EMPLOYMENT TRIBUNALS

Claimant: Mr R Sturch
Respondent: Atlas Care Services Limited

At a Full Hearing by CVP

Heard at: Nottingham
On: 4, 6 and 7 January 2021 and
RESERVED TO: on 15 April 2021 (in chambers)
Before: Employment Judge M Butler
Members: Mrs J Bonser
Mr A Greenland

Representation
Claimant: In person
Respondent: Mr Gunstone, Counsel

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

1. The unanimous Judgment of the Tribunal is that the claims of unfair dismissal, disability discrimination and detriments after making a protected disclosure are not well founded and are dismissed.

RESERVED REASONS

The Claims

1. The Claimant presented his claim to the Tribunal on 18 January 2019. He was employed by the Respondent from 1 July 2015 until his dismissal for gross

misconduct on 13 November 2018. His employment was transferred to the Respondent from Bloomsbury Home Care Ltd under the Transfer of Undertakings (Protection of Employees) Regulations 2006 on 1 October 2018.

2. The Claimant claims unfair dismissal, detriments as a result of making a protected disclosure and disability discrimination on account of his dyslexia. The Respondent conceded the Claimant was disabled by virtue of dyslexia for the purposes of section 6 of the Equality Act 2010 (EQA). The Claimant claims that his dismissal was automatically unfair for making a protected disclosure. The Respondent denies that he was unfairly dismissed, automatically unfairly dismissed or discriminated against because of his disability.

3. The Claimant's claim of ordinary unfair dismissal is made under section 98(4) of the Employment Rights Act 1996 (ERA); his claim of automatically unfair dismissal following making a protected disclosure is made under section 103A ERA; and his claim for disability discrimination is based on the Respondent's alleged failure to make reasonable adjustments under sections 20 and 21 EQA.

The Issues

4. The issues before the Tribunal are as follows:

    1. Did the Claimant's make or more protected disclosures under sections 43(b) and 43(c) ERA as set out below? The Claimant relies on subsection (d) of section 43(b)(1). The Respondent defends the claim on the basis that no qualifying disclosure was made at any time during his employment by the Claimant.

    2. What was the principal reason the Claimant was dismissed and was it that he had made a protected disclosure?

    3. Did the Respondent subject the Claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the Claimant as a matter of law.

    4. If so was this done on the grounds that he made one or more protected disclosures?

    5. The alleged disclosures the Claimant relies on are concerning Health and Safety issues as a result of having insufficient staff to cover home visits leading to breaches of the Working Time Regulations 1998 by the Respondent.

    6. The alleged detriment to the Claimant relies on his dismissal which he submits renders his dismissal automatically unfair for the purposes of section 103A ERA.

7. In respect of ordinary unfair dismissal, what was the principal reason for dismissal and was it a potentially fair one in accordance with section 98(1) and (2) ERA? The Respondent asserts that it was a reason relating to the Claimant's conduct.

8. If so, was the dismissal fair or unfair in accordance with section 98(4) ERA and, in particular, did the Respondent in all respects act within the so called "band of reasonable responses"?

9. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility of that the Claimant would still have been dismissed had a fair and reasonable procedure been followed?

10. Would it be just and equitable to reduce the amount of the Claimant's basic award or compensatory award because of any blameworthy or culpable conduct before the dismissal and, if so, to what extent?

11. In respect of reasonable adjustments for the purposes of section 20 and 21 EQA, did the Respondent not know and could it not reasonably have been expected to know that the Claimant was a disabled person?

12. Did the Respondent have the following provision, criterion or practice (PCP) namely, providing documents only a couple of days prior to a disciplinary hearing in circumstances where the Claimant's dyslexia put him at a substantial disadvantage in preparing for the hearing compared with persons who are not disabled.

13. If so, did the Respondent know or could he have reasonably expected to know the Claimant was likely to be placed at any such disadvantage?

14. If so, where there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The Claimant alleges he should have been given more time to digest and understand the documents relevant to the disciplinary hearing.

15. If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

The Law

5. Section 98(1) (ERA) provides that:

"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2)…..

2)A reason falls within this subsection if it—

(a)……

(b)relates to the conduct of the employee,

(c)……..

(d)……..

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

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

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

Section 43B (1) provides that:

"a qualifying disclosure means any disclosure of information of 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)….

(b)….

(c)….

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

(e)….

(f)…"

Section 43(C) ERA provides that:

"(1)a qualifying disclosure is made in accordance with this section if the worker makes the disclosure-

(a) to his employer

(b) …….”

Section 103A 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 employee made a protected disclosure”.

Section 20 EQA provides that:

“where (A) is the employer

(1)…..

(2)……

(3)the first requirement is the requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

Section 21 EQA provides that:

(1)a failure to comply with the first….requirement is a failure to comply with a duty to make reasonable adjustments.

(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.”

The Evidence

6. We heard evidence from the Claimant and, for the Respondent, from Mr Wayne Watts, Regional Operations Manager and the Dismissing Officer, and Mr Philip Claridge, Managing Director of the Respondent and who heard his appeal against dismissal.

7. There was an agreed bundle of documents and references to page numbers in this Judgment are to page numbers in that bundle. The witnesses provided written statements, gave oral evidence and were cross-examined.

The Factual Background

8. Following the contract to provide health and social care to clients living in the Bourne, Lincolnshire, area being transferred to the Respondent in June 2018, the Claimant spent a period dividing his time between the outgoing provider, Bloomsbury Home Care, and the Respondent in order to help facilitate the transfer of client and staff information. The Claimant was then placed on garden leave by Bloomsbury Home Care on 13 September 2018 and the Respondent took over the contract on 1 October 2018. The Claimant's job title was Regional Manager.

9. It is relevant to note at this stage that the Claimant is a qualified registered nurse who was included by the Disclosure and Barring Service (DBS) in the adults barred list and the children's barred list as a result of his failures whilst working at two hospitals between March 2010 and September 2010 and, subsequently, 2011 and 2012, when his fitness to practice as a registered nurse was impaired by reason of his lack of competence.

10. Further, as a result of his employment with the Respondent, it was found that he failed to administer required medication to an 84 year old service user (MA); administered the incorrect medication to MA that was prescribed to another person and was out of date; and failed to follow a safe procedure to seek professional medical advice instead of handing this off to MA's daughter. MA is the service user who is central to many of the issues in this case.

11. On 6 October 2018, the Respondent experienced an unusually high level of sickness absence among its care staff and the Claimant was obliged to go out on calls to visit service users. In the late morning, he arrived at MA's house, gave him lunch and asked if he had any medication to take. MA replied that he did and the Claimant asked where the medication was kept to which MA said it was in the kitchen cupboard. The Claimant found the medication in the cupboard and gave it to MA.

12. At approximately 8.00pm that evening, MA's daughter telephoned the Claimant to say that her father had not been given his medication. The Claimant told her that he had found the medication in the cupboard above the cooker in the kitchen and administered this to MA. His daughter then found the medication he had administered and it was out of date medication that had been prescribed for MA's wife before she died. It transpired that this was medication which could have had an adverse impact on MA's health. The Claimant then advised MA's daughter to call 111 to seek immediate medical advice.

13. The Claimant then reported the incident to Mr Watts and on 8 October 2018 Mr Watts asked the Claimant to write a statement giving details of what happened. The Claimant states that he was effectively locked in a room and was not allowed to leave until he had completed his statement. This took some time because he suffers from dyslexia and he says he should have been given more time to do this rather than Mr Watts on several occasions asking him if he had finished his statement yet. The Claimant completed his

statement and was suspended by Mr Watts pending an investigation. His statement given to Mr Watts is at pages 102–103. In it, he said "I know I did not complete the checks as I would have noted the name and not given the medication" and "I understand the potential consequences of the error which is the reason I reported this to my senior immediately".

14. The Claimant states that the Respondent was aware of his disability through staff information transferred to it from Bloomsbury Home Care. Mr Watts says he did not know the Claimant was dyslexic, that the statement written out by the Claimant showed no indication of dyslexia, the Claimant did not mention it at any time and, if he had asked for more time to prepare his statement, it would certainly have been given. In relation to the visit to the house of MA, we noted the evidence of the Claimant. In his statement of 6 October 2018 at page 102, he said "there was no Atlas MAR chart within the property at this point and to memory I cannot remember if there was a Bloomsbury one but do remember a file being in place so it is possible that this is in the property". He does not seem to deal with this point at all in his witness statement but gave confusing and inconsistent evidence under cross-examination. In his statement written two days after the incident, he acknowledges there was a file at the home of MA. Under cross examination, he said that there was both a file and there was no file. Of course, memories fade over the years and this is a long standing case. However, we cannot rely on inconsistent evidence given at the hearing when a witness statement written by the Claimant two days after the event indicates there were documents in MA's property and the Claimant saw them. His evidence in relation to the administration of medication changed significantly from giving MA's wife's medication to being sure that he gave the correct medication. We found his evidence in this regard to be totally unreliable.

    In relation to being effectively held at the Respondent's premises and until he had finished writing his statement, we do not find that evidence to be reliable. He admitted he did not raise with Mr Watts at any stage that he suffered from dyslexia and would need more time. The obvious question to ask in this regard is why, if he needed it, did he not simply ask for more time?

15. Mr Watts carried out an investigation into what had happened. He interviewed MA's daughter and she confirmed that the Claimant had spoken to her. However when she telephoned him on the evening of 6 October 2018 he had told her to call 111 to seek urgent medical advice. The Claimant's evidence that he did this because she was with MA and better placed to answer questions does not comply with a carer's duty to call the medical services himself. This is clear from the letter from DBS referred to above.

16. The Claimant was then invited to a disciplinary hearing by letter of 31 October 2018 (112A and 113) which was scheduled to take place on 7 November 2018. The Claimant complains in his witness statement that the letter from Mr Watts inviting him to the disciplinary hearing gave no opportunity for him to request reasonable adjustments in line with "The Disabilities Act". The

Claimant was on annual leave until 5 November 2018 but the Tribunal noted at page 113 that Mr Watts' invitation stated "you may request to waiver the 72 hour notice period required for invitation to a disciplinary hearing, you should contact us to arrange this either in writing or verbally.Please could you confirm that the date and time is suitable for the disciplinary hearing". With respect to the Claimant, if he had required more time to prepare for the disciplinary hearing it is clear that all he had to do was ask for it. He did not do so.

17. The Claimant takes issue with the fact that Mr Watts conducted the investigation and held the disciplinary hearing. This is explained by Mr Watts on the basis that there were no other key personnel with experience in investigations or disciplinary hearings within the Respondent other than him and Mr Claridge and he appreciated that Mr Claridge would not be able to participate in the disciplinary hearing in the event he was required for an appeal.

18. The disciplinary hearing took place on 7 November 2018 and the notes of that meeting begin at page 118. During the hearing the Claimant changed his account again saying (page 120) "gone into property, asked if had meds, hunted around, pretty certain I looked and found his name, can't remember if the MAR chart in there, checked the name on blister pack and administered, which is why I'm concerned that that's not the right meds". At page 122, it can be seen that Mr Watts asked the Claimant whether he had any questions regarding his original statement. His reply was that he did not. At page 125 of the notes the Claimant said "but the only way I have given the wrong meds is to not check and I have been racking my brains".

19. The disciplinary hearing was adjourned so Mr Watts could consider his decision. He wrote to the Claimant on 13 November 2018 dismissing him for gross misconduct with immediate effect. The reasons for the dismissal were expressed to be:

    - "Wilful or deliberate neglect or abuse of a service user – (failing to follow a safe medication administration process leading to incorrect medication being given as well as missing the correct medication).

    - Breach of any applicable professional codes of conduct.

    - Serious act breaks the mutual trust and confidence or which brings or is likely to bring the company into disrepute – (failing to report the medication error appropriately to a health care professional to see advice at the time of the incident and then failing to record the medication error in the care notes)."

20. The Claimant's appeal to Mr Claridge by email of 18 November enclosing a substantial letter of appeal begins at page 152. Included within the appeal letter were references to breaches of the Respondent's policies and procedures, CQC guidelines and the Working Time Regulations. He also

raised his whistleblowing concerns.

21. Mr Claridge invited the Claimant to an appeal hearing by letter of 29 November 2018, the hearing to take place on 6 December 2018. The notes of that meeting commence at page 170. At page 173, the Claimant is noted saying he did not admit to a medication error with MA. He also said that it was MA's daughter who said he had given medication and he had not given this. At page 174 he said he did not give all the medication to MA.

22. After adjourning the appeal hearing, Mr Claridge wrote to the Claimant on 13 December 2018 dismissing his appeal.

23. In the light of the Claimant's inconsistent evidence, we preferred the Respondent's evidence in relation to the disciplinary investigation and subsequent hearing. Both Mr Watts and Mr Claridge gave their evidence in a consistent and straightforward manner and we had no reason to question its credibility. Mr Watts' investigation was comprehensive and the Claimant was given a reasonable opportunity to respond to the allegations both in the disciplinary and appeal hearings. The appeal hearing was also comprehensive and amounted to a rehearing of the disciplinary hearing. We considered that the Claimant, through his inconsistent evidence, attempted to muddy the waters in relation to the administration of the wrong medication to MA. He ignores the fact that the administration of the wrong medication and the failure to follow the correct protocol in contacting medical professionals himself lay at the heart of his dismissal.

24. The Claimant's evidence in relation to his alleged whistleblowing was often confused. He refers to documents which he says show that the Respondent was employing insufficient care workers prior to the commencement of his employment with the Respondent and refers to documents, including a CQC report, which post date the termination of his employment. Others post date his suspension. At pages 605–661 the Claimant sets out a total of 25 protected disclosures and sets out to which subsections of section 43B (ERA) they refer. The Tribunal noted that none of the alleged disclosures were relied upon by the Claimant throughout the disciplinary process.

25. The first three disclosures were allegedly made verbally on 1 and 30 September 2018 and 6 October 2018 to Mr Claridge and/or Mr Watts. These relate to insufficient staffing levels and are all denied by the Respondent. The fourth disclosure was allegedly made on 8 October 2018 verbally to Mr Watts concerning an allegation that the Respondent had failed to share information necessary to keep clients safe. Mr Watts has no recollection of this comment and denies it was made at all. The fifth disclosure was allegedly made within the Claimant's statement given to Mr Watts on 8 October 2018 again relating to an alleged failure to share information to keep clients safe. The Respondent denies this is a protected disclosure and adds that all relevant information was in the file for each client.

26. The sixth disclosure was verbal to Mr Watts made on 22 October 2018 to the

effect that the Working Time Regulations had been breached. The Respondent denies the disclosure was made and, in any event, it was not made in the public interest. The seventh allegation was allegedly made to Mr Watts and Mr Claridge in an email dated 26 October 2018 regarding information regarding where to find MA's medication. On any sensible reading of this email, it could not be a protected disclosure as it is a request to provide information in connection with the Claimant's disciplinary hearing. The Claimant relies on the same email for his eighth allegation in relation to breaks under the Working Time Regulations. Again, this is expressed as, "Please provide Company guidelines regarding adequate breaks as per Working Time Directive". This was another request for information and does not amount to a qualifying disclosure. The ninth alleged disclosure refers to an email dated 1 November 2018 (page 116) where the Claimant again asked a question in relation to information as to where to find medication. This is a further request for information in connection with his disciplinary hearing and is not a protected disclosure.

27. Allegation ten in relation to protected disclosures repeats what was said about breaks under the Working Time Regulations in the Claimant's email of 1 November 2018. It was a request for information and not a public interest disclosure.

28. The remaining alleged disclosures can be categorised as follows: those numbered 11, 14, 17, 18, 22 and 25 relate to the failure to communicate information to staff regarding medication; those numbered 12, 13, 15, 16, 20 and 23 repeat alleged issues in complying with the Working Time Regulations.

29. In relation to the Claimant's evidence, it was clear to the Tribunal that many of the alleged disclosures are not capable of being qualifying disclosures because they were merely requests for information in relation to the disciplinary procedure. As such, they were not made in the public interest but rather in the Claimant's self-interest. Those disclosures which took place after his dismissal cannot satisfy the requirements regarding being the principal reason for the Claimant's dismissal. The Tribunal was concerned that the Claimant has completely misunderstood the law surrounding protective disclosures and, after the event, has simply attempted to add a further cause of action to his claim which has no merit. In relation to the alleged disclosures made verbally to Mr Watts and/or Mr Claridge we prefer their evidence that these disclosures were not made.

30. In relation to the disability discrimination claim, we note that the Respondent has conceded the Claimant is disabled for the purposes of section 6 EQA because of his dyslexia. However, the Respondent denies any knowledge of this disability until the Claimant submitted his claim. The Claimant relies on his application form for his employment with Bloomsbury Care which should have been sent to the Respondent as part of the employee information in the TUPE transfer. In particular, he refers to the Equal Opportunities Monitoring form (page 68) where he discloses dyslexia as a disability. Further, he refers to page 91 which is part of the Respondent's TUPE employment form wherein

he confirms he suffers from dyslexia. The Respondent will rely on an email at page 97 from its recruitment administrator to the Claimant indicating that the TUPE employment form had not been filled out correctly. Further, the TUPE employment form within the bundle was not provided by the Respondent, since they say they did not have it, but by the Claimant. In these circumstances, and considering the unreliability of the Claimant's evidence in relation to the other issues, we preferred the Respondent's evidence that they had no information about the Claimant's disability.

31. We also note the Claimant's own evidence that he at no time relied on his dyslexia to request further time in order to properly participate in any stage of the disciplinary process thereby putting the Respondent on notice of his disability.

Findings of Fact

32. In relation to the issues, we find the following facts:

(i) On 6 October 2018, the Claimant attended the home of one of the Respondent's service users, MA, and negligently administered medication which had been prescribed a considerable period of time previously for MA's now deceased wife. Later that day, MA's daughter contacted the Claimant to advise him of the error. The Claimant notified Mr Watts that same evening and on 8 October, at the request of Mr Watts, he prepared a statement of what at happened after being suspended by Mr Watts. In the statement the Claimant admitted to not completing the appropriate checks before administering the wrong medication. The Claimant was not refused permission to leave the Respondent's premises before completing his statement and was not put under any pressure to complete the statement quickly. Although suffering from dyslexia, the Claimant did not ask for more time to complete the statement. He confirmed in that statement that upon speaking to MA's daughter he advised that she needed to call 111 for professional medical advice.

(ii) As well as considering the Claimant's statement and his subsequent email about the colour of the blister pack from which he took the medication he gave to MA (104), he met with MA's daughter on 9 October 2018 to obtain details of the medication wrongly administered to MA by the Claimant. The meeting notes are at page 105A and 105B. Mr Watts carried out a reasonable investigation in the circumstances and completed a disciplinary investigation report form (page 109 – 112). In the circumstances Mr Watts investigation was both reasonable and proportionate.

(iii) The Claimant was invited to a disciplinary hearing by letter of 31 October 2018 and this took place on 7 November 2018. The minutes are at page 118–127. Prior to the disciplinary hearing, the Claimant requested further information and comment from Mr Watts

which was provided to him. The allegations against the Claimant were that he had failed to follow a safe medication administration process leading to incorrect medication being given and failed to report the error appropriately to a health care professional in order to seek advice at the time of the incident and failing to record the error in the client's care notes.

(iv) Having considered what the Claimant had to say in the disciplinary hearing, Mr Watts decided that he had committed acts of gross misconduct and summarily dismissed the Claimant (page 128). The reason for the Claimant's dismissal was conduct.

(v) We find the Respondent genuinely believe the Claimant is guilty of misconduct, had reasonable grounds upon which to base that belief and carried out a reasonable and proportionate investigation in the circumstances. The decision to dismiss fell within the range of reasonable responses.

(vi) The Claimant appealed (page 151A) enclosing a substantial letter of appeal (pages 152 – 159). He was invited to an appeal hearing before Mr Claridge by letter of 29 November 2018 (page 168). The appeal hearing took place on 6 December 2018 and the notes of that meeting are at (pages 170 -177). Mr Claridge considered the appeal in great detail but dismissed the appeal by letter of 13 December 2018 (page 178).

(vii) In relation to the claim of unfair dismissal under section 103A ERA, as stated in our review of the Claimant's evidence above, we do not consider he made any qualifying disclosures. We find he did not make verbal disclosures in relation to the Working Time Regulations prior to his suspension. Thereafter, he made requests for information which do not amount to qualifying disclosures and the same applies to alleged disclosures made during his disciplinary hearing and appeal hearing. Whilst his schedule of disclosures, amounting to 25 in all, make reference to disciplinary and appeal hearing notes, we find the Claimant did not make qualifying disclosures. He makes vague references to such matters relative to his suggestion that he made the medication error because he was tired through working excess hours. We note he was responsible for the staff rota himself, was aware of high sickness absence on 6 October 2018 and was subject to an opt out of the Working Time Regulations.

(viii) We find that the comments made by the Claimant after his dismissal cannot amount to qualifying disclosures and none of the alleged disclosures were made in the public interest. Those made after his suspension and after his dismissal were made in his own self interest and designed to raise a smoke screen to excuse his negligent administration of medication to MA. The Claimant cannot

succeed in a claim that he was dismissed for making qualifying disclosures which he made after his dismissal.

(ix) In relation to the failure to make reasonable adjustments under section 20 EQA 2010, we find that the Respondent was not aware of the Claimant's disability during the course of his employment. The Claimant did not raise his dyslexia as an issue either during the disciplinary or appeal process. We find that his TUPE employment details were not submitted to the Respondent, he at no time raised it verbally with the Respondent and they had no knowledge of his disability until these proceedings were commenced.

Submissions

33. Both Parties provided written submissions which we briefly note here but confirm that we have fully considered them in reaching our decision.

34. For the Respondent, Mr Gunstone submitted that the requirements set out in **British Home Stores Ltd v Burchell [1980] ICR303** were satisfied in this case. Further the investigation undertaken by Mr Watts was reasonable and proportionate in the circumstances. The decision to dismiss for what was serious misconduct fell within the range of responses of a reasonable employer. In relation to whistleblowing, there were no qualifying disclosures and in any event, many of the alleged disclosures took place after the Claimant's suspension and, in some cases, dismissal and are raised now because they are entirely self-serving and cannot have amounted to a reason for his dismissal. As far as failure to make reasonable adjustments on account of the Claimant's dyslexia is concerned, the Respondent had no knowledge and so cannot be liable for such failure.

35. The Claimant submitted that he was treated badly by the Respondent. In particular, he maintained that he was put under pressure to prepare his statement on 8 October 2018 and this did not form part of the investigation. He further submitted that the Respondent was aware of his dyslexia and he should have been given more time to complete the statement and also consider matters ahead of the disciplinary hearing. He further alleges that Mr Watts should not have investigated the incident and then held the disciplinary hearing. He complains that no reasons for either the decision to dismiss or to dismiss his appeal were given in the respective outcome letters. The Claimant further submitted that he did blow the whistle in relation to the Working Time Regulations and breaches of various procedures. He submitted that the evidence was clear that he had sent his TUPE employment form to the Respondent's Directors and so they would have been aware or ought to have been aware of his disability.

Discussion and Conclusions

36. As well as the written and oral evidence of the Parties in this case, there were a significant number of documents. Many of these were included at the

behest of the Claimant who was intent upon persuading the Tribunal that the Respondent had breached its own policies and those of the local authority and the CQC. During the hearing, we were directed to very few of these documents. This is because, in our view, they were not entirely relevant to the issues. Indeed, we felt that the Claimant's reliance upon them was part of an elaborate smoke screen by him to avoid the real issues in the case.

37. In respect of the issues regarding ordinary unfair dismissal, we had to decide whether the principles set out in the Burchell case were satisfied. In his statement written at the request of Mr Watts on 8 October 2018 (page 102), the Claimant said he had not completed "the checks" before giving the wrong medication. He also said he remembered a file being in place at MA's property. He also confirmed, "I understand the potential consequences of the error…". that based on the Claimant's own admissions, the Respondent had a genuine belief that he had administered the wrong medication to MA.

38. We next consider whether the investigation carried out by Mr Watts was both reasonable and proportionate. He interviewed MA's daughter at some length and was in receipt of the Claimant's own statement. Whilst the Claimant considers that at least one other carer should have been interviewed, in the light of information available to Mr Watts in his investigation, we consider this investigation to have been reasonable. The two people involved in the incident were the Claimant who administered the wrong medication and MA's daughter who discovered it. Whether a dismissal for a conduct reason is reasonable depends upon whether it falls within the range of reasonable responses of a reasonable employer. But following **J Sainsbury Plc v Hitt [2003] ICR111, CA**, the investigation leading up to the dismissal must also fall within the range of reasonable responses that a reasonable employer might have adopted. Tribunals must be wary of substituting their own view as to what is a reasonable investigation. Considering Mr Watts' investigation objectively, he obtained a statement from the Claimant and interviewed MA's daughter which led to a detailed disciplinary investigation report form. MA was not interviewed because he lacked the mental capacity to provide any useful information. Thus, although the Claimant seeks to argue otherwise, we consider the investigation to have been one reasonably carried out by a reasonable employer.

39. Following on from this, we address the disciplinary hearing itself. The Claimant seeks to argue that Mr Watts, having carried out the investigation, had already made up his mind. We do not consider this is borne out by the notes of the disciplinary hearing (page 118). The disciplinary hearing lasted for over 90 minutes including an adjournment to enable Mr Watts to speak to MA's daughter to ask her for information regarding the blister pack which contains the medication the Claimant wrongly administered to MA. We considered that, had Mr Watts already made up his mind or was just going through the motions so to speak, he would not have done this. We also note that during the disciplinary hearing (page 120) the Claimant said, "Only thing I can think of is that I've not done my checks correctly which if that's the case I hold my hand up".

40. In the light of these matters we find not only that the investigation was reasonable, but it shows that the genuine belief in the Claimant's conduct was maintained after the investigation.

41. In considering the reasonableness of the dismissal, we must have regard to the ACAS code of practice and also the Respondent's own disciplinary procedure (page 335). The Respondent's policy provides that "the appropriate management team member will decide who will be the investigating officer and who will be the hearing officer of any possible disciplinary hearing". All investigation will be carried out without reasonable delay to establish the facts of the case and to decide whether to proceed to the disciplinary hearing….. wherever possible, different people will carry out the investigation and the hearing. This is a matter which concerns the Claimant in light of the fact that Mr Watts carried out the investigation and held the disciplinary hearing. The Respondent's evidence in relation to this is that there was no one else at the appropriate level and with the appropriate experience other than Mr Watts to carry out the investigation and hold the disciplinary hearing. Mr Watts was conscious of the fact that he had to keep Mr Claridge removed from this process because he needed to be available to hear any appeal. In these circumstances, we do not consider it unreasonable that Mr Watts fulfilled both the investigative and disciplinary functions. We have already noted that he carried out a reasonable investigation and this extended to the disciplinary hearing where he clearly took matters seriously even to the extent of adjourning to take further evidence from MA's daughter as a direct result of something the Claimant had said. In these circumstances, we do not consider that the disciplinary process was tainted with any irregularity.

42. In deciding whether the decision to dismiss was fair, we must take into account the alleged misconduct itself, the size of the Respondent's undertaking and equity and the substantial merits of the case. This was a serious incident. The Claimant made an error in administering medication to a confused client. The consequences could have been disastrous. The Claimant accepted that he had not undertaken his checks properly or at all. Whilst he attempted to muddy the waters in between being suspended and up to the end of his disciplinary hearing, we must conclude in all the circumstances that the decision to dismiss fell within the range of responses of a reasonable employer. We bear in mind the judgment by the Court of Appeal in **Alidair Limited v Taylor [1978] ICR 445 CA** which approved a statement in the Employment Appeal Tribunal that, "In our judgment there are activities in which the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal". Further, we refer to the judgments in **Haddow and others , Inner London Education Authority [1979] ICR 202 EAT** and **Norland Managed Services Limited v Hastick EAT 0005/12,** where in both cases someone involved in the investigation and the disciplinary hearing did not render the dismissal unfair. This may be the case in smaller businesses like that of the Respondent or where the disciplinary procedure provides for a

disciplinary hearing to be carried out by the employee's line manager. In this case, in all other respects, the ACAS code of Conduct was followed and we have concluded that Mr Watts was not biased against the Claimant.

43. Even if there were any irregularity in Mr Watts involvement in the disciplinary process, we consider that this would have been corrected by the appeal process conducted by Mr Claridge. This was clearly far more than merely going through the motions. The Claimant submitted a substantial appeal document and Mr Claridge clearly afforded him an opportunity to set out the reasons for his appeal and duly considered them. This is confirmed in **Taylor v OCS Group Limited [2006] ICR 1602 CA.**

44. In considering the Claimant's alleged protected disclosures, we have already found as fact that we do not consider any of his alleged disclosures to have either satisfied the definition of a qualifying disclosure or to have had any influence on the decision to dismiss him. We do not accept that he made qualifying disclosures prior to the incident on 6 October 2018 in relation to the Working Time Regulations. Thereafter, his alleged disclosures (and it has to be said many of which are repeated) were made after his suspension or after his dismissal.

45. The Claimant claims that he was automatically unfairly dismissed for making qualifying disclosures contrary to section 103A ERA. As Mr Gunstone submitted, following **Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979**, there is both a subjective and objective element to whether a disclosure is a qualifying disclosure. The Claimant must hold an honest belief but it must also be a reasonable belief. In considering the Claimant's position, we do not consider he held an honest belief or that the belief was reasonable. As we have already noted, it is our view that he at no time considered his alleged disclosures to be in the public interest rather that they are now relied upon in his own self interest in wrongly attempting to suggest that he was dismissed, not for recklessly administering the wrong medication to an elderly service user, but because he blew the whistle.

46. We have already found that his disclosures were not qualifying disclosures. Indeed, our concern is whether they were disclosures at all. Many of them can be classified at best as being points of information given in the ordinary course of his employment. Others were merely requests for information. We consider the whistleblowing elements of his claim to be misconceived.

47. Given our findings of fact, we can briefly give our conclusions in relation to the claim of disability discrimination. We have found that the Respondent had no knowledge of the Claimant's disability until his claim form was submitted. Having made that finding of fact, we also considered whether the Respondent ought to have known the Claimant was disabled by virtue of his dyslexia. In determining this second point, we have had regard to the fact that the Claimant does not allege that the Respondent should have been put on notice of his dyslexia. He says he needed more time to prepare his statement for Mr Watts. In our view, this evidence was introduced in order that he could then

dispute the meaning of certain comments within his statement. We note he did not ask for any additional time throughout the disciplinary process because of his dyslexia. We do not accept that the Respondent received the TUPE employment form which stated he had dyslexia. Accordingly, the obligation to make reasonable adjustments did not arise.

48. In reaching our conclusions in this case, we have been mindful of our duty to consider the dismissal from the point of view of a reasonable employer. We have not considered what we would have done. Indeed, this was set out and agreed by the Tribunal members at the commencement of our deliberations. We have also reminded ourselves that we do not have to consider every piece of evidence we have heard in reaching our conclusion. We have concentrated on the issues as we see them and as were agreed by the Parties.

49. For the above reasons, we dismiss the claims.

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Employment Judge M Butler

Date: 13 July 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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