EMPLOYMENT TRIBUNALS

Claimant: **Mrs Tiffany Simmonds**

Respondents: **Mrs Sarah Bell**

Heard at: **Southampton by CVP.** **On: 1 and 2 July 2020.**

Before: **Employment Judge Hargrove, and Members Mrs W Rowntree and Mr J Howard**

Representation
Claimant: In person
Respondents: In person

RESERVED JUDGMENT AND REASONS

The reserved Judgment of the Tribunal is as follows:

1. The claimant's claim of being subjected to a detriment for making a public interest disclosure under 43G of the Employment Rights Act, in the form of the termination of her engagement as a groom, contrary to section 48 of the ERA, is well founded.
2. The claimant's claims of a failure to pay holiday pay due upon termination of her engagement, contrary to regulation 16 of the Working Time Regulations 1998, and of a failure to pay wages contrary to section 13 of the ERA are well founded.
3. The respondent is ordered to pay to the claimant: –
   (1). For the detriment claim, £5150 for loss of earnings, and £3000 for injury to feelings.
   (2). For the holiday pay claim £1442.
   (3). For unpaid wages £124.50

REASONS

1. By a claim submitted to the Employment Tribunal on the 6th of July 2018 following early conciliation from 4 June to 2 July 2018, the claimant makes claims of being subjected to a detriment for making a public interest disclosure (PID), contrary to section 48 of ERA, of three days unpaid wages on 14th 15th and 16th May 2018, and for holiday pay due on termination of her engagement. The claimant was engaged as a part-time groom at the respondent's Stable-yard on the outskirts of Sutton Waldren near Blandford Forum, latterly from May 2017 to 17 May 2018, on which date her engagement was terminated. This is the detriment to which she claims she was subjected for making a PID.
2. It is not now in dispute: –

(1) That the claimant qualified as a worker as defined in section 230 of ERA, and for the purposes of a PID claim, section 43K of ERA. The respondent had originally claimed that the claimant was self-employed. The claimant originally claimed that she had been unfairly dismissed as an employee, but withdrew that claim at the first case management hearing recognising that she did not have the requisite two years continuous service.

(3). That the claimant made a PID to World Horse Welfare and to RSPCA on or about 9 May 2018 which satisfied sections 43A and 43G of the Act; and that the claimant had made disclosure of substantially the same information over the previous 12 months to the Respondent, concerning the state of health of one of the respondent's 11 horses, Destiny, who had a bad lower leg, illustrated in photographs sent to the two organisations as part of the disclosure.

3. Those findings above were made at a public preliminary hearing which took place on 9 January 2019 before EJ Dawson. The respondent did not attend that hearing, although she had had notice of it, but subsequently made an application for reconsideration of the finding that the claimant was a worker which was however unsuccessful. Also on 9 January 2019 case management orders were made and this hearing was listed, originally to take place in person at Southampton, but due to Covid, on the 26th of June 2020 it was converted to a CVP hearing, at which we heard sworn evidence from the claimant and the respondent.

EJ Dawson expressly left open for this hearing the following issues: –

(1) If and when the respondent first became aware of any disclosures to World Horse Welfare and RSPCA.

(2) If and when the respondent first became aware that it was the claimant who had done it.

There were also the issues about the claimant's entitlement to holiday pay and unpaid wages.

4. The claimant initially worked as a groom for the respondent from a date in 2015 to 31 January 2017 when she resigned on one months notice. Paragraph she had worked five days per week part time from around 7:30 am to 2 pm. She was responsible for the feeding and grooming of up to 11 horses kept in fields and a stable block near to the respondent's house. The claimant was due to go on holiday at the end of January 2017, and left on notice However, she was engaged again from May 2017 until May 2018 when it was terminated. The circumstances of the resumption are

contentious. Mrs Bell claims that the claimant only agreed to help out for as long as it took to find a replacement for the claimant, it being difficult to find a replacement during the exceptionally inclement weather in February March 2018. Mrs Simmonds claims that she intended to continue to work for the respondent and that there was no stated intention that she should leave when a replacement was found. We were satisfied that Mrs Bell did advertise for a vacancy for a groom from about January 2018, but after the claimant's resumption the contentious issue is whether a new groom was to be a complete replacement for the claimant, or additional help because the claimant only worked part time hours. Significantly however, on 20 May 2018, the respondent started advertising specifically for a groom to work the morning hours previously worked by the claimant.

5. Since it is not now in dispute that the claimant was a worker, at least from May 2017 to May 2018, she qualified for paid holiday under the WTR 1998. During that period she did take holiday but it was unpaid. Regulations 13 and 13 A of WTR 1998 define the period of entitlement to annual leave. In the claimant's case it was an entitlement to 28 days in the leave year beginning May 2017 when her employment resumed. Regulation 16 has the effect that the worker is entitled to be paid leave at the rate of a weeks pay over 28 days. In this case, the claimant claims an entitlement to pay at a daily rate of £51.50, 5.15 hours x £10 per hour, Amounting to £1442. Mrs Bell did not pay it because she did not recognise that the claimant was a worker, as opposed to self employed.
6. The claimant also claims for three days unpaid wages on 14, 15 and 16 of May 2018. Without going into the detailed matters of dispute, we are not satisfied that the claimant worked throughout all of the hours which she claimed in the worksheets, and have consequently made a reduction of £10 per day. The issue was that the claimant booked a finish time in advance of the leaving time of 2 pm and then did not subsequently work up to 2 pm. Mrs Bell failed to pay anything at all for those three days. The claimant was and is accordingly entitled to reduced pay for those 3 days at £41.50, amounting to £124.50. However, for reasons which we will explain next, we do not accept that the failure to work the claimed hours on those occasions or on any earlier occasions formed any part in the reasons for Mrs Bell's termination of the claimant's engagement on the evening of 17th of May.
7. The principal issue in this case concerns the reason for the termination of the claimant's engagement on the 17th of May. The claimant asserts that it was terminated because she had made PIDs as above. Mrs Bell claims that she did not know that a PID had been made at the time of the termination and did not discover in any event that it was made by the claimant at least until receipt of the claim from the tribunal in July 2018. The relevant provisions are set out in 43A which defines a PID, and section 43B which defines what is a qualifying disclosure, including a disclosure of information which in the reasonable belief of the worker tends to show that a criminal offence has been or is been committed all that a person is failing or has failed to comply with a legal obligation. We make it very clear here that it is NOT, and never has been an issue in this case that Mrs Bell did commit a criminal offence or a breach of a legal obligation. The issue was whether or not the claimant reasonably believed that she was neglecting the horse as a perceived breach of a legal obligation. The quite complex provisions relating to PIDs require a disclosure of the information either to the employer, or, under section 43F, to one of a number of prescribed persons or bodies specified in the Public Interest (prescribed persons) Order 2014.

Neither World Horse Rescue nor the RSPCA are prescribed persons. (NSPCC is one example of a Prescribed Person). A third alternative is a disclosure to some other person or body in the circumstances specified in section 43G. The worker is required to show that he or she believed that the information disclosed and any allegation contained in it were substantially true; that he or she did not make the disclosure for the purposes of personal gain; and that one of three alternative further conditions were met. These are EITHER(1) that at the time of making the disclosure the worker reasonably believed that he would be subjected to a detriment by his employer if he made the disclosure to his employer or to a prescribed person; OR (2) the worker reasonably believed that it was likely that evidence relating to the relevant failure would be concealed or destroyed if he made the disclosure to the employer; OR (3) that the worker had previously made a disclosure of substantially the same information to his employer. The worker is also required to show that in all the circumstances of the case it was reasonable for him or her to make the disclosure in question. Section 43G (3) specifies the matters to which the tribunal shall have regard to in assessing whether the disclosure was reasonable. These include, the identity of the person to whom the disclosure was made; the seriousness of the relevant failure; whether the relevant failure is continuing or was likely to occur in the future; whether the disclosure was made in breach of a duty of confidentiality owed by the employer; and action which the employer has taken or might reasonably be expected to have taken as a result of the previous disclosure. We are satisfied that EJ Dawson made express findings on 9 January 2019 that the claimant had discussed the issue of Destiny's health with Mrs Bell during the period between May 2017 to May 2018; that Mrs Bell claimed that she was treating it; that the claimant was aware that the leg was not improving; that Mrs Bell told her that on one occasion she had been in contact with the vet but did not explain further; that Mrs Bell did not believe in using doctors or vets unless it was necessary; that there were text messages passing between the claimant and Mrs Bell discussing the horse in March and April 2018; and that the claimant was told by a local vet that the leg could become infected if left untreated. These points are repeated in paragraph 2 of the claimant's evidence to this hearing, the truth of which we accept. In these circumstances, it has already been found that in particular Sections 43G (1)(b) and (c) applied in respect of subsection (2)c(i), and the tests in (2)(e) were made out, and that it was reasonable for the claimant to make the disclosures when she did because the claimant had previously discussed the issue with Mrs Bell, and the leg was not getting better and could become infected.

8. The issues which accordingly were left for us to decide were whether, at the time of the termination of the engagement on 17 May 2018, Mrs Bell was aware that a Disclosure had been made, was aware or believed that the claimant had made the disclosures, and that she terminated the claimant's engagement because of them. In this respect, section 48(2) is highly material: – "it is for the employer to show the ground on which any act or deliberate failure to act, was done". This has the effect of reversing the burden of proof so that once the claimant proves on the balance of probabilities that an act has been done which is capable of being a detriment to the worker, the burden shifts to the employer to prove that the disclosure did not materially influence the treatment. See NHS Manchester v Fecitt 2012 IRLR page64.
9. Conclusions.

We are not satisfied that Mrs Bell did not end the assignment of the claimant for reasons unconnected with the fact that she had made PIDs for the following reasons.

(1).We note that the claimant made her disclosures on or about the 9th of May by sending an email and photographs to World Horse Welfare. See page 5 of the second bundle.She also telephoned the RSPCA. Receipt was acknowledged on the 15th of May and it was stated that the information had been sent to a field officer. There is no clear evidence as to when WHW and RSPCA took action by approaching the respondent. The claimant has made enquiries and received unhelpful responses citing data protection reasons for not disclosing the information. However a response from Penny Baker, field officer for WHW dated the 7th of May 2019 (one year later) indicated "we have dealt with the horse you called us about. Data protection means I cannot explain in full details but just to say I can confirm a vet has now been sent out. RSPCA continue to monitor as they were also involved". This information does not definitively prove that a visit was made to the respondent before the evening of 17th of May, but the unexpected termination took place only 8 days after the PIDs. Mrs Bell accepts that she received a visit from two women separately, one from WHW and one from RSPCA who spoke to her for 5 to 10 minutes on the doorstep at her house and never examined any animal. Furthermore, she claims that they mentioned a complaint about horses and dogs. The claimant did not make any disclosure about the treatment of the respondent's dogs – we accept the claimant's evidence on this point. We find it highly improbable that, having regard to the details of the report and photographs, there would have been no request for an inspection of the horse or enquiries as to the nature of the problem with the horse. Furthermore, Mrs Bell has not mentioned any subsequent visit or visits from the RSPCA despite them, supposedly, "continuing to monitor". More particularly, we consider it unlikely that the respondent would not have remembered or have recorded the date of the visits. Mrs Bell claims to remember that the visits were shortly after her mother died, and that she was pre-occupied. According to enquiries made by her during her evidence to the tribunal, her mother-in-law had died on the 19th of April 2018 and the funeral took place in Scotland on the 3rd of May 2018 followed by a memorial service on the 30th of May. We regard Mrs Bell's explanation that many baseless complaints have been made about her treatment of animals from members of the local community over recent years and that accordingly, she had no reason to be surprised or take note of this complaint or its date as unconvincing.

(2). The claimant had made timely enquiries as to when the visits had been made, but the respondent had made no such enquiries until asked to do so by the Tribunal in a break in her evidence on 2 July 2020 but with negative results. Since the respondent was aware of the importance of the issue precisely when the visits were made in relation to the date of termination of the claimant's employment, we regard it is surprising and significant also that the respondent had made no earlier enquiries as to the date of the visits.

(3). Next, we regard it as significant that the termination took place only eight days after the disclosures were made; and also that complaints were made about the claimant falsifying her worksheets and about the state of the saddles were only raised with her by text on the 18th of May the day after notification of the dismissal, and a first email of the 18th of May timed

at 12:33 “taking her up on her offer of leaving”, thanking her for all work, and raising no issues about her conduct at that stage.
(4). Mrs Bell’s explanation on 17th of April 2019 (page 24) that there were complaints about a dog and two horses; and that the horses grazed a field with a public footpath running through it used by the public all the time, and thus suggesting that anyone could have made the complaints; and that she was not aware of the identity of the complainant until receipt of the claim form in July 2018 are also unconvincing. We have already noted that the claimant made no disclosure about dogs or two horses. In any event, we accept that the claimant had raised with Mrs Bell issues about the condition of Destiny’s leg over the preceding year. We accordingly do not accept that Mrs Bell did not know or had no reasonable cause to suspect that the claimant was the whistleblower. The proximity of the termination to the making of the PID leads us to conclude that it was far more likely that the PID was the reason for the termination. Although we have found that the claimant did not work all of the hours claimed on the 14th to the 16th of May 2018, and the respondent claims that after exhaustive enquiries (which she could not have made before 17 May) there were earlier occasions on which she overcharged, we note that the respondent first raised the issue only at 14.20 on the 18th of May and no earlier. This was only after the claimant had challenged the termination. We conclude that Mrs Bell was looking for another reason for the termination, but she had not raised any earlier complaints about the claimant’s conduct, although she alleged in her witness statement that the claimant was responsible for horses being let out from a field and trespassing into her garden, causing significant damage in an incident in April 2018. We do not accept that the claimant was primarily responsible for the escape of horses on this occasion because it transpired that it was the gardener who was responsible for leaving open the gate giving access to the garden from the lane, by which the horses got access. We were not convinced by Mrs Bell’s explanation that she was a non-confrontational person. We also do not accept that the claimant only agreed to return to work in early 2018 on a short term basis until a replacement was found. We note that an advertisement was placed for a groom to work at the yard on morning hours closely approximating to the claimant’s hours only from 20 May 2018, 2 days after the claimant’s post was terminated. See page 2 of the claimant’s first bundle. We conclude that earlier advertisements were for posts working different hours. For these reasons, we conclude that there were visits by HWH and RSPCA before the claimant’s termination, and that it is more probable than not that the claimant was dismissed very soon after and because of the visits, the respondent knowing or believing that the claimant was responsible for the reports.

10. Compensation.
    10.1. Section 49 of ERA sets out that if an employment tribunal finds a complaint of detriment well-founded it shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the complainant. The amount of the compensation awarded shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the infringement to which the complaint relates, and any loss which is attributable to the act, or failure to act, which infringed the complainant’s right. The two heads of compensation claimed by the claimant in this case are loss of earnings and injury to feelings. In respect of the claim of loss of earnings, there is an obligation on

the part of the worker to take reasonable steps to mitigate the loss by looking for alternative employment. However the burden of showing that the claimant has failed to mitigate his loss falls upon the employer. In this case the claimant produced a list of jobs primarily involving the caring for animals for which she had applied following the termination of her engagement on 17th of May 2018. She was off work until, at the end of August 2018, she was invited for interview in a different capacity as a Community Support Reablement Worker and started in post on 8 October 2018, following training. Mrs Bell points out that there is no written evidence of any responses to the list of jobs for which she applied between May and August. However, we accept that the claimant did make the applications and that they were unsuccessful; and that many of the prospective employers failed to respond to the applications. In the circumstances we award loss of earnings from 18th of May to 8th of October at the rate of £51.50 per working day amounting to £5150.

10.2. The claimant was in receipt of state benefits during this period which are set out in pages 14-15 of the claimant's first bundle under the heading of "Benefits", including housing benefit, child tax credit, and working tax credits all totalling £4711.38. The normal rule is that where an employee or worker who has lost her earnings as a result of a wrongful dismissal constituting a detriment is subsequently in receipt of state benefits intended to cushion the employee after the dismissal, those benefits fall to be deducted from the monetary award for loss of earnings. Mrs Simmonds claims that she received these benefits even when working for Mrs Bell before the termination on 18 May 2018. However she does not say that she received them at the same rate or a lower rate. Accordingly, Mrs Simmonds is required to notify the Tribunal and Mrs Bell in writing within 14 days of promulgation of this judgment at what weekly rate she was receiving these benefits before 18 May 2018. Pending receipt of that information, that part of the judgment only (for £5150) will not be enforceable against the respondent without further order of the Tribunal.

10.3. Next we considered the claim for injury to feelings. We record that a claim for injury to feelings can be made for loss of engagement of a worker notwithstanding the provision in section 49 (6), because the word "loss" in section 49 (2)is appropriate to include loss from injury to feelings. See Virgo Fidelis Senior School v Boyle 2004 ICR page 1210, as approved in Timis v Osipov 2019 ICR page 655. We calculated the loss in accordance with the principles in Vento V Chief Constable of West Yorkshire police, uprated for inflation. The claimant is claiming the sum of £3000 for injury to feelings, which represents the lower part of the lower band in Vento and in our view is appropriate for loss of work after one year in the circumstances of this case.

Employment Judge Hargrove

Date 7 July 2020.

Judgment and reasons sent to parties 15 July 2020

FOR THE TRIBUNAL OFFICE