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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111249/2019

**Preliminary Hearing Held by Cloud Video Platform (CVP) on 24 and 25
March 2021**

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Employment Judge: L Wiseman

Members: P McColl

N Bakshi

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Ms Valerie Joyce

**Claimant
Represented by:
Ms L Neil
Solicitor**

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The Beeches Home Care Agency Ltd

**Respondent
Represented by:
Mr P J Harvey
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The tribunal decided: (1) to dismiss the claim of unfair dismissal and (2) to order the respondent to pay to the claimant the sum of £224 (net) in respect of one week's notice of termination of employment.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 26 September 2019 in which she complained that she had been automatically
5 unfairly dismissed because of having made a protected disclosure to Ms Currie on the 18 February 2018 (section 103A Employment Rights Act) and/or because of having made a request for flexible working (section 104C Employment Rights Act). The claimant also complained of discrimination because of disability (in terms of sections 15 and 20 of the Equality Act) and
10 that there had not been a payment of notice.
2. The respondent entered a response denying the claims. The respondent accepted the claimant had been dismissed but asserted the reason for dismissal had been due to a breakdown in the relationship between the claimant and Ms Currie, the manager, and the office staff.
- 15 3. We heard evidence from the claimant; Ms Tracy Duke, Co-Ordinator and Ms Kelly Dhesi, Managing Director. The tribunal did not hear from Ms Currie, who had left the employment of the respondent last year.
4. The use of witness statements had been ordered in this case, and the witness statement of Ms Currie was included in the bundle of documents produced for
20 this hearing. We agreed the witness statement would be accepted by the tribunal, but the weight to be attached to it would be reduced because it could not be tested in cross examination.
5. The tribunal was also referred to two bundles of documents: one produced by the claimant and one by the respondent. Ms Neil objected to the respondent's
25 documents on grounds of relevance and that they could have been produced earlier. The tribunal decided the documents could be admitted under reservation.

6. Ms Neil's request to ask supplementary questions of the claimant was granted on the basis she wished the claimant to address a matter included in Ms Currie's statement, which had not been addressed in the claimant's statement.
7. Mr Harvey's request to ask supplementary questions of Ms Duke was also granted.
8. Ms Neil confirmed, at the commencement of the case, that the disability discrimination claim had previously been withdrawn. The claim of automatic unfair dismissal because of having made a flexible working request was withdrawn during the course of the hearing. Accordingly, the issues to be determined by the tribunal were:
- did the claimant make a protected disclosure to Ms Currie on the 18 February 2019;
 - if so, was the making of the protected disclosure the reason for dismissal and
 - is the claimant entitled to be paid one weeks' notice.

Findings of fact

9. The respondent owns and operates two home care agencies. Ms Dhesi is the Managing Director of the respondent. Ms Joy Currie was the Manager of the respondent at the time of the claimant's employment and Ms Tracy Duke was employed as a Co-Ordinator from April 2019.
10. The claimant was employed as a Carer at The Beeches Home Care Agency Ltd from (or about) the 24 September 2018 until her dismissal on the 31 May 2019. The claimant earned a net weekly pay of £224.
11. The claimant's role involved her visiting service users in their home and providing in-house care to them.

12. The claimant reported to Ms Joy Currie, Manager, and also had communications with the Co-Ordinators, Ms Tracy Duke and Ms Karen McGoldrick.
13. The claimant was a disabled person because she had breast cancer and subsequent surgery for a mastectomy. This was prior to her employment with the respondent.
14. The claimant was employed on a zero hours contract, however there was an understanding between the parties that the claimant would be allocated full time hours. The issue of working hours was raised during Ms Currie's first supervision meeting with the claimant on the 19 March 2019. The claimant requested to work five days one week and four days the next to accommodate fortnightly physiotherapy appointments. This was agreed by Ms Currie.
15. The claimant subsequently made a request to reduce her hours because she no longer wanted to work beyond 5pm. Ms Currie advised the claimant the business could not accommodate this request because of the volume of work and the fact service users required to be supported at that time.
16. Ms Currie found the claimant difficult to deal with because of the claimant's attitude in the way she spoke to people, and because she came across as aggressive when speaking and being spoken to. Ms Currie did not raise these matters with the claimant, but did complain to Ms Dhesi about the claimant on a number of occasions, for example, after the claimant had been disruptive in a staff meeting in May 2019.
17. Two incidents occurred which resulted in the claimant being invited to attend an investigatory meeting with Ms Duke. The claimant was, by letter of the 17 May 2019 (page 56) invited to attend an investigation meeting on the 24 May into an allegation that the claimant had confronted day service staff when they were collecting a service user. Ms Currie received a complaint from the social work department to inform her that they had received a complaint from a service user's day centre. The staff at the day centre alleged the service user had been unkempt and covered in dry faeces on picking him up to transport

him to the day centre. The claimant had been responsible for washing and dressing the service user. The claimant had subsequently had “a discussion” with the day centre staff about this.

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18. The claimant was, by letter of the 21 May 2019 (page 58) invited to attend a further investigation on the 30 May into “two staff attending the same service user with overlapping times, but both members of staff had written reports that they made the service user dinner but did not see each other at the service user’s home.” The claimant was one of the members of staff who had attended the service user on the evening in question. The log book completed by the two staff members was produced in the respondent’s documents at page 7. The claimant’s entry in the log book noted the time in as 18.35 and time out as 19.30; the other entry noted the time in as 7pm and out at 8pm.
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19. The claimant, in addition to the above allegations, was involved in an incident when the service user she attended was taken very unwell and an ambulance had to be called. The claimant telephoned Ms Currie to advise her of the situation and confirm that she was going to tidy-up and complete the log book, but that she would still attend the next service user. Ms Currie noted the next service user required two members of staff for the visit and there was only one other member of the team working that day. Ms Currie told the claimant there was only 15 minutes before the claimant was due to attend the next service user, that she would send someone else to do the tidying up, and that the claimant should attend the next service user.
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20. The claimant refused to leave until the log book had been completed. Ms Currie accepted this had to be done, but was keen to impress upon the claimant that she had to get to the next service user. The discussion became heated and the claimant put the phone down on Ms Currie.
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21. Ms Currie sent Ms McGoldrick to take over from the claimant to allow the claimant to go to the next service user’s house. The claimant refused to leave. Ms McGoldrick went to the next service user’s house to see if she could help out even though she was not trained.
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22. The claimant advised Ms Currie that she was not prepared to attend the investigatory meeting on the 24 May without a witness present, and that she could not arrange for a witness at short notice. Ms Currie agreed to reschedule the investigation meeting.
- 5 23. The investigation meeting was rescheduled, but the claimant would not attend without the presence of a note-taker. Ms Currie agreed to reschedule the investigation meeting to the 29 May when a note-taker would be present.
24. The claimant did not attend the investigation meetings. The claimant had wanted to contact the trade union again for advice, but felt she had not had
10 time to do so. The claimant went off sick to “buy [herself] some time”.
25. The claimant, prior to going off sick, refused to do a shift which finished after 5pm. The claimant considered she had previously “told” the respondent that she would only be working beyond 5pm for a further week. Ms Currie, who had previously sought advice about the claimant’s request, informed the claimant
15 that she was required to make the request in writing. The claimant was not pleased at being told this.
26. The claimant contacted Ms Currie to ask for copies of all documents relating to her working hours and the supervision notes. The claimant also attended at the respondent’s Clarkston office on the 30 May, rather upset, and demanding
20 copies of the paperwork. Ms Duke informed the claimant she was not sure where the supervision notes were kept, and she advised the claimant to contact Head Office. The claimant was not happy with this and Ms Duke felt the claimant became aggressive towards her.
27. The claimant told Ms Duke that a former member of staff had been stealing
25 money from a service user, and that she had told Ms Currie about this in February but nothing had been done. Ms Duke, who knew Ms Currie and shared a room with her, doubted nothing would have been done if the claimant had indeed told Ms Currie this information.

28. The following day the claimant made two phone calls to Ms Duke which Ms Duke described as having been aggressive and demanding. The claimant told Ms Duke that she was to tell Ms Currie that she was a liar, and that if Ms Duke did not tell her, she [the claimant] would. The claimant had previously asked Ms Duke if she would be paid to attend the investigation meetings. Ms Duke told the claimant she would have to find out. The claimant raised this again on the 31 May when she told Ms Duke she'd better find out and if not, she should text the claimant to explain why she had not found out.

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29. Ms Duke did not like the tenor of the phone calls, and contacted Ms Currie to inform her about this and to give her opinion that the claimant was "becoming unmanageable".

30. Ms Currie made the decision to terminate the claimant's employment having discussed it with Ms Dhesi. Ms Currie reached this decision because she believed the claimant's conduct was completely unacceptable.

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31. The claimant was informed of her dismissal by letter of the 31 May 2019 (page 60). The letter stated "*Over a period of 10 weeks, there has been an extreme breakdown in terms of your relationship with the office staff and myself. This has left me with no alternative, but to discuss this situation with the owners of the company. There have been examples of:*

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- *Making aggressive and threatening phone calls to office staff;*
- *Shouting down the phone at office staff;*
- *Bullying and intimidating staff members;*
- *Bringing the company into disrepute by your comments to service users families;*
- *Hanging up the phone with your manager when asked to follow a reasonable request and*

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- *Refusal to follow a reasonable request by a senior member of staff.*

These standards are completely intolerable in the workplace. The Beeches Home Care Agency believes in mutual respect and reasonable behaviour in all our dealings, whether it is clients, colleagues, office staff or management.

5 *Therefore, regrettably, I must inform you that your association with the Beeches Home Care agency has been terminated, with immediate effect....”*

32. The claimant responded to this letter on the 16 June (page 61) seeking a copy of the supervision notes and uncollected payslips.

10 33. Ms Currie had not been in the office on the 30 May. She learned of the allegation made by the claimant upon her return to the office on the 31 May. Ms Currie contacted the service user’s social worker to inform them of the allegation. The social worker asked Ms Currie to attend at the service users house, with a witness, to ask if there had been a theft. Ms Currie duly did so. The service user, who had been assessed as having capacity to understand and respond, denied that a staff member had taken or stolen money, or that
15 he had offered him any money.

34. Ms Currie also contacted the Police but was advised that the matter would not be investigated because there was no evidence to support the claimant’s allegation.

20 35. Ms Currie completed an AP1 form and a notification to the Care Inspectorate (respondent’s documents page 18). Ms Currie referred to the claimant as being “a disgruntled staff member who was under investigation for a number of things” and that the claimant had been “aggressive and demanding”.

25 36. Ms Currie set out details of the allegation made and the action she had taken, which included interviewing the service user in the presence of his social worker. The report noted the service user had been offering money to staff during their visits, and that protocols and risk assessments had been put in place to deal with his, and that staff had been made aware they should refuse any money offered to them, record it in the log book and inform the office, who
30 would in turn inform the service user’s social worker. The service user

confirmed to Ms Currie that no member of staff had taken money. She was advised no further action was required.

5 37. The claimant obtained cleaning work at Airbnb accommodation in June 2019, on an “as and when required” basis. The claimant did this work during June and July 2019, but then gave it up because she found it too physical. She earned £709.76 for this work.

38. The claimant was signed off by her GP as being unfit for work from the 15 July 2019 until February 2020 due to “work related stress”.

10 39. The claimant has been in receipt of Universal Credit from 1 August 2019 until 22 January 2020 at the rate of £73.34 per week. She has received the sum of £92.59 per week since the 22 January 2021 following a work capability assessment decision in January 2020 (page 83) which confirmed she had limited capability for work.

15 **Credibility and notes on the evidence**

20 40. The claimant’s position was that she had received a telephone call from a colleague, on the 16 February 2019. The colleague, whom she described as having been very drunk, told the claimant that he had stolen money from a service user in his care. The claimant and the colleague subsequently attended a party where they consumed a large amount of alcohol. The claimant stayed the night at the colleague’s house because she had lost her handbag. The following morning the claimant waited for her colleague to sober up and asked him about what he had told her the day before. The colleague confirmed he had stolen money from a service user.

- 5 41. The claimant felt under a “legal and moral obligation” to disclose her colleague’s conduct and so on Monday 18 February 2019 she phoned Ms Currie and told her about the theft. Ms Currie responded the matter would need to be dealt with immediately. Ms Currie subsequently phoned the claimant to confirm she was meeting with the colleague later, and that he would be sacked. Ms Currie warned the claimant that the colleague was likely to know that it was her who had reported his conduct. Ms Currie phoned again to advise the claimant the colleague would be given an opportunity to resign at the meeting. 10 The claimant did not agree with this.
- 15 42. The claimant was contacted some time later by her colleague who told her he had been called into the office and told there had been an allegation of theft against him. He had been told the best thing he could do was resign, and that was what he had done. He told the claimant that the respondent had failed to carry out a PVG check on him at the start of his employment. The claimant was of the opinion this explained why the respondent had given her colleague an opportunity to resign.
- 20 43. The claimant attended a staff meeting in May 2019, where a discussion took place regarding service users being abused. The claimant commented that “*if someone is stealing from clients that’s financial abuse. How do you go about reporting that? Do you have to report it to social services?*” The claimant felt she did not get a satisfactory answer, and was of the opinion Ms Currie had been vague because she felt threatened by the claimant’s comments due to the matter she had raised not having been dealt with adequately. 25
- 30 44. The claimant asserted she had been dismissed because of having made a protected disclosure to Ms Currie on the 18 February. The claimant believed Ms Currie knew the claimant would not let the matter, which she considered had not been dealt with properly, rest, as was evidenced by it being raised at the meeting in May, and when she raised it with Ms Duke on the 30 May.

45. The claimant rejected all suggestion that she had been aggressive and threatening in her phone calls or behaviour to office staff or staff members. The claimant's version of events in respect of the other alleged incidents was that she had acted calmly. In relation to (i) interaction with the day centre staff, the claimant believed she had been calm and respectful; (ii) the incident which occurred following the service user being taken to hospital, the claimant accepted she had put the phone down on Ms Currie, but insisted that she had not been shouting, or aggressive during the call and (iii) two service users allegedly attending the same service user, the claimant insisted that she had correctly attended the service user.

46. The Tribunal require to determine whether a protected disclosure was made to Ms Currie on the 18 February, in circumstances where the claimant asserted contact and a disclosure was made to Ms Currie that day, and Ms Currie denied contact and a disclosure had been made. In order to make this determination we had to assess and balance the evidence available to us, which included:-

- the credibility and reliability of the claimant's evidence;
- the evidence of Ms Duke
- the evidence of Ms Dhesi
- the witness statement of Ms Currie and
- the phone records produced by the claimant.

47. Ms Duke's position was that the claimant told her on the 30 May that her colleague had been stealing from a service user and that she had contacted Ms Currie about it in February 2019, but nothing had been done. Ms Duke commented "which would not have been the case". Ms Duke, when asked to explain what she meant by that comment, explained that Ms Currie was "very professional and [she] could not imagine for a moment that she would not act on a disclosure like that".

48. We found Ms Duke to be a credible and reliable witness who gave her evidence in a straightforward manner. Ms Duke had limited her witness statement to matters in which she had been directly involved, and which she considered relevant. Ms Duke provided further information when responding to questions put in cross examination, and told the tribunal that although she had directly experienced the claimant's behaviour on the 30 and 31 May, she shared a room with Ms Currie and had heard the way the claimant shouted at her. Ms Duke described the claimant's behaviour as threatening and aggressive.
49. Ms Dhesi told the tribunal that Ms Currie's experience was in managing care homes, staff and training. Ms Dhesi stated that "if the claimant had made a disclosure to Ms Currie, [I] know for a fact it would have been reported to me. She [Ms Currie] was professional: she would not and did not know and take no action". Ms Dhesi made reference to the fact that following the allegation of theft having been made by the claimant to Ms Duke on the 30 May, Ms Currie had reported the matter to the service user's social worker, to the Police and made a report to the Care Inspectorate.
50. We also found Ms Dhesi to be a credible and reliable witness. She clearly relied on Ms Currie as the Manager, who had day-to-day contact with, and responsibility for, staff, service users and the running of the service. Ms Dhesi expressed unreserved confidence regarding Ms Currie's knowledge, experience and professionalism.
51. Ms Currie, in her witness statement, rejected the claimant's version of events and asserted the claimant had not contacted her on the 18 February 2019: she further denied that she had twice phoned the claimant to say it was likely the colleague would be dismissed and, subsequently, that he would be given the opportunity to resign. Ms Currie noted the colleague had walked out of his employment on the 17 February 2019 because he had been asked to attend the office to discuss his sickness absence and Ms Currie's suspicion that he had been untruthful regarding his sickness absence. Ms Currie wanted to discuss with him concerns regarding him calling the on-line mobile at 3am

when apparently under the influence of alcohol and crying down the phone stating that he needed help. He had resigned and had not been dismissed.

52. The claimant produced a document (page 62) said to be a phone record from her house phone, showing (amongst other things) three calls on Monday 18 February 2019 to the same number. The time of the calls was noted as being 11.14am, 1.25pm and 1.26pm.

53. The tribunal were not satisfied any weight could be attached to the document, said to be a phone record, produced at page 62. We say that because there was nothing to suggest the claimant's phone number and, more particularly, whether the claimant had made or received the calls to the numbers noted. The column in which the phone numbers were noted was entitled "Destination" which implied that they were numbers which the claimant had phoned. There was nothing on the document to suggest it also recorded numbers which had phoned the claimant. Accordingly we could not accept the document supported the claimant's position that Ms Currie had twice phoned her on the 18 February.

54. We acknowledged the document did support the claimant's position that a phone call appeared to have been made to the respondent's office at 11.14am on the 18 February 2019. The claimant stated she made the phone call to Ms Currie: this is denied by Ms Currie. The document did not assist in identifying who answered the call, and there was no evidence to inform the tribunal whether the destination number noted was a general office number, and if so whether it would be common for Ms Currie to answer such phone calls, or if it was a number for Ms Currie.

55. The tribunal did not find the claimant to be an entirely credible or reliable witness. The claimant told the tribunal that she had received two convictions for being drunk and disorderly. In fact the claimant had one conviction for being drunk and disorderly, and one conviction for resisting arrest. The tribunal considered it rather unusual for a person to forget the nature of their criminal charges when they occurred not very long ago.

56. The circumstances of the alleged disclosure to the claimant by her colleague were mired in the consumption of a considerable amount of alcohol. The claimant told the tribunal that her colleague had been “very drunk” when he first told her about the theft. The claimant also told the tribunal that she had subsequently been drunk at the party with her colleague. The claimant rejected any suggestion her evidence was not reliable because of the amount of alcohol involved, and suggested the day after the party she had waited until her colleague was sober before asking him about what had been said.
57. The tribunal however did not find the claimant’s suggestion that she had waited until her colleague was sober before asking him about what had been said, to be reliable. The claimant had, the previous night, lost her handbag which contained her mobile phone and keys. She told the tribunal that she had stayed overnight with her colleague but left early to get her phone and keys sorted out. This did not sit comfortably with the suggestion that she had waited for her colleague to sober up.
58. The claimant spoke of a “moral and legal” obligation to report what her colleague had told her, yet if her version of events was to be believed, she knew Ms Currie did not take any action regarding the matter, but she (the claimant) took no further action to report the matter to Ms Dhesi, social work or the Police. The claimant only took action, after her dismissal, to contact the Care Inspectorate. This struck the tribunal as odd in circumstances where there were protocols and risk assessments in place to deal with this very situation and which involved the service user’s social worker.
59. The evidence of Ms Dhesi and Ms Duke was consistent regarding their experience of the claimant’s behaviour, or what they had been told by Ms Currie regarding the claimant’s behaviour.

60. The tribunal considered the claimant's evidence regarding her desire to finish work at 5pm to be illustrative of the claimant's attitude. The claimant was initially told by Ms Currie that the request could not be granted because of staffing issues and the fact 5pm is a busy time in respect of service users.
5 The next time the claimant raised the matter she "told" the respondent she would not be working after 5pm. The claimant then refused to do a shift which involved working beyond 5pm. The claimant justified her position by referring to the fact she had a zero hours contract. The claimant objected to being told she had to put her request for flexible working in writing. We formed the
10 impression, based on this and other incidents referred to above, that the claimant did not like to be managed.
61. We acknowledged the weight to be attached to Ms Currie's witness statement was reduced because the evidence had not been tested in cross examination. However, the evidence of Ms Dhesi and Ms Duke was generally supportive
15 of what Ms Currie set out in her witness statement. In particular both Ms Dhesi and Ms Duke spoke of the difficulties Ms Currie had with the claimant, and both spoke of the professionalism of Ms Currie.
62. The professionalism of Ms Currie was a factor which weighed heavily with the tribunal: if the claimant was to be believed, it meant Ms Currie, having
20 received an allegation of theft by a member of staff from a service user, did nothing. We found that difficult to accept.
63. The tribunal, having balanced all of the factors set out above, concluded the claimant did not contact Ms Currie, on the 18 February 2019, to inform her
25 that a colleague had stolen money from a service user. We reached that conclusion, on balance, because we considered that if the claimant had raised the matter with Ms Currie on the 18 February, and was unhappy it had not been dealt with adequately, the claimant would have told someone else about it yet she did not do so until after she had been notified of the investigations to take place and after her request to no longer work beyond
30 5pm had been refused.

64. We also preferred the evidence of Ms Dhesi and Ms Duke to that of the claimant regarding the claimant's behaviour.

Claimant's submissions

5 65. Ms Neil referred the tribunal to section 103A Employment Rights Act and submitted the claimant had made a protected disclosure to Ms Currie on the 18 February 2019, that a colleague had stolen money from a service user, and the claimant had been dismissed for having made this disclosure.

10 **66.** The first question for the tribunal is what facts and beliefs were relied on by the decision-maker. The respondent relies on the breakdown of the relationship: the claimant relies on the protected disclosure. The claimant must show she made a protected disclosure and that this was the reason for dismissal (*Kuzel v Roche Products 2008 ICR 799*).

15 67. Ms Currie took the decision to dismiss, and the reasons for the dismissal were set out in the letter of dismissal at page 60. Ms Neil invited the tribunal to note the 10 week period referred to in the letter coincided with the time the disclosure was made. There was no written evidence regarding the disclosure, but Ms Neil invited the tribunal to prefer the claimant's evidence, because it was candid and had been given in a straightforward manner. The claimant
20 admitted her two convictions and admitted her drinking. She also admitted she had hung up on Ms Currie. In contrast, Ms Currie's witness statement carried little weight.

25 68. Ms Neil submitted the two investigations had been nothing more than an effort by the respondent to intimidate the claimant. The complaints/allegations were spurious. The claimant had wanted a witness present at the investigation meeting, and Ms Duke accepted this had not been unreasonable. It was submitted that wanting a note taker present had not been unreasonable.

69. Ms Dhesi had little contact with the claimant.

70. The claimant denied the allegations, with the exception of hanging up on Ms Currie.

71. The terms of Ms Currie's report to the Care Inspectorate sought to undermine the allegation made by the claimant.

5 72. The second question for the tribunal is whether the disclosure made was a
protected disclosure. Ms Neil referred to section 43B Employment Rights Act
and submitted there had been a disclosure of information to Ms Currie, her
manager, on the 18 February regarding a breach of a legal obligation and a
criminal offence. The claimant reasonably believed the information to be
10 correct and in the public interest.

73. Ms Neil submitted there was no reliable account of the conduct of which the claimant was accused. The tribunal was being asked to believe there had been no issues with the claimant's behaviour until February 2019 – that is, the time of the disclosure.

15 74. Ms Neil noted the claimant had, on the 30 May, made Ms Duke aware of the allegation of theft, and this had been reported to Ms Currie. Ms Neil invited the tribunal to accept Ms Currie knew, at that stage, what this meant, and that was that the claimant was not going away and would not back down. This explained why the claimant was dismissed.

20 75. Ms Neil invited the tribunal to find the claimant had been dismissed for making a protected disclosure on the 18 February 2019. A schedule of loss had been prepared. Ms Neil submitted the claimant's loss should not be broken by her work for Airbnb: the claimant had enduring loss due to her mental suffering.

25 **Respondent's submissions**

76. Mr Harvey submitted the case turned on a very narrow point which was an issue of fact: why was the claimant dismissed? Either the reason for the dismissal was because a protected disclosure had been made (Mr Harvey accepted that if a disclosure was made on the 18 February it was a protected

disclosure), or had the respondent had enough of the claimant because of the reasons set out on page 60?

- 5 77. Mr Harvey questioned whether the tribunal could find reasonable grounds to believe the reasons set out in the letter of dismissal were the reasons for dismissal. He submitted it did not matter there had been no investigation because that was an issue which went to the fairness of the dismissal and that was not a question the tribunal had to determine in this case. Mr Harvey acknowledged it had been unfortunate Ms Currie was not present for the hearing, but her statement could be regarded as evidence and it was supported by the evidence of Ms Duke and Ms Dhesi.
- 10 78. The claimant's position was that she told Ms Currie on the 18 February 2019 that a colleague had stolen money from a service user. The claimant accepted the colleague had consumed excessive amounts of alcohol, and then he and the claimant had then consumed more alcohol. All of this within 24 hours of making the disclosure. It was submitted this made the evidence unreliable.
- 15 79. Mr Harvey also invited the tribunal to note there was nothing in writing from the claimant: why did she not email Ms Dhesi or complain? The claimant did nothing until she repeated the allegation to Ms Duke on the 30 May. If the tribunal accepted the claimant's evidence it would mean questioning Ms Currie's position. Ms Currie has many years' experience in care: she was competent and professional. Could the tribunal accept she just sat on a disclosure of this nature? Mr Harvey submitted that on a balance of probabilities the better conclusion was that she did not know of the allegation prior to it being reported to her on the 31 May.
- 20 80. Mr Harvey invited the tribunal to find the reason for dismissal was as set out in the letter of dismissal, and to dismiss the claim.
- 25 81. Mr Harvey submitted that should the tribunal find the claimant was dismissed for having made a protected disclosure no basic award should be made because the claimant had less than two years' service. The claimant relied on the Fit Notes produced to support her position that she could not work.
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However, the Fit Notes were based on what she told the GP. There was no support for any causal connection between the loss claimed and what happened to her.

5 **Discussion and Decision**

82. We firstly had regard to the terms of section 103A Employment Rights Act which provides that an employee who is dismissed shall be regarded for the purposes of this Part, as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

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83. Section 43B Employment Rights Act provides that 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 of more of the following (points (a) to (f) has occurred, is occurring or is likely to occur. We noted the respondent accepted that if the claimant raised the allegation with Ms Currie on the 18 February 2019, it was conceded the disclosure would be a protected disclosure. Accordingly the first issue for the tribunal to determine is whether the claimant made a disclosure to Ms Currie on the 18 February 2019.

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84. We have set out above our conclusion that the tribunal decided the claimant had not made a disclosure to Ms Currie on the 18 February 2019. We reached that conclusion because we judged the claimant's evidence not to be sufficiently credible or reliable regarding this matter. In particular:-

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- the initial phone call said by the claimant to have been received from a colleague, was at a time when he was "very drunk";
 - the claimant and the colleague went to a party that night and both got drunk: the claimant's suggestion that she waited the next morning until they were both sober to question him about what he had told her did not ring true in circumstances where she also said
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she had left early to try to get her phone and keys (which she had lost) sorted out;

- 5 • the claimant told the tribunal she did not agree with her colleague being given the opportunity to resign and was concerned that he could continue to work in social care. The claimant however did nothing to raise the matter either with Ms Dhesi, or with social work, the Police or the Care Inspectorate. The claimant in fact did nothing until she was dismissed;

- 10 • the claimant's behaviour in, for example, her insistence that she complete the log book after the service user was taken to hospital; her refusal to accept her request to no longer work beyond 5pm could not be granted and her refusal to attend the investigation meetings unless a witness and note-taker were present, did not sit comfortably with her position that Ms Currie did nothing to address the disclosure, yet she [the claimant] took no action to raise it further and have the matter, which she described as having a "legal and moral obligation" to raise, addressed and

- 15 • the phone records produced by the claimant were unclear and did not support her position that she had made a call to Ms Currie, who had then phoned her back twice.

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85. The tribunal, having taken these factors into account, and together with the evidence of Ms Dhesi and Ms Duke regarding the experience and professionalism of Ms Currie, could not accept a disclosure was made to Ms Currie which she failed to act upon. The tribunal decided no disclosure was made to Ms Currie on the 18 February 2019.

86. We decided it would be appropriate for the tribunal to continue to consider whether, if there had been a disclosure (which the respondent conceded would have been a protected disclosure) was that the reason for the dismissal of the claimant.

87. Ms Neil, in her submission to the tribunal, invited the tribunal to accept there was a causal connection between the making of the disclosure and the claimant's dismissal because the claimant had not had any difficulties at work prior to the February 2019 and because the matters said to be under investigation had been spurious. We considered these matters in turn.
88. We could not accept the claimant had not had any difficulties at work prior to February 2019. We preferred the evidence of the respondent's witnesses (Ms Duke and Ms Dhesi) to the effect that Ms Currie was voicing concerns regarding the claimant prior to February 2019. Ms Dhesi told the tribunal that Ms Currie would "mention [the claimant] often – there was nothing you could put your finger on".
89. Ms Duke told the tribunal that she had heard and/or witnessed the claimant's behaviour towards others. Ms Duke shared a room with Ms Currie and overheard telephone conversations where the claimant would be shouting at Ms Currie. Ms Duke described that Ms Currie had been distressed and that her dealings with the claimant were causing her stress and issues with her mental health.
90. Ms Duke was also able to give the tribunal direct evidence regarding her interaction with the claimant on the 30 May, and the phone calls with her on the 31 May. Ms Duke described the claimant as "not being happy" and being very aggressive and threatening. Ms Duke told Ms Currie she thought the claimant was becoming unmanageable. This opinion was based not only on the way the claimant had behaved but also her lack of co-operation with the investigations.
91. We concluded from this evidence that whilst issues may not have been raised with the claimant, there were concerns regarding her behaviour, her attitude and the way she spoke to people. This was a case where those concerns increased in the period prior to the dismissal.
92. We also could not accept the suggestion the two investigations commenced by the respondent were spurious. The first investigation was to address a

complaint received by Ms Currie from the social work department regarding the behaviour of the claimant in respect of an interaction with day care staff. Ms Neil questioned whether any such complaint had been received by Ms Currie from social work, because nothing had been produced in writing. Ms Dhesi informed the tribunal the complaint had been received by telephone and we accepted this evidence.

93. We acknowledged the claimant disagreed the service user had been unkempt on being picked up by the day centre staff, and we further acknowledged there appeared to have been some issues between the day centre staff and the service user's mother. That said however, we were entirely satisfied that the respondent was reasonably entitled to investigate the matter, interview the claimant and any other relevant witnesses and determine what had happened any why. There may well have been an entirely reasonable explanation for what had occurred, but that does not equate to the investigation being spurious. It is only by investigating the matter that the respondent can reasonably determine what happened and whether any further action is required.

94. The second matter concerned a log book which appeared to show two employees being at the home of a service user at the same time but not knowing the other was there. The claimant invited the tribunal to accept her entry in the log book was made first, was more detailed and therefore if anyone was to be investigated it should be the other employee. We again acknowledged the claimant may well have been right in what she said, but it is only by investigating the matter that the respondent can understand what happened and whether any further action is required.

95. The respondent formed the view that the claimant was unwilling to co-operate with the investigations. The claimant initially asked for the meeting to be postponed because she wanted a witness present. The respondent agreed. The claimant then refused to attend the re-arranged meeting because a note-taker was not present. The respondent agreed to re-arrange the meeting. The

claimant then took objection to the fact the investigation meetings were going to be back-to-back.

- 5 96. We considered the respondent took a reasonable approach to re-arranging the meetings to accede to the claimant's requests. We concluded the respondent was reasonably entitled to conclude the claimant was not willing to co-operate with the investigations. We considered the respondent's conclusion was supported by the fact the claimant herself told the tribunal that she had wanted to contact the trade union but had no time so "I phoned in sick to buy time".
- 10 97. The claimant had had at least a week to contact the trade union. She told the tribunal she was a new member of the trade union and was unsure if she was entitled to have representation. The claimant did not suggest she took any action to try to have another witness attend the investigation meeting with her, or to act as a note-taker for her.
- 15 98. We had regard to the letter of dismissal (page 60) and to the reasons set out in that letter to explain the basis of the dismissal. The letter referred to conduct over a period of 10 weeks and gave examples of behaviour which included making aggressive and threatening phone calls to office staff; shouting down the phone at office staff; bullying and intimidating staff members; bringing the company into disrepute by your comments to service users' families; hanging up the phone with your manager when asked to follow a reasonable request and refusal to follow a reasonable request by a senior member of staff.
- 20 99. Ms Duke provided evidence of the aggressive and threatening phone calls she had received from the claimant, and of calls she had overheard when the claimant had been shouting down the phone at Ms Currie. The claimant accepted she had hung up the phone on Ms Currie and had refused to follow a reasonable request to go to the next service user's home. The allegations of bullying and intimidating staff members and bringing the company into disrepute were matters set out in Ms Currie's statement.
- 25 100. The Tribunal was satisfied the issues set out in the letter of dismissal were issues of concern for the respondent. We were further satisfied that the
- 30

behaviour of the claimant on the 30 and 31 May was the catalyst for the dismissal. We say that because the behaviour demonstrated, and complained about, that day was akin to the behaviour the respondent was no longer prepared to tolerate.

5 101. We also took into account the fact that if, as asserted by the claimant, Ms Currie dismissed her because she had made a protected disclosure on the 18 February 2019, why did Ms Currie wait until the end of May to dismiss the claimant. We acknowledged the claimant stated that the delay was caused by the fact she would not keep quiet about what had happened and it was only
10 when Ms Currie learned this that she decided the claimant had to go.

102. The difficulty with the claimant's position is that she did keep quiet about it: the claimant did not make Ms Dhesi aware of it, nor did not make social work or the Police aware of it. The claimant suggested that she was not sure of the most appropriate body to make the disclosure to. We found this evidence
15 lacked credibility in circumstances where the claimant had constant contact with social work and could have been guided by them or by a phone call to the Care Commission.

103. The claimant suggested she had raised it at a staff meeting, but the evidence of the claimant and the witness statement of Ms Currie were largely in
20 agreement to the extent that no allegation was made, and the claimant's comment was limited to a general enquiry about what to do if someone was stealing from clients.

104. The matter was not referred to again by the claimant until the 30 May when she told Ms Duke about it and suggested she had told Ms Currie about it in
25 February.

105. We concluded that the weakness in the claimant's position was that she knew in February that she was not happy with the way in which Ms Currie had dealt with the matter and considered it had been swept under the carpet. The claimant could, at any time after that, have made someone else (either within
30 or outwith the organisation) aware of the disclosure. She did not do so. In fact

there was no mention of it by the claimant until after the claimant was invited to attend the investigation meetings and had had her request to no longer work beyond 5pm refused.

5 106. We also had regard to the fact we were told by Ms Dhesi that Ms Currie had many years' experience working in care and managing and training staff. The professionalism of Ms Currie was noted by Ms Dhesi and endorsed by Ms Duke. We could not, in the absence of having heard from Ms Currie, attach much weight to this factor, but we did attach weight to the fact Ms Dhesi clearly trusted Ms Currie and trusted her judgment and running of the respondent's
10 business. We were reluctant to accept, against that background, that Ms Currie had received notice of theft from a service user and taken no action. This was something that could have ended Ms Currie's career and had a detrimental impact on the respondent's business. We preferred Mr Harvey's submission on this point that the better conclusion, on the balance of probabilities, was that
15 Ms Currie did not know of the allegation until the 31 May 2019.

107. We decided, having had regard to all of the above points, that even if the claimant did make a protected disclosure to Ms Currie on the 18 February 2019, the making of that protected disclosure was not the reason for the claimant's dismissal. The claimant was dismissed because the respondent was
20 no longer prepared to tolerate her behaviour.

108. We, in conclusion, decided to dismiss the claim because the claimant did not make a protected disclosure to Ms Currie on the 18 February 2019; and, even if she had made that disclosure, it was not the reason for the claimant's dismissal.

25 109. The claimant also brought a claim in respect of the payment of one week's notice. We noted the letter of dismissal did confirm the claimant's employment had been terminated with immediate effect, but it did not refer to gross misconduct. We concluded the conduct complained of did not, in the circumstances, amount to gross misconduct. We accordingly decided the
30 claimant had been entitled to receive one weeks' notice of the termination of her employment. The respondent shall pay to the claimant the sum of £224.

Employment Judge: L Wiseman
Date of Judgement: 26 April 2021
5 Entered in register: 06 May 2021
and copied to parties