EMPLOYMENT TRIBUNALS

Claimant: Mrs N Tingle

Respondent: Anchor Hanover Group

HELD AT: Newcastle, by video **ON:** 7-8 January 2021

BEFORE: Employment Judge Aspden
Mr G Gallagher
Ms C Hunter

REPRESENTATION:

Claimant: Mr F Greatley–Hirsch, counsel
Respondents: Ms R Swords-Kieley, counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. By a claim form presented on 17 January 2020, the claimant brought several complaints against the respondent. She subsequently withdrew a number of complaints at a case management hearing in March 2020, leaving a complaint that, contrary to section 47B of the Employment Rights Act 1996, the respondent subjected her to detriments on the ground that she had made protected disclosures.

2. The alleged detriments were as follows:

2.1. The respondent took shifts off her on 1 September and 22 and 23 August 2019.
2.2. The respondent failed to offer her any more shifts.
2.3. The respondent terminated her contract as a worker by letter dated 17 September 2019, which the claimant alleged she received on 20 September 2019.
2.4. Before she received that letter of termination the home manager, Mrs Sargent, commented about the claimant to junior care staff at the home in terms, "She won't be back as I have sacked her".

3. At a case management hearing on 7 July 2020 it was suggested that the claim also included a complaint that the respondent subjected her to detriment by failing to provide a reference for her in respect of an application she made to work for NHS Professionals. At this hearing, however, it became clear that this alleged detriment cannot have formed part of the claim as presented by the claimant because the alleged detriment cannot have occurred until after the claim was presented on 17 January 2020. That being the case, and there having been no application to amend the claim, Mr Greatley–Hirsch said before we began hearing evidence that the claimant was not pursuing a complaint that the respondent subjected her to detriment contrary to section 47B by failing to provide her with a reference.

4. The claimant's case was that she was subjected to the detriments outlined in paragraph 2 above because she made protected disclosures. EJ Morris identified the alleged protected disclosures at the July case management hearing as follows:

4.1. 'Shortly after 9.00am on 20 August 2019, she had spoken to a gentleman at the respondent's Head Office (she cannot remember his name) to make him aware of her horror at discovering when attending work on 17 August 2019 that "there were only 3 care staff to maintain the care of the 50 residents of the home".' At this hearing the claimant said that in fact she made the phone-call on 19 August rather than 20 August. The claimant's case is that what she says she said to the gentleman during the 'phone call was a disclosure of information that in her reasonable belief was made in the public interest and tended show both a failure on the part of the respondent to comply with a legal obligation and that the health or safety of an individual had been endangered.

4.2. The claimant alleges she made a subsequent protected disclosure to the Care Quality Commission ("the CQC") in September 2019. The CQC is a prescribed person as is referred to in section 43F of the 1996 Act and the Public Interest Disclosure (Prescribed Persons) Order 2014.

5. The claimant also contended that she subsequently contacted the CQC again (she thinks in November 2019) and submitted a formal grievance to the respondent in November 2019 after her worker contract ended. However, as it is now clear that the claimant is not pursuing a complaint about any alleged detriments that post-dated the termination of her engagement, it is unnecessary for us to consider whether they were protected disclosures.

Relevant legal framework

6. The Employment Rights Act 1996 gives workers the right not to be subjected to detriment for making what are commonly referred to as whistleblowing disclosures. The right is set out at section 47B, which says this:

> 47B Protected disclosures.
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
> (a) by another worker of W's employer in the course of that other worker's employment, or
> (b) by an agent of W's employer with the employer's authority,
> on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.
>
> (1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
> (a) from doing that thing, or
> (b) from doing anything of that description.

Meaning of 'protected disclosure'

7. In order for a whistleblowing disclosure to be considered as a protected disclosure, three requirements need to be satisfied (ERA 1996 s 43A). Firstly, there needs to be a 'disclosure' within the meaning of the Act. Secondly, that disclosure must be a 'qualifying disclosure', and thirdly it must be made by the worker in a manner that accords with the scheme set out at ERA 1996 ss 43C–43H.

8. In this regard, the following provisions of the 1996 Act are relevant:

> "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 of sections 43C to 43H.
>
> 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, is made in the public interest and 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, is being or is likely to be deliberately concealed.

9. As to what amounts to a "disclosure of information", the Court of Appeal held in Kilraine v Wandsworth London Borough Council [2018] ICR 1850, that in order for a statement to be a qualifying disclosure for the purposes of section 43B(1), it must have a sufficient factual content and specificity capable of tending to show one of the matters listed in paragraphs (a)–(f) of that subsection; the concept of "information" is capable of covering statements which might also be characterised as allegations, although not every statement involving an allegation would constitute "information" and amount to a "qualifying disclosure" within section 43B(1).

10. The claimant in this case relies on s43B(1)(b) and (d). In the context of section 43B(1)(b), the EAT has held that the term 'likely' requires more than a possibility or a risk that the employer might fail to comply with a relevant legal obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation: Kraus v Penna plc [2004] IRLR 260, EAT.

11. The Court of Appeal had held that, in the context of s43B(1)(a), provided the whistleblower's belief that a criminal offence has been committed, is being committed or is likely to be committed is objectively reasonable, neither (1) the fact that the belief turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence — is sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute: Babula v Waltham Forest College [2007] EWCA Civ 174, [2007] IRLR 346. The same must be true of a belief that a person has failed, is failing or is likely to fail to comply with any legal obligation or that the health or safety of any individual has been, is being or is likely to be endangered under s43B(1)(b) and (d) respectively.

12. The words "in the public interest" in s 43B(1) were considered by the Court of Appeal in Chesterton Global Ltd v Nurmohamed [2017] IRLR 837. The leading judgment of Underhill LJ made it clear that the question for the tribunal is whether the worker believed, at the time he or she was making it, that the disclosure was in the public interest and whether, if so, that belief was reasonable. The judgment

also held that, while the worker must have a genuine and reasonable belief that a disclosure is in the public interest, this does not have to be his or her predominant motivation in making it.

13. In order to qualify for protection, the disclosure must be to an appropriate person.

14. The effect of section 43C is that any qualifying disclosure made to the employer will be a protected disclosure.

15. The Care Quality Commission is a prescribed person as is referred to in section 43F of the 1996 Act and the Public Interest Disclosure (Prescribed Persons) Order 2014. A qualifying disclosure made to the CQC will be a protected disclosure if the worker reasonably believed, at the time of the disclosure, that the information disclosed, and any allegation contained in it, was substantially true, and the relevant failure was a matter relating to the provision of a regulated activity or any other activity in relation to which the CQC exercises its functions.

Detriment

16. In order to bring a claim under section 47B, the worker must have been subjected to a detriment by an act or a deliberate failure to act.

17. The concept of detriment is very broad and must be judged from the view-point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and the Court of Appeal in Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73, [2020] ICR 1226 confirmed that it has the same meaning in whistle-blowing cases.

18. A detriment exists if a reasonable worker (in the position of the Claimant) would or might take the view that the treatment accorded to him or her had, in all the circumstances, been to his or her detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had thereby been disadvantaged in the circumstances in which he had thereafter to work.

Reason for detrimental treatment

19. Section 47B requires that the act, or deliberate failure to act, is "on the ground that" the worker has made the protected disclosure. That requires the Tribunal to ask itself why the alleged discriminator acted as they did: what, consciously or unconsciously, was their reason?

20. In Manchester NHS Trust v Fecitt [2011] EWCA 1190; [2012] ICR 372, the Court of Appeal held that the test for detriments is whether “the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower."

21. The burden of showing the reason is on the employer: section ERA 1996 s 48(2). If the Tribunal rejects the employer's explanation for the detrimental treatment under consideration, it may draw an adverse inference and find liability but is not legally bound to do so: see Serco Ltd v Dahou [2015] IRLR 30, EAT and [2017] IRLR 81, CA. In the Court of Appeal, Laws LJ said: "As regards dismissal cases, this court has held (Kuzel, paragraph 59) that an employer's failure to show what the reason for the dismissal was does not entail the conclusion that the reason was as asserted by the employee. As a proposition of logic, this applies no less to detriment cases. Simler J did not hold that it would never follow from a respondent's failure to show his reasons that the employee's case was right."

Evidence and facts

22. We heard evidence from the claimant and from one of her former colleagues Ms Cross. For the respondent we heard evidence from Mrs Hill, who was the claimant's line manager, and Mrs Sargent, who was the manager of the care home at which the claimant worked. We also took into account the contents of a written statement prepared by another of the claimant's former colleagues, Ms Sinclair, who was unable to attend the hearing.

23. In addition, we took into account the documents to which we were referred in a bundle of documents prepared for this hearing.

24. Important elements of this case were dependent on evidence based on people's recollection of events that happened some considerable time ago. In assessing that evidence we bear in mind the guidance given in the case of Gestmin SGPS -v- Credit Suisse (UK) Ltd [2013] EWHC 3560. In that case Mr Justice Leggatt observed that is well established, through a century of psychological research, that human memories are fallible. They are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. In the Gestmin case, Mr Justice Leggatt described how memories are fluid and changeable: they are constantly re-written. Furthermore, external information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all. In addition, the process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to parties. It was said in that case: 'Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.' In light of those matters, inferences drawn from the documentary evidence and known or probable facts tend to be a more reliable guide to what happened than witnesses' recollections as to what was said in conversations and meetings. It is worth observing from the outset that simply because we did not accept one or other witness' version of events in relation to a particular issue did not necessarily mean we considered that witness to be dishonest.

25. Even before the events with which we are concerned, the claimant felt she did not have a good relationship with Mrs Sergeant.

26. On several occasions before 19 August 2019 the respondent cancelled shifts the claimant was booked to do. The same happened with other bank workers. The claimant was unhappy about shifts being cancelled and raised the matter with Mrs Hill. In a grievance submitted after her bank contract ended the claimant said she was 'constantly told' she was not needed for shifts.

27. The claimant worked a shift that began on the evening of 17 August 2019. She was concerned to find that there were only 3 care staff working that night, which she considered inadequate. She was also concerned that there would be no team leader working once she finished her shift.

28. The claimant's case is that she telephoned head office on 19 August and told them of her concerns about the 17 August shift. The respondent denies the claimant made any such disclosure. Our findings of fact on this matter appear later in our judgment.

29. At some point before 20 August the claimant had put her name down in the diary to work on 1 September. On 20 August at 7.57am Mrs Hill messaged the claimant to tell her that she had cancelled that shift. Mrs Hill said in her message 'Morning Natalie, you are down for a shift on the 1st Sept. Karen had already picked this shift up. I have taken you off and put her back in sorry.' Later that day Mrs Hill spoke to the claimant on the 'phone and during that conversation told the claimant she was not needed for shifts on 22 and 23 August, when the claimant thought she was due to work.

30. The claimant sent a message to Mrs Hill later that day saying: 'So I put my name in diary and shift gets took of me and am basically told am a liar and to beg for shift back i put my name on rota shifts taken of me yet am good enough to come in an do meds to help out cause no one else to do them and no senior or management in building place is a joke it's one rule for one and another for another well that's fine but I wont be helping out no more am sick of it.'

31. Within a few minutes Mrs Hill messaged the claimant back, saying 'I do apologise you have, I'll speak to karen when she gets in later.' Mrs Hill later 'phoned the claimant and told her she could have the shift. The claimant declined the shift. Mrs Hill's evidence was that the claimant told her where to stick the job and put the phone down. We accept Mrs Hill's evidence on that point. It is consistent with what the claimant said in the message and the fact that she was unhappy about shifts being, in her view, repeatedly cancelled.

32. On 17 September 2019 Mrs Hill sent the claimant a message on Facebook asking if she was working that Friday (20 September). We accept Mrs Hill's evidence that she believed the claimant was scheduled to work a shift that day: this is what was shown on the rota. The claimant responded 'me no' and Mrs Hill replied 'ok.'

33. That same day Mrs Hill spoke with Mrs Sargent and Mrs Sargent decided to terminate the claimant's bank work contract. She contacted the respondent's employee relations advice team and was provided with a template letter that she used to inform the claimant that her contract was at an end. The letter, which was dated 17 September, said 'I am writing to confirm that we no longer require your services as a Bank Care Assistant. Your appointment will terminate on 20th September 2019. I thank you for the service that you have provided. Should you have any queries regarding this letter please do not hesitate to contact me…' We accept that that was a standard letter used by the respondent to terminate bank staff contracts, that Mrs Sargent used it on the advice of HR, and that it was not the respondent's practice to give reasons to bank staff when their engagement was terminated.

34. Ms Cross gave evidence that, on the evening of 17 September, she overheard a conversation between Mrs Hill and Mrs Sargent in which Mrs Sargent said the claimant had been sacked. Her evidence was supported by messages between her and the claimant on 21 September, which referred not just to the conversation but specifically to Mrs Sargent having used the word 'sacked'. We accept Ms Cross' evidence on this matter and find that on the evening of 17 September Ms Cross overheard Mrs Sargent saying to Mrs Hill '.....now that we have sacked Natalie', to which Mrs Hill replied 'don't you think you should wait until she receives the letter before you tell people?' Ms Cross saw Mrs Sargent then shrug her shoulders. Ms Cross asked 'Natalie who?' and Mrs Sargent replied 'Tingle' and laughed.

35. When the claimant received the letter of 17 September she telephoned the respondent's Head Office in a distressed state. The person she spoke to told the claimant he or she was not aware of the letter or the reasons why the claimant's contract had been terminated and that the claimant could put in a grievance.

36. On 19 September the claimant telephoned the Care Quality Commission (CQC). We were referred to a note of the conversation provided by the CQC. We find that that note is likely to be an accurate and contemporaneous record of what was said in that conversation between the claimant and the person she spoke to at the CQC. Based on that note we make the following findings:
    36.1. The claimant told the person she spoke to at the CQC that she had received a letter that day terminating her services as a bank staff worker. We infer that the claimant had received the letter of 17 September earlier on 19 September and not on 20 September as she said in evidence.
    36.2. The claimant told the person she spoke to at the CQC of her concerns about the 17 August shift amongst a number of other things.

37. The note makes no mention of the claimant having already spoken to her employer specifically about her concerns about the 17 August shift, although it does say 'The contact stated that she would raise concerns, and nothing seems to get done.' The note refers to the claimant 'planning on raising a grievance' and having been in contact with the head office, saying 'This has been more in relation to employment and not care issues. It was head office that advised to put a grievance.' The note also records that 'the contact was going to write an email to head office to address the care issues.' It ends 'Advised to raise concerns with

head office.' We find it more likely than not that the reference to the claimant having been in contact with head office was a reference to the 'phone contact made by the claimant with Head Office that day, after she had received the letter telling her that her bank contract had been terminated: the claimant accepted that that was the case when asked during this hearing. We find that the claimant told the person she spoke to at the CQC that she was going to write an email to Head Office to address the care issues and that the person she spoke to advised her to do that.

38. We infer that the claimant and the person she spoke to discussed whether or not the claimant had raised her concerns about care issues with Head Office. Even if the claimant was not asked directly if she had alerted anyone at Head Office or at the respondent to her concerns, it is clear that the person the claimant spoke to at the CQC was of the view that the claimant should bring the matters to the respondent's attention, and it is likely (in our judgement) that he or she was interested to establish whether the claimant had already done so. We infer from the content of that note that the claimant did not tell the person she spoke to that she had already contacted Head Office and made them aware of her concerns about care issues. If she had said that it is likely that it would have been recorded. Indeed, the person she spoke to clearly appears to have been under the impression that the claimant had not raised care issues previously.

39. The claimant messaged Ms Cross and told her she had received a letter the previous day telling her she had been sacked. The claimant sent this message on 20 or 21 September (the date on the copy of the messages in the bundle is unclear). Ms Cross replied saying that she already knew and that Mrs Sargent had told everyone. The claimant asked if Mrs Sargent had used the word 'sacked' and Ms Cross said she had. The claimant and Ms Cross then spoke on the phone and Ms Cross told the claimant what she had heard and seen on the night of 17 September.

40. On 14 November 2019 the claimant submitted a grievance to the respondent by email. We make the following observations and findings about that grievance:
    - 40.1. In the grievance the claimant said she was very upset at how she had been treated by Mrs Sargent, saying she felt Mrs Sargent had treated her unfairly throughout her years at Wynyard Woods, from being a full-time employee to bank employee. She referred to her wages often being wrong and her shifts being cancelled regularly since December 2018.
    - 40.2. Whilst critical of Mrs Sargent, the claimant praised Mrs Hill, saying she would 'always go above and beyond to solve any issue or problem.'
    - 40.3. The claimant referred to the 17 August shift, saying 'In August I was asked to go into Wynyard woods on a Saturday night to do medication as they was no management or senior staff in the building to do medication that night a was told I could do medication then leave and be paid for 6 hours for two hours work when I arrived there was three carers meaning that once I had left which I had to due to child care that if anyone needed PRN that night or an emergency there was no senior staff or management to deal with this.'
    - 40.4. The claimant did not say in her grievance that she had previously raised a concern about that shift with head office. Nor did she say she

thought she had had shifts removed and been dismissed because she had raised concerns about that shift.

41. In her grievance the claimant said she had learned of the termination of her contract in a message sent by another staff member. We infer that was a reference to Ms Cross. It was not correct that the claimant had learned of her termination from Ms Cross: it is apparent from the messages between them that the claimant knew of her termination (from the letter of 17 September) before messaging Ms Cross about it.

42. The claimant referred to her contract being terminated 'with no explanation as to why'. She added 'I have not been approached and asked if there was any issues or as to why I had not been working but why would I when I had shifts in but were taking of me.'

43. Along with her grievance the claimant sent to the respondent an email of advice she had received from a solicitor at Teesside University on 22 October. That email contains an account of what we infer the claimant told the adviser. We find that the claimant told the adviser, amongst other things: that her pay had been frequently incorrect; that she had had shifts cancelled; that she had been dismissed without notice and without being given any reason; that she learned of her dismissal from another employee by text message before receiving the termination letter; that in 2018 to 2019 she had spoken to Mrs Sargent, Mrs Hill and head office on numerous occasions about incidences of health and safety issues in the care home that she was concerned about; that, on 17 August 2019, she raised a further concern to Head Office, expressing her concerns about the welfare of both the residents and staff members on duty that day; and that at this point Head Office were on a first name basis with her, due to numerous conversations over a yearly period regarding discrepancies in her contract and concerns about the home.

44. The claimant alleges in this case that she made a protected disclosure in a 'phone call to the respondent's Head Office on 19 August 2019 (although at an earlier stage of proceedings she said she had made the call on 20 August 2019). It is necessary for us to determine firstly whether the claimant made a 'phone call to Head Office at all on either of those dates.

45. In support of the claimant's account are the following:
    45.1. The claimant's own evidence given at this hearing.
    45.2. The respondent accepts that the claimant had genuine concerns about events that happened on 17 August regarding how that shift was staffed. That is also demonstrated by the fact that the claimant went to the Care Quality Commission, which we find she did on 19 September after she had been dismissed.
    45.3. The fact that Mrs Sargent said, at the time of the claimant's dismissal, that the claimant had been 'sacked'. That is not a neutral word, in our view. It implies that Mrs Sargent was in some way dissatisfied with the claimant.

46. Mr Greatley-Hirsch submits that the fact that no reason was given for the termination at the time supports the claimant's account that her employment was

terminated because there was a change of attitude towards her which was because of her making a protected disclosure. However, we are not persuaded that this does lend any real support to the claimant's case. We accept that the termination letter was a standard-form letter used by the respondent for bank staff, that it was used on the advice of HR, and that it was not the respondent's practice to give reasons to bank staff when their engagement was terminated.

47. It was suggested on behalf of the claimant that the cancellation of shifts for 22 and 23 August and 1 September and the timing of the termination of the claimant's bank contract, some four weeks after the alleged disclosure, suggests a recent change in attitude towards the claimant. On the other hand, Mrs Hill's evidence was that the claimant was unwilling to work, something which the claimant denies. We make the following observations:

    47.1. The fact that the claimant had been willing to work on 22 and 23 August when she had had shifts cancelled and had been willing to work on 1 September before that shift had been cancelled lends some support to the claimant's evidence on this point.
    47.2. Furthermore, although Mrs Hill's gave evidence that the claimant turned down a number of shifts offered from the end of August to September, there was a lack of specificity as to the occasions on which this happened.
    47.3. Nevertheless, we accept that Mrs Hill thought the claimant was due to work a shift on 20 September, given that that is what the rota showed and given the fact that Mrs Hill messaged the claimant to ask her if she was coming in. That being the case, there is evidence in support of Mrs Hill's account that she believed at least that the claimant had cancelled the 20 September shift.
    47.4. Furthermore, as recorded above, the claimant had turned down the 1 September shift when it was reinstated after she complained when Mrs Hill cancelled the shift on 20 August. We can see how Mrs Hill could have perceived that as the claimant cancelling a shift.
    47.5. Additionally, the claimant had made her unhappiness about having shifts cancelled clear in her text exchange and subsequent 'phone conversation with Mrs Hill on 20 August, saying 'I wont be helping out no more am sick of it' and telling Mrs Hill where to stick the job before putting the 'phone down on her.
    47.6. There is, therefore, evidence in support of the respondent's case that it was thought the claimant no longer wanted to work there. We accept that from a managerial point of view there is no sense in keeping somebody on the books if they are not willing to accept work. Also, from a managerial point of view, a manager is unlikely to be inclined to keep staff on the books if they are known to be disaffected, and the claimant had made it clear that she was.
    47.7. What is more, the claimant's own evidence was that cancellation of shifts was a problem before 19 August. It had happened on several occasions before then. The claimant was clearly unhappy about that, which unhappiness manifested itself in getting another job, which we find she must have taken steps to do before her contract was terminated.
    47.8. The claimant's own evidence also was that she did not have a good relationship with Mrs Sargent even before these events. Again, that casts

doubt on the idea that the respondent's attitude towards her changed after 19 August.

47.9. In addition, the messages between the claimant and Mrs Hill cancelling the 1 September shift (messages from 20 August) show that she apologised to the claimant and took steps to try and remedy the situation and ultimately changed again the shifts and offered the claimant the shift back when she objected. That supports the respondent's evidence that the issue about shift cancellation arose because of the way bank staff were booked to do shifts and the new regime that had been introduced that meant there could be a conflict between what was in the diary and what was on the rota. It certainly undermines the claim from the claimant that she was being victimised, because for Mrs Hill to backtrack and apologise appears to us inconsistent with the idea that she was victimising the claimant when looked at in the round.

48. We have also considered evidence in relation to the claimant's attempts to obtain her 'phone records. Mr Greatley-Hirsch says it is supportive of the claimant's case that she attempted to get her phone records to demonstrate the calls she had made. As we understand it, he says that she would not have asked for them if she did not think they would reveal the number. However, the claimant did not ask for the Head Office number. The claimant was quite clear in her evidence that she had phoned the Head Office and that was the number she had used. It is surprising therefore that she did not ask for that number when she was attempting to obtain her phone records. That being the case, we do not agree with Mr Greatley-Hirsch that the claimant's attempts to obtain 'phone records supports her case.

49. There is also evidence that undermines the claimant's account that she spoke to someone in Head Office about her concerns on 19 August.

49.1. Most significant of all, we find, is the record of the conversation the claimant had on 19 September with somebody at the Care Quality Commission. The claimant told the person she spoke to at the CQC of her concerns about the 17 August shift, amongst other things. However, the note makes no mention of the claimant having already spoken to her employer about this. It refers to the claimant having been in contact with Head Office and says this has been 'more in relation to employment and not care issues.' We have found that this was a reference to the 'phone contact made by the claimant with Head Office after she found out her employment had been terminated. We have found that the claimant did not tell the person she spoke to that she had already contacted Head Office and made them aware of her concerns about care issues. If the claimant had already raised the matter it is surprising that she did not tell the person at CQC, particularly when they specifically advised her to raise the matter with Head Office.

49.2. Also undermining the claimant's claim is the fact that the claimant's own narrative of events has changed. The claimant was directed to say, in the course of these proceedings, when the disclosure was made and provide details of the detriments. Until shortly before this hearing the claimant consistently said she phoned Head Office on 20 August, and she also said in

her witness statement that she had her 1 September shift taken off her half an hour later. She now claims that she phoned Head Office on 19 August. Explaining this disparity, the claimant says she originally thought her shift had been on 18 August and so said that the disclosure was on 20 August because she knew it was two days later that she rang Head Office. She says she now realises her shift was on 17 August and that, therefore, the phone-call to Head Office must have been two days after that date ie on 19 August. We note that the claimant referred to the shift being on 18 August in further particulars produced in response to a direction by Employment Judge Johnson. However, in her witness statement she correctly identified the date of her shift as 17 August and still referred to her disclosure being on 20 August. Nor did she, at any time until just before the hearing, seek to correct Judge Morris' record. We note the claimant also said in her witness statement that her 1 September shift was taken off her half an hour after her call to Head Office. If she is wrong about the date of the protected disclosure she must have been wrong about that too given that we can see from the text messages put before us that the shift was taken off her on 20 not 19 August. It seems to us that the claimant was fitting her narrative around the evidence. The screenshots of messages show that the shift on 1 September was taken off her before 9.00am on 20 August, so that cannot have been in response to the call to HR if that call was on 20 August.

50. There are other features of the claimant's account that cause us to question its reliability. In particular, it seems somewhat unlikely, although not impossible, that an HR professional would advise a care worker off-the-cuff on the proper procedure for the management of a Home given how many Homes the respondent was responsible for. Furthermore, the claimant's evidence was that the conversation lasted a couple of minutes. In that time the person she spoke to would have been able to glean only a limited amount of information about the issues, yet the claimant says the HR professional advised her that a complaint would be looked into, that no further information was required from her, and did not ask her to put her concerns in writing or arrange any follow-up with her to take further details. We agree with Ms Swords-Kiely that it would be surprising for one of the respondent's HR operatives to respond to a concern about resident safety in that way.

51. Also going to the claimant's reliability generally is the fact that in her formal grievance she, incorrectly, stated that she had learned of her termination from Ms Cross and only received the letter of termination after she spoke to Ms Cross. That casts doubt on her reliability as a historian of events.

52. Ms Swords-Kiely referred to other matters that she said undermined the claimant's account. In that regard:

    52.1. We are not persuaded that the claimant's account is undermined by the fact that she could not recall what switchboard option she was put through to or who she spoke to.

    52.2. We note that when the claimant raised her formal grievance she did not say she had raised concerns with HR previously about the events of 17 August, although in the note she attached from the Law Centre it does

appear she may have said something to whoever she spoke to there about the matter.

53. Weighing up all the evidence we find it more likely than not that the claimant did not call Head Office and alert them to her concerns regarding the 17 August shift, either on 19 August or on 20 August.

Conclusions

54. As we are not satisfied that the claimant made a protected disclosure to the respondent on 19 or 20 August 2019 as alleged, her claim that she was subjected to detriment on the ground that she made such a disclosure must fail.

55. The claimant made a 'phone-call to the CQC in which she raised certain concerns about, amongst other things, what happened during the 17 August 2019 shift. Ms R Swords-Kieley accepts that was a protected disclosure. However, we have found that the 'phone-call did not take place until 19 September, after the claimant's employment had ended. That being the case, it cannot have been a reason for any of the alleged detriments that are the subject of the claimant's complaint before us.

56. It follows that the claimant's complaint that she was subjected to detriment on the ground that she made protected disclosures is not made out.

Employment Judge Aspden

Date: 15 June 2021