EMPLOYMENT TRIBUNALS

Claimant: **Ms Tracy Buckley**

Respondent: **Atkins Care Services Ltd**

Heard at: **by CVP**

On: **1-2 June 2021 and 4 June in chambers**

Before: **Employment Judge Martin**
Mr C Rogers
Mr A Fairburn

Representation
Claimant: **In person**
Respondent: **Mr D Jones - Counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claims are unfounded and are dismissed.

REASONS

1. On 29 August 2019 the Claimant brought claims of constructive unfair dismissal, holiday pay, unauthorised deductions from wages and detriment for making a public interest disclosure (whistleblowing). The Respondent defended the claims. At a preliminary hearing on 6 February 2020, the Claimant withdrew her claim for holiday pay. She withdrew her claim for unauthorised deductions from wages at the hearing.

2. The issues were agreed at the preliminary hearing as follows:

    i) The Claimant claims unfair constructive dismissal, detriment in employment and dismissal by reason of having raised a protected disclosure (whistleblowing), and unauthorised deductions from wages. The Claimant confirmed that she was withdrawing her claim for holiday pay.

Constructive unfair dismissal

ii) With regard to the Claimant's claim of constructive unfair dismissal the Claimant makes the following allegations:

iii) On 29 July 2016 a letter was sent from the Respondent to clients stating that there would be an increase in the hourly rate charge and expressly stated that carers would receive an increase to their salary. However, the staff did not receive any increase in pay.

iv) In 2016 the Claimant was assaulted by a client's husband on three occasions. On the third occasion on 05 October 2016 the Claimant incurred physical harm. The Claimant argues that there was no contact from her manager for nearly three weeks, no risk assessment took place and the Claimant was not provided with safety options such as pair working or a safety alarm.

v) The events set out in the Claimant's particulars of claim relating to events on 31 October 2016 are by way of background evidence only.

vi) In July 2018 the Claimant spent time cleaning a client's home and informed the Respondent of unworkable conditions. The client's family was not informed, and the Claimant was not properly paid for her additional work.

vii) On 04 March 2019 the Claimant had a new client on her rota. She expected to meet with a carer who would introduce her to the client. None had been arranged. The client was upset. The care plan was inadequate to locate essential household matters.

viii) On 25 March 2019 the Claimant attended at a meeting to discuss her appraisal. The Claimant raised the issue of shadowing when assigned to a new client. The Claimant argues that she blew the whistle at this meeting and told managers Mr Damian Nolan and Ms Teresa Bennett "go where you want to go with it". The Claimant was also told that there was a new Team Leader. The Claimant was told this had been advertised in the January/February Newsletter. However, on further enquiry, the Claimant was told that there had not been a January/February newsletter.

ix) The outcome of that meeting was for the Claimant to forward her concerns the Respondent, which she did by e-mail to Ms Bennett on 29 April 2019 and a further meeting was arranged for 09 May 2019. The Claimant was told that her concerns would be discussed as 'any other business' at that meeting, but they were not put on the agenda. Also Ms Jenna Hamblin was at this meeting who formed part of the concerns raised by the Claimant.

x) As a consequence of this meeting the Claimant resigned from her employment, which was accepted by the Respondent.

xi) The Claimant relies on all the above events as forming part of the reason why she left the Respondent's employment. The last straw was the meeting on 09 May 2019.

Protected disclosure (whistleblowing) claim

xii) With regard to the protected disclosure (whistleblowing) claim, the Claimant argues that she made a protected disclosure at the meeting on 25 March 2019 and in the email of 29 April 2019 giving information that the Claimant says she reasonably believed tended to show a breach of a legal obligation regarding the issue over pay and not providing adequate handover and that this was also in the public interest. The Claimant argues that by not placing her concerns on the agenda in the meeting on 09 May 2019 amounted to a detriment in employment for having raised a protected disclosure and constructive dismissal by reason of having made a protected disclosure.

Unauthorised deduction from wages claim

xiii) The Claimant's unauthorised deduction from wages claim is that she alleges that she would be paid at an hourly or half-hourly rate no matter how long she worked so in essence the amount of time she worked would be rounded up to the nearest half an hour. The Claimant argues that this was unilaterally changed in Winter 2017 after which she was paid by the minute. The Claimant argues that this can be demonstrated by pay slips entries.

3. During the Claimant's cross examination, she was asked whether she relied on items 3 – 6 of the list of issues as being the reason that she resigned. She said that she did not. To be sure about this, given that the Claimant was a litigant in person, the Employment Judge specifically asked the Claimant if these matters were either the cause of her resignation or formed part of the reasons that she resigned. She confirmed unequivocally that they were not and that she relied on items 7 – 10 of the list of issues only. Consequently, the Tribunal has not considered items 2-6 even though it heard evidence from the Claimant about them.

The law as relevant to the issues

Constructive unfair dismissal

4. A claim for constructive unfair dismissal requires a claimant to show that there was a breach of contract and that it was sufficiently serious to justify his resignation or that he resigned in response to the last of a series of incidents. The claimant must have left in response to that breach and must not have delayed his resignation.

Public interest disclosures

5. The principal definition is in section 43A Employment Rights Act 1996 which refers to other sections.

> **43A Meaning of 'protected disclosure'**
>
> In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any sections 43C to 43H.

6. Section 43B(1) is as follows:

43B Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

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

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

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

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

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

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

7. The Claimant must therefore prove as a first step that there has been a disclosure of information. The Tribunal will have to find that the Claimant actually believed that that information tended to show one or more of the matters set out in paragraphs (a)-(f), and also that it was reasonable for that belief to be held.

The hearing

8. At the start of the hearing the Claimant complained that she had not received a copy of the final bundle from the Respondent. After some discussion, Mr Jones agreed to print a hard copy of the bundle and courier it to the Claimant that day. The Claimant had wanted to go ahead without it; however the Tribunal was concerned that this would put the claimant at a disadvantage and preferred to wait and start the hearing on the following day. This view was reinforced when the Claimant talked about page numbering and it transpired that the numbering she had on the copy she had was different to the numbering of any other bundle. The Claimant was sent a paper copy of the bundle on day one and on day two said was happy to proceed.

9. The Tribunal had before it an agreed bundle of documents numbered to 231 and heard from the Claimant and for the Respondent from Mr Damian Nolan and Ms Jenna Hamblin.

The facts as found by the Tribunal

10. The Tribunal has come to the following findings of fact on the balance of probabilities having heard the evidence and considered the submissions. These findings are confined to those that are relevant to the remaining issues and necessary to explain the decision reached. Even though not all facts are recorded below, all the evidence was heard and considered.

11. The Claimant period of continuous employment began on 17 November 2008. She was transferred to the Respondent when it took over the business in February 2015. Her terms and conditions of employment remained the same and she was employed on a zero hours contract. She also had a floristry business.

12. The Respondent provided Care Givers to work in client's houses. The Claimant was a good Care Giver and her clients were appreciative of the work she did for them. However, throughout her employment both before and after the transfer to the Respondent there were issues with her time keeping and other operational matters. These were discussed in supervision meetings with the notes of the meeting being signed by the Claimant as being correct.

13. On 4 March 2019 the Claimant went to visit a client who she had not visited before. The rotas were sent out at least two weeks in advance and Mr Nolan said that the Claimant would have received the rota with this new client on it, at least 12 days prior to her visit. The Claimant says she expected someone to meet her at the premises to introduce her to the client. She telephoned the Respondent to be told that no one was available, and she went into the property to visit the client. Her evidence was that the client was unhappy as he did not know her.

14. The Claimant relies on a document which appears to be from a website, and states: "*A CAREGiver is always introduced to you before the care service begins, to ensure they are compatible and are the right fit for happy home care*". The Tribunal is unsure of exactly what this relates to and Mr Nolan was not able to say with any certainty. This document appears to be sales literature from the franchisor (the Respondent is a franchisee of Home Instead Ltd). Mr Nolan confirmed that it was not a policy document that related to the Claimant's employment. Policies were produced in the bundle none of which related to introductions to new clients for Care Givers.

15. Mr Nolan's evidence was that where possible, and certainly when a Care Giver makes a request, an introduction is done when a Care Giver visits a client for the first time. He accepts that this does not always happen and says that the Claimant had previously visited new clients without an introduction. Apart from the phone call to the office when she first arrived at the property there was no evidence of any other complaint after the visit save as set out below.

16. On 25 March 2019 the Claimant had an appraisal. The normal process is that the appraisee completes an appraisal form in advance of the meeting. The Claimant did not complete a form as requested. The appraisal was

begun on that day and there was a record of the appraisal in the bundle which the Clamant signed. The Claimant had matters she wanted to discuss much of which was operational, and she was told that they would be dealt separately in supervision meetings. The Claimant was asked to set out in writing her concerns so that the Respondent could investigate them and to send this to the Respondent by 28 March 2019. It was agreed that the appraisal would be adjourned to reconvene later.

17. The Claimant says that she made a verbal protected disclosure at this meeting. The Tribunal had to consider and make findings about what was said by the Claimant. Mr Nolan's witness statement says that *"Mrs Buckley commented that she was not happy with the scheduler (planner) and wanted a conversation with her. I replied that this was an appraisal and that operation issues would be addressed in supervision. Mrs Buckley also said she had a query with the number of hours allocated to her. I replied that there were hours available and she was welcome to apply for a full-time contract as advertised in out March 2019 newsletter*". He said that the main issue was her hours which he would investigate.

18. The Claimant said that at this meeting she wanted to discuss matters including lack of hours, training, ethical practises, the ways staff were expected to work as well as undignified practices. Her evidence was that she said, "*call me a whistle blower Damian, go where you want to with it*". From her evidence the Tribunal is unclear as to whether this is what she wanted to say or what she did say at this meeting.

19. To reconcile this the Tribunal turned to the record of this meeting which the Claimant signed. This records that there was a conversation about the schedule; the difference between an appraisal and supervision; that Mr Nolan would look into the issue of loss of hours; that she loves her role and has many years of experience. It is also recorded that she wanted to work between 9 am and 3 pm, that her manager would look at the visit on 4 March 2019 and how long it had been on the schedule. It records that the Claimant was happy with al policies and procedures. The conclusion was for the Claimant to complete the appraisal form and make a list of operational issues to discuss in supervision and to send this to the Respondent by 28 March 2019.

20. From this, the Tribunal concludes that there was mention about the client visit on 4 March 2019, but it is far from clear what the discussion was about or what was actually said. On balance having taken all this into account the Tribunal concludes that there was no disclosure made by the Claimant that was a qualifying disclosure such as to give protection under the whistleblowing legislation. What was discussed was more operational and without clear evidence about what the Claimant said the Tribunal can not conclude a qualifying disclosure was made. The burden rests on the Claimant. The matters all seem to be personal to the Claimant and no in the public interest.

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21. It is of note that the Claimant did not send a list of matters to the Respondent by 28 March 2019. Therefore Ms Bennett-Johnson sent an email to the

Claimant on 16 April 2019 setting out the matters to be discussed at the supervision meeting. There were four matters listed: 1. Hours requested and planned; 2. working documents; 3. Timescales and 4. deadlines and outstanding payment. The Claimant did not respond to this or send her list of operational matters until 29 April 2019. The Claimant relies on this as her second protected disclosure.

22. In the meantime, Mr Nolan started to investigate the matters raised by the Claimant at the appraisal regarding hours and pay and asked Ms Hamblin to get some information from him which he spent some time analysing.

23. The email from the Claimant on 29 April 2019 refers to the appraisal and that her wages and holiday pay were to be investigated. She commented on the appraisal form and referred to the offer of 35 hours per week being discussed. She mentions the Respondent's comment that she was always off sick on a Monday and Friday, and in the final substantive paragraph refers to shadowing clients. She said *"Shadowing clients, I have brought this up in so many meetings you always deny this is not how you work, it happen on too many occasions TR – how was this client put on my schedule without any details, Communications, A phone call, I say it too often Not even a care plan offered, I had no knowledge of his mental state, mobilty, couldn't even find the folder, phone until I fund my bearings, Also With client shouting at me "who am I", I am an experienced carer that adapts too any situation, helps and makes life easier for other struggling with a disease in all homes Any situation, end life I'm not afraid of, but no brief, no communication… Is a struggle for me."* (sic). It is noted that she has not said that the appraisal form missed anything that had been discussed thus reinforcing the Tribunal's conclusion that there was no disclosure on 25 March 2019.

24. The Tribunal considered whether the Claimant's email of 29 April 2019 amounted to a protected disclosure. The Tribunal notes the tenor of the email which relates to her personal situation rather than to a wider group of people. In her evidence to the Tribunal she referred to the webpage discussed above which the Tribunal has concluded was something on the website for prospective clients. She says that clients were told that there would be introductions to new carers and that this did not happen. Whether or not this is the case, the email of 29 April 2019 does not refer to it. If it had, the Tribunal may well have considered this to be in the public interests. The Tribunal however finds that the email was not in the public interest as it refers to her personal situation only.

25. The detriment relied on by the Claimant as set out in the list of issues is that the Respondent did not place her concerns on the agenda for the supervision meeting. As can be seen from the chronology, the agenda for the meeting was set before the Claimant sent her email of 29 April. It was clear from the previous meeting that operational matters were scheduled to be discussed at the meeting on 9 May 2019.

26. Given some of the matters to be discussed at the supervision meeting related to the schedules, Mr Nolan asked Ms Hamblin to sit in so he could ask questions of her and she could provide information. The meeting on 9

May 2019 was very short. The Claimant had not requested anything else to be put on the agenda.

27. The Claimant's witness statement says that *"When I arrived I asked what the meeting was about, I was given an agenda noticed that A.O.B had not been added ….."* …. *"The email was not included in agenda, in the meeting, there was just agenda topic. It was clear that those present did not want to discuss any other business other than agenda….."* (sic). She describes Mr Nolan being frustrated and getting up and taking off his glasses. She left the office saying she was resigning.

28. By all accounts the meeting was heated. The Claimant was forceful and raised her voice. Ms Hamblin said she was shocked about how the Claimant had spoken to Mr Nolan. Mr Nolan's evidence was that he was going to go through the agenda which had previously be notified to the Claimant and then there would have been an opportunity to discuss other matters, however it never got that far as the Claimant resigned and walked out. He wanted to discuss the matters arising from the previous appraisal. His evidence was that the Claimant demanded that her email of 29 April was discussed. Mr Nolan then got up and told her that he was there to discuss the matters on the agenda and that if she was not prepared to do this the meeting should be ended. He said that the Claimant stood up and said that she was not going to work another day for a company that does not put health and safety first and was resigning and that she left the office. In response to a question in cross examination the Claimant said that what she meant by health and safety was integrity.

The Tribunal's conclusions

29. Having found the factual matrix as set out above, the Tribunal has come to the following conclusions.

30. The Tribunal finds that the Claimant was not dismissed but resigned. In order to show a constructive dismissal, the Claimant must show that the Respondent was in fundamental breach of her contract of employment. Although not spelt out by the Claimant, the term she relies on is that of mutual trust and confidence (there is no criticism here, as the Claimant is a litigant in person). The Tribunal finds that matters were raised in the appraisal and that they were to be dealt with at a future supervision meeting. The matters to be discussed following the appraisal were sent to the Claimant in writing and she did not challenge them or ask for anything else to be added. The Claimant had written her email of 29 April 2019 after the agenda had been set without asking for it to be amended to include what she had written.

31. The Respondent was proposing to deal with the matters arising from the previous appraisal as per the agenda. The Tribunal accepts Mr Nolan's evidence that had the meeting progressed he would have considered the matters raised in her email of 29 April but that he as not given the chance. The Claimant may have been irritated that the matters set out in her email were not specifically on the agenda, however this does not mean that the Respondent was not intending to deal with them. Had the meeting

progressed, and had Mr Nolan refused to consider her email then or at any other time, then maybe that would be grounds for resigning and claiming constructive unfair dismissal. However, this is not what happened.

32. The Claimant was asked in cross-examination what she thought whistleblowing meant. She replied that she *"tried to make them aware and they were not listening*". She was asked what she believed the Respondent was doing that was wrong and replied *"integrity Saying you are this lovely company, brochure, advertise, go and meet you, did not happen get client and send in anyone. Previous workers had shadows and training off base.".* (taken from Employment Judge's notes of evidence).

33. The Tribunal finds that there was no protected disclosure made by the Claimant during the appraisal meeting on 25 March 2019. As set out above, there is no clarity about what was said, and from what evidence there was what was said relates to the Claimant's personal situation only. However, even if the Tribunal was wrong about this there is no causal connection between this, and the detriment relied on namely that her email of 29 April was not on the agenda for the meeting on 9 May 2019.

34. The Tribunal finds that the second protected disclosure relied on by the Claimant, namely her email of 29 April 2019 is similarly not a disclosure in the public interest. The Claimant links in her evidence the webpage referred to above with what happens in practice. However, this is not referenced in the email of 29 April 2019 and it was not reasonable for the Respondent to know that this is what she was referring to. Had the Claimant linked the two then the Tribunal may have found the disclosure to be in the public interest.

35. Even if the Tribunal had found the email of 29 April to be a protected disclosure, there is no causal connection between that disclosure and it not being part of the agenda for the meeting on 9 May 2019. The Claimant accepted that she had not asked for it to be on the agenda and the Tribunal has found the agenda was set before the Respondent received her email of 29 April 2019 was received.

36. In all the circumstances the Claimant's claims are dismissed.

Employment Judge Martin

Date: 7 June 2021