeployment options with him. When no return to work could be achieved it was not unreasonable thereafter to ask the claimant to attend a meeting, where he was advised that dismissal may be an outcome and to explore matters further with him at that meeting when he was accompanied by his Trade Union representative.

130. By the point Ms Blessing took the decision to dismiss, the claimant had been absent for a period of over seven months. Albeit the claimant suggested in submissions that this was a mental health case, Ms Blessing was reasonably entitled to take into account the terms of the occupational health report which confirmed that the claimant was fit to return to work. Applying the objective test of a reasonable employer, Ms Blessing was entitled to attach considerable weight to this, notwithstanding the fact that the claimant has supplied fitness notes from his GP which stated that he was unfit due to work-related stress. In doing so it was not unreasonable for Ms Blessing take into account that the claimant, whilst refusing on the one hand to go back to work in his substantive role because he would have to work under the same managers he had previously worked with, was prepared to turn to work with those managers if he returned in his role as Senior. Applying the test of reasonableness, Ms Blessing was entitled to attach weight to that, and to conclude that the claimant was fit to return to work, and it was as suggested in the Occupational Health report, a management issue as opposed to an ill health issue which was preventing the claimant's return.

131. The claimant stated in cross examination that the reason he wanted to return to his Senior role was that it would send a message to whistleblowers in the Council not to be afraid. That however was not the reason advanced to Ms Blessing in the course of the Incapability Hearing, where the claimant stated the reason he wanted to return to his old post was that he didn't want people laughing at his and he could not hold his head up.

132. It was not unreasonable, applying objective standard of reasonable employer for Ms Blessing not to return the claimant to the post of Senior. She was reasonably entitled to conclude that that was not open to her as the claimant's demotion had occurred as a result of a disciplinary procedure. Nor was unreasonable for Ms Blessing not to apply the Switch 2 policy. That policy applied in particular circumstances, where an employee was displaced, or was unfit to return to their substantive post, neither of which applied in the claimant's case. It was not unreasonable for Ms Blessing to take into account that there was no foreseeable date on which the claimant could return to work, and to attach weight to the considerable length of time which the claimant had been absent.

133. Taking all these factors into account it cannot be said that it was unreasonable for the response to dismiss the claimant on the grounds of capability, and therefore the claim for unfair dismissal fails.

**Employment Judge : L Doherty**
**Date of Judgment : 4 February 2020**
**Date sent to parties : 6 February 2020**