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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107405/2020

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Held in Glasgow by Cloud Video Platform (CVP) on 14-16 September 2021

Employment Judge Murphy

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Ms A Finnigan

**Claimant
In Person**

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Cairllum Care Ltd

**Respondent
Represented by
Mr M Collier -
Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that the claimant's dismissal was automatically unfair pursuant to section 103A of the Employment Rights Act 1996. Save in respect of the following issues, the question of remedy is held over. The Tribunal makes the following determinations relevant to remedy:

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i. The dismissal was neither caused nor contributed to by any action of the claimant for the purposes of s.123 (6) of the Employment Rights Act 1996; and

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ii. It has not been proved that a fair dismissal would have ensued or that the claimant's employment would have ended lawfully within any particular timescale, had she not been unfairly dismissed when she was, such that no reduction falls to be

applied to any award through the application of the principle in **Polkey v AE Dayton Services Ltd** [1987] UKHL 8.

ORDER OF THE EMPLOYMENT TRIBUNAL

1 The Tribunal orders that:

5 1. A remedy hearing (by CVP) shall be listed for three hours on the next available date to determine the claimant's remedy entitlement arising from the foregoing judgment on liability.

2. The Respondent and any representative will be entitled to:

a. attend the remedies hearing;

10 b. cross-examine the claimant / any claimant witnesses on issues of remedy / compensation (only on issues which have not been determined in the foregoing judgment);

c. make oral submissions to the Tribunal on issues of remedy / compensation (only on issues which have not been determined in the
15 foregoing judgment);

3. **Within 14 days** of the date of this Order, the **claimant shall send to the Respondent and to the Tribunal by email** the following. Please see paragraphs 8 to 12 below for more information on how these documents should be organized and formatted:

20 a. An updated schedule of loss (i) particularising all sums sought; and (ii) providing a clear explanation of how each sum is calculated;

b. Particulars of benefits received since 8 November 2020;

c. Particulars and evidence of any income / earnings from any source since 8 November 2020;

25 d. Particulars of any efforts to mitigate loss arising from the dismissal to include applications for alternative employment and other

documentation showing or tending to show efforts to secure employment;

e. Copies of any documents on which the claimant intends to rely at the hearing which shall include copies of the following:

5 i. The claimant's bank statements for the period 8 November 2020 to the date of the response to the order (or, if shorter, for the period in respect of which the claimant claims losses) . Leave is granted for the claimant to redact irrelevant entries / private information.

10 ii. Pay slips supplied to the claimant during her employment with the respondent and, if applicable, such other documentation as shows or tends to show the claimant's entitlement to salary and other benefits prior to the termination of employment with the respondent;

15 iii. documents evidencing the respondent's employer contributions to the claimant's pension during her employment or confirmation there was none;

20 iv. the claimant's P60s for tax year 2020/2021 (claimant must check HMRC do not have copies if she doesn't have them) or confirmation there are none;

v. any other documents relevant to compensation / remedy on which the claimant intends to rely at the remedies hearing.

4. When exchanging documents, the parties may do that simply by sending scans to each other.

25 5. **The claimant must send the documents listed in paragraph 3 and sub paragraphs to the respondent and to the Employment Tribunal by email within 3 weeks of the date of this Order** in the format prescribed below. The claimant must prepare a file for the remedies hearing to include these documents as well as any documents which the respondent has

indicated it will rely upon in relation to remedy. **If the respondent wishes to rely on any written documents** at the remedies hearing which are relevant to remedy / the compensation the claimant may receive, **the respondent must send such documents to the claimant within 2 weeks of the date of this Order**. The claimant shall include any such documents sent by the respondent in the single paginated file to be sent to the Tribunal and the Respondent within 3 weeks of the date of this Order.

6. The file of documents prepared by the claimant for use at the remedies hearing must be contained in a single pdf file as far as reasonably practicable and should be indexed and paginated. The visible pagination must match the pagination of the electronic pdf file. That means that subdivided pagination (e.g “pages 56A to 56C”) should not be used under any circumstances. It also means that the index must itself be paginated.
7. Unless the Tribunal has ordered otherwise, each side can decide whether they wish to use hard copy printed documents during the preliminary hearing or electronic documents displayed on a suitable screen. If electronic documents are to be used, then an additional screen or device will be needed to display them because the video link will require a dedicated screen of its own.
8. Each witness (if any are called other than the claimant) will require their own copies of the joint file of documents. The party calling the witness must ensure that the witness can refer to those documents during the hearing, on a separate screen or device if they are viewing them electronically.
9. Unless and until notified that the Tribunal needs hard copies, the parties should assume the Tribunal is happy to receive documents solely in electronic PDF format.

IMPORTANT INFORMATION ABOUT ORDERS

- 1) If this order is not complied with, the Tribunal may make an Order under Rule 76 (2) for expenses or preparation time against the party in default.
- 2) You may make an application under Rule 29 for this Order to be varied, suspended or set aside. Your application should set out the reason why you say that the Order should be varied, suspended or set aside. You must confirm when making the application that you have copied it to the other party(ies) and notified them that they should provide the Tribunal with any objections to the application as soon as possible.
- 3) If this order is not complied with, the Tribunal may make an Order under Rule 76 (2) for expenses or preparation time against the party in default

REASONS

Introduction

10. This final hearing took place remotely by video conferencing. The parties did not object to this format. A face-to-face hearing was not held because of the Covid 19 pandemic and issues were capable of determination by a remote hearing.
11. The claimant was dismissed by the respondent. An email was sent purporting to terminate the employment on 3 November 2020, though this was not read until later owing to the claimant being in hospital. She complains her dismissal was automatically unfair pursuant to section 103A of the Employment Rights Act 1996 ("ERA"). She alleges that she made various protected disclosures to the respondent in June, July and October 2020.
12. The respondent denies that the disclosures were protected disclosures and denies that the reason or principal reason for the claimant's dismissal was that she made all or any of the disclosures.
13. The claimant gave evidence on her own behalf and led evidence from Alix Cowan, Elizabeth Ann McKenzie and Audrey Hughes Graham, all of whom

were former employees of the respondent. Mr Collier was the only witness for the respondent. Witness names are abbreviated as follows in the judgment.

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Alix Cowan, Care Support Worker employed by the respondent at the material time	AC
Elizabeth Ann McKenzie, Visiting Officer employed by the respondent at the material time	EAM
Audrey Hughes Graham, Care Support Worker employed by the respondent at the material time	AHG
Mike Collier, owner and director of the respondent	MC

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14. Other individuals named in the judgment who did not attend as witnesses are:

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Lisa Chapman, employed by the respondent as Care Manager at the material time	LC
Debbie Shields, employed by the respondent as Assistant Manager at the material time	DS
Siobahn McCaig, employed by the respondent as Assistant Manager at the material time	SMcC

15. Evidence was taken orally from the witnesses during the hearing.

16. The respondent was ordered by Order of 30 June 2021 to prepare a joint bundle for use at the hearing consisting of all the documents that the respondent and the claimant wished to rely upon. The bundle was ordered to be provided to the Tribunal 14 days before the hearing and to be numbered with items in chronological order. On the morning of the hearing, it was identified that, although the respondent had sent in some documents, these were not organized in a single bundle and were not paginated. Instead, they were contained in multiple attachments across several emails, some of which ran to multiple pages without page numbering. The attachments were not intuitively named. It was identified that it would be excessively difficult for the Tribunal, the parties and the witnesses to attempt to refer to the documentary evidence in this format during the hearing.
17. Mr Collier indicated he did not have the facility to prepare a joint bundle which was chronological in a single file with page numbers. The claimant indicated she could assist, and an adjournment was granted to allow her to undertake this exercise. Given the resulting loss of Tribunal time, it was agreed with the parties that the issue of remedy would be held over to reduce the risk of the claim being part heard by the end of the three days allocated. A joint set of productions was lodged by the claimant early in the afternoon. During the hearing, the claimant added two further documents to the productions.

Issue to be determined

18. A preliminary hearing took place on 24 June 2021 at which the issues to be determined were clarified and agreed. It was agreed that there are alleged to be disclosures regarding four different matters. These were identified at the preliminary hearing as follows:
- 1) Disclosures made in the period 26 to 28 July and 31 July 2020 regarding service user A. These disclosures are alleged to have been made to EAM, Lisa Chapman ("LC") and MC. It is alleged

that these disclosures are disclosures under section 43B(a), (b) and (d) of the Employment Rights Act 1996 (“ERA”).

5 2) Disclosures made on 15, 16 and 24 June 2020, on 14 July 2020 and 16 October regarding service user B. These disclosures are alleged to have been made to LC. It is alleged that these disclosures are disclosures under section 43B (d) of ERA.

10 3) Disclosures made on 22 October 2020 regarding service user A. These disclosures are alleged to have been made to LC. It is alleged that these disclosures are disclosures under section 43B (a), (b) and (d) of ERA.

15 4) Disclosures made on 26 October 2020 regarding various matters as set out in the further and better particulars of 7 April 2021. These disclosures are alleged to have been made to LC and MC. It is alleged that these disclosures are disclosures under section 43B (a), (b) and (d) of ERA.

19. The Tribunal requires to determine the following issues:

- 20 a. Were the alleged disclosures made and if so, are any of them protected disclosures under ERA?
- b. If any of the alleged disclosures were protected disclosures, was the reason or principal reason for dismissal that the claimant made the protected disclosure(s)?

Findings in Fact

25 20. The following facts were found to be proved on the balance of probabilities. Further findings of fact, relevant to whether the disclosures made by the claimant amounted to qualifying disclosures for the purposes of section 43B of ERA are recorded in the section headed ‘discussion and decision’.

Background

21. The respondent is a company which provides personal care services to service users in Ayrshire. It currently employs approximately 55 people. MC is the owner of the company and Managing Director. He owns another care business in the Glasgow area and splits his time between the two companies.
22. Lisa Chapman ('LC') is the respondent's Care Manager who has overall management responsibility for the respondent's operation. She is assisted by Assistant Managers, Debbie Shields ('DS') and Siobahn McCaig ('SMcC'). They are office based. The respondent's senior team also includes a Visiting Officer who splits her time between 'field work' (i.e. in service users' homes) and in the office. During the period of the claimant's employment, the Visiting Officer was EAM. EAM is no longer employed by the respondent. The respondent also employs four Senior Carers who work in the field. The remainder of its workforce comprises Care Support Workers who work in the field.
23. The claimant was employed by the respondent as a Care Support Worker (also referred to in the judgment as a 'carer' or 'care worker') from 5 March 2020.
24. On that date, she signed a written contract of employment as did DS on behalf of the respondent. Under the written terms, the claimant was contracted to work 35 hours per week on a variety of shifts between Monday and Sunday. She was contracted to undertake her duties in the homes of the service users for whom she was caring, or in their community.
25. The contract provided that the claimant was subject to a six-month probationary period during which time her performance and conduct would be monitored and appraised. The clause indicated performance would be reviewed at the conclusion of the 6-month period and that it '*may be terminated if you are found for any reason whatsoever to be incapable of*

carrying out, or otherwise unsuitable for, your job. Alternatively, the Company may extend your probationary period.”

- 5 26. The contract set out that the respondent had a primary duty to protect the interests of its service users and conferred an obligation on the claimant as a Care Support Workers to act in a reasonable manner in approaching her duties in accordance with the respondent’s procedures.
- 10 27. The claimant had previously worked in the hospitality sector and had no prior experience of working professionally as a Community Support Worker. At a personal level, however, she had experience from a young age of providing care for her mother, who was immobile.
28. From the commencement of her employment to in or around 22 October 2020, she worked a six-day week. Initially she was allocated shifts from 10 am to 5 pm.
- 15 29. The respondent had no complaints about the standard of care provided by the claimant in undertaking her duties at any time during her employment. The respondent received no complaints from service users about the claimant. The claimant’s probationary period expired on 5 September 2020 and was not extended by the respondent.
- 20 30. The respondent uses a database and staff, including the claimant, had access to an app. This allowed employees to view the staff rotas as they were updated. It also allowed the Care Support Workers to write notes in an electronic diary about their visit to a service user. This may relate to something the carer has seen which has caused them concern or simply information
25 about the service user to ensure continuity. MC had access to these entries but did not read all entries.
31. The claimant uploaded notes to this diary from time to time as did other field staff. There was, however, a limitation on the amount of text which could be uploaded in this manner. Sometimes constraints of space or the importance

of an issue made it more appropriate to send a report by email to the respondent's office.

32. If a Care Support Worker required advice or support in connection with a situation arising with the service user they were working with, they were told to telephone the respondent's on-call support number. The purpose was to provide 24/7 support to those working in the field with service users. During office hours, carers were instructed to call the office for assistance. They had a contact number for use outside office hours, which was manned by the respondent's office-based staff who took turns to be 'on-call'.

10 *15 June – 14 July 2020 (Service User B)*

33. On 15 and 16 June 2020, the claimant sent emails to LC raising concerns about service user B, following visits to B's home. The correspondence raised concerns about B's safety for reasons that were unrelated to the respondent's practices or staff. The claimant also called the office and informed SMcC about the concerns. She also spoke to LC on the phone about the situation. LC told the claimant she would pass the matter on to a social worker or Adult Protection.

34. In the weeks that followed, the claimant called the office to pass on further concerns of a similar nature about this service user once or twice a week. She often spoke to SMcC and DS who told her they would pass her concerns on to LC. The claimant began to develop concerns that she was viewed as a pest when she phoned the office with these concerns. Nevertheless, the office staff always took her calls, listened to her reports and said they would pass them to the relevant department.

35. The respondent's standard practice was that once concerns were raised and a report filed about an issue relating to a service user, there would be no follow up with the Care Support Worker who would not be informed on the outcome or process unless it was relevant to the care they required to provide.

36. On 14 July, the claimant emailed LC again regarding B with further concerns about B's safety. LC replied that she would call social work in the morning and then advise the claimant on the approach, which she did.

5 37. Throughout this period, MC was not aware of the concerns the claimant had raised about service user B. LC did not, at the time, discuss these with MC and did not forward on the claimant's email correspondence on the subject. Nor did MC review any of the claimant's diary entries on the app relating to service user B in this period.

c.26 – 31 July 2020 – Service User A

10 38. The claimant took two weeks' annual leave in July 2020. She returned on or about 27 July. She was at home during her leave, and had received a text message from AC concerning service user A.

15 39. AC, another carer, was covering the visits to service user A that the claimant would normally undertake. Service user A has no mobility and requires significant support with day to day living. AC told the claimant she had been rota'd with another of the respondent's carers, who she had not met previously. AC was concerned about this colleague repeatedly swearing in front of service user A and about a situation which had arisen where AC alleged the colleague had told A that she had arranged a deal for him to purchase tobacco through someone who'd been found on Facebook. Because of this, service user A wanted AC to take him to a cheque cashing place to cash money for the purpose of buying the tobacco.

20 40. The claimant told AC to contact the office to seek advice. She warned AC that a relative of service user A had power of attorney over A's financial affairs so that taking the service user to a cheque cashing place without involving that relative may be some kind of offence.

25 41. AC called the claimant when she finished her shift. During this call, AC mentioned to the claimant that money appeared to be missing from service user A's home. On her return from annual leave, the claimant was rota'd to be on shift alongside the same colleague AC had voiced concerns about at

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service user A's home. The claimant was unhappy about this given what AC had told her.

42. On Monday 27 July 2020, the claimant returned to work and visited service user A at his home. A told her there was money missing from his savings. The claimant went through the money in the property and agreed money appeared to be missing. Although the claimant by now felt the office staff were unreceptive to her frequent contact, she had developed a good relationship with the respondent's Visiting Officer, EAM. EAM had substantial experience in the care sector, and the claimant valued her advice.

43. She communicated with EAM by text message and by phone about service user A. The claimant told EAM she was uncomfortable working alongside the colleague concerned at A's home because of the missing money and because A had not been comfortable to discuss it with the carers who had been in his home the week before (including this individual). EAM advised the claimant to report the concern to the respondent's office. EAM told the claimant via text message that ultimately if the claimant remained dissatisfied with how matters were dealt with, the claimant could contact the SSSC to raise concerns with them.

44. The claimant called the office that day. She spoke to SMcC and told her about the missing money. SMcC advised the claimant to put it in an email to LC. The claimant sent LC an email on 27 July 2020 which included the following text.

She [AC] also said [a named colleague] had set some deal up via Facebook for [A] to buy tobacco from some guy and [the named colleague] was giving [A] the number and that A had received a check through the post so A asked AC to take [A] to a cheque cashing place ...I told her she had to be careful as [A's relative] has financial power of attorney and I wasn't sure A was allowed to go and cash a cheque like that

....

5 *Apart from this A's savings jar is short and A's questioning it, ... he had £92 only £2 in coins ... and prior to me leaving last week [A's relative] had left £20.... A said no one could find A's savings ... and when Debbie got it for A yesterday there was only £61 in it £6 in £1 coins...*

...it is concerning as if A's right there is £32 not accounted for ... am really not comfortable with that, am not in any way accusing anyone, A could be forgetting a shop trip or something along those lines...

10 *.....A's also said today A heard [a named colleague] on the phone telling this tobacco guy she was going to add a bit on and he could charge what he liked because A's mum and dad had plenty...*

15 45. LC was on annual leave. She emailed the claimant to say it was being passed to MC. MC telephoned the claimant on Wednesday 29 July 2020 while the claimant was at service user A's home. MC asked the claimant to confirm if the money was definitely missing and she told him it was. The claimant told MC that she had appeased A by telling A that she would check the financial record but that, in reality, she had already done so, and the money was not accounted for on the record. The claimant told MC that service user A had indicated a preference not to have the colleague who'd visited the week before with AC back in the house. MC asked why and said A had been happy to see that carer back the previous week. The conversation ended prematurely as the claimant needed to assist A.

25 46. MC called the claimant back later that evening after her shift. They talked further about the missing money. The claimant told MC that service user A had told her he'd overheard the colleague who visited him last week when she'd been talking on the phone outside A's window. A believed she was discussing the tobacco deal on the call. A had CCTV footage of the call. The claimant believed the footage had audio. She told MC that A believed the colleague could be heard saying to the person on the other end that A's parents were worth a fortune, and they could charge what they wanted.

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47. The claimant felt unhappy about the approach of the respondent to the matter, and she texted EAM voicing her unhappiness. She mentioned she was considering resigning. EAM sent an email to SMcC, telling her about the content of the claimant's text message, and asking for advice on how to deal with it. On 30 July, SMcC forwarded EAM's email to MC.

48. Following receipt of that email, MC asked to speak to EAM as she was leaving the office. MC asked EAM to show him the text messages between the claimant and EAM on EAM's mobile phone. EAM was not happy to do so but agreed. MC asked EAM if EAM knew the claimant outside of work and how long they had known each other. EAM told him that as far as she was concerned, the claimant was employed by the respondent as a carer like any other. She told him the claimant had raised with her concerns about service users and the attitude of the people in the office when she called for support on these concerns.

49. Later that evening, the claimant had a phone call with EAM. EAM told the claimant about the conversation MC had had with her and about MC looking at the text messages on her phone. EAM told her in future if the claimant wished to chat with her, she would avoid putting things in text messages but that the claimant was free to phone her for advice and support whenever needed.

50. On 31 July 2020, MC sent an email to the claimant which included the following text:

I am aware that you contacted the situation with Elizabeth Ann regarding the situation you had reported with [A] and the subsequent issues following that ... Whilst I have no issue in you contacting [EAM] it is not in her role to discuss employer / employee issues as they must be dealt with the management of the company. I understand you have stated that you feel it may be necessary to resign your position and that is entirely your choice, I certainly wouldn't want anyone working

5 *with us who was not happy or who felt unsupported. As I stated to you on Wednesday you are entitled to bring to us concerns regarding any allegation that a colleague ... has behaved inappropriately or said things that may be untrue, the comments reported to you by AC will be investigated once Lisa returns...Nobody to my knowledge has ever questioned the effort and commitment you have given to your role ... and it is greatly appreciated.*

...

10 *I think from here onwards if [A] or his [relative] have any questions, comments or suggestions you should ask them to speak with the office directly and remove yourself from being the “go between”. If you have concerns or they make comments and don’t want to contact the office you should still report them as usual but you should not become*
15 *involved in issues between them and us whenever possible.*

51. After MC’s email of 31 July 2020, the claimant received no further contact from him regarding the matter.

October 2020

- 20 52. In or around early October 2020, the claimant called the office while on shift to discuss an issue concerning a service user. EAM happened to be in the office when the call came in. The phone numbers of incoming calls come up on a screen in the office so the staff there can often identify who is calling
25 before they answer the phone. EAM heard DS tell LC that it was the claimant calling and heard LC respond: “no again!” LC went on to say that the claimant only had a 15-minute appointment with service user B; why did the claimant not just get in and back out? EAM heard LC proceed to question aloud why service user B spoke only to the claimant about the problems B had, and not
30 other care staff.

53. On 15 October 2020, the claimant visited service user B. She was concerned about B. She emailed LC and informed her of her concern about an injury B had and how this was caused.

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54. On 16 October, the claimant visited service user B again. During that visit the claimant had a query about administering medication to B. Antibiotics had appeared which had no instructions on them as to dosage and which were not mentioned in the medication record maintained by the respondent at the service user's home. She contacted the office and spoke to Kirsten who was managing on call support. Kirsten told her just to give them to B; everyone else had. The claimant said, 'no, that's not right; I am the first care worker to visit since this medication appeared.' The claimant was dissatisfied with Kirsten's advice, and she called EAM EAM advised her to email LC about the matter which she did, after her shift. The claimant's email raised her suspicion that B's injury and raised her concern about the advice she had been given in relation to B's medication.

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55. On Monday 19 October, the claimant was off work. One of the respondent's other care support workers, signed the Medication Administration Record ('MAR') at B's home to confirm she had given anti-psychotic medication to B. This type of medication was to be administered by South Ayrshire Council, not by the respondent's care workers. On 20 October, the claimant visited B and noticed this. She called the office and reported it to SMcC, who told her, 'It's fine – I know. I've spoken to the Council; it's just been a mistake.'

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56. On the same date, the claimant visited service user A. She was concerned to find what appeared to cannabis joint ends on the back steps. A is immobile and could not himself procure cannabis. The claimant was concerned that one of the carers employed by the respondent may have been smoking cannabis when they were supposed to be providing care for service user A.

57. The Covid 19 pandemic was continuing at this time and the respondent had put in place a number of measures to minimise risks to their staff and service

users. They had a policy with respect to the use of gloves in service users' home. When gloves were used for any procedure, including changing or bathing the service user or administering medication, they required to be disposed of in a bag immediately afterwards and placed in an outdoor bin.

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58. On Thursday 22 October 2020, the claimant sent LC an email regarding service user A, which included the following text:

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Have sat on this since Tuesday and couldn't be sure so left it ...[A's relative] asked me to sort the back steps... went out and there was two joint ends ... One of the girls had mentioned one of the new girls had said her car was smelling of grass after a support having left [a named colleague] in the car, I did say that should be passed to the office but whether she has or not am not sure so for safety reasons as much as anything else thought I would drop you a mail...

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...

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Just thinks she needs to be aware of what's required in [service user A's] when she's here, day off Monday and house was a tip again on Tuesday bins full, gloves left in A's room again and ... even the worktop still had traces of the day before's food... Anyways main reason for the email was the cannabis thing and the mistake in service user B's Mar as well was Monday, if she [the named colleague] had been smoking she wouldn't be fully aware in B's so thought best to email with the concern.

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59. Within the respondent, a support visit to a service user is often referred to as a 'support'.

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60. LC forwarded the claimant's email to MC on 22 October 2020, and he read it on that date. LC did not forward to MC the other recent email correspondence from the claimant sent on 15 and 16 October but LC did have a phone conversation with MC that day about the email of 22 October 2020 and the claimant generally. LC discussed with MC her frustrations with the claimant's

approach. They resolved to invite the claimant to a meeting with MC and LC to discuss her email of 22 October 2020 and other matters.

5 61. On 23 October 2020, LC sent an email to the care support workers apologising for the delay in issuing the rotas and pointing out the rotas were busy the following week with a lot of uncovered shifts. The claimant noted that her own shifts had been cut from 40 to 21 hours. She replied to LC to ask if there was any particular reason for this.

10 62. LC replied by email to the claimant. She copied in MC:

Yes – I was about to email you in response to the email you sent me over yesterday and a few other things.

15 *I would like you to attend an informal meeting with myself and Mike on Monday at 13:00 to discuss the email you sent yesterday in further detail – this is why I haven't put you on shift.*

...

20 *There have also been another couple of accusations brought to my attention from other staff members that I would like to discuss with you and get your take on.*

It has been alleged that you told a member of staff the following –

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- You told a staff member that [a named colleague] had been discussing them with colleagues and had suggested she may have been involved in missing items from service users home.*
 - You told a staff member that [another named colleague identified by initials] had been having an affair with a fellow colleague.*

30 *I would like to discuss this with you and hopefully clear up any misunderstanding there may have been and / or discuss anything that you may wish to bring up.*

63. On Monday 26 October 2020, the meeting went ahead at the respondent's office. MC and LC attended along with the claimant. MC began by discussing the claimant's concern about service user A in her email of 22 October 2020. He asked why she'd waited two days to make the report and the claimant explained she wished to be sure that A had not received any other visitors who might be responsible for the joint ends before reporting the matter and implicating the care support worker she had mentioned. She told them she had checked, and he had not. MC told the claimant she was being accusatory and suggestive by stating that another member of staff had mentioned a smell of grass on that particular colleague. He told her she had partaken in gossip. The claimant denied this. She said she had simply received this information from the person whose car the colleague had been in, and taken it onboard. She had not passed it on, other than to LC in her email of 22 October.
64. The claimant restated her concern about the advice she had received from Kirsten in the office when she called on 16 October 2020 to ask about service user B's medication when there were no instructions on the antibiotics and no record on the MAR. She said she had called Kirsten and had been told by her just to give B the medication because everyone else had. The claimant said she found that advice flippant. LC apologised for not having called the claimant regarding that matter when the claimant reported it.
65. LC asked the claimant about the claimant's conversation with EAM on this subject and the claimant told LC that EAM had told her that she had heard LC say that the claimant only had a 15-minute appointment with service user B; why did the claimant not just get in and back out? The claimant told LC that EAM had also told her that LC had also queried why service user B only spoke to the claimant about problems and not to other care workers who attended at B's home. LC responded that the claimant had a duty to report EAM's discussion to LC at the time it took place.
66. MC then referred to the fact the claimant had called the office about the mistake on service user B's MAR the day or two before the claimant's email

regarding service user A on 22 October. This was the error whereby anti-psychotic medication had been administered to B by a colleague when it should have been administered by the Council. MC told the claimant that her mention of this in her email of 22 October was a further 'suggestive remark' on the claimant's part regarding the colleague concerned.

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67. LC and MC went on to discuss with the claimant the allegations of gossip mentioned in LC's email of 23 October. The claimant denied she told a staff member that the colleague in question had been discussing that staff member with others and suggesting that staff member's involvement in missing items. The claimant named the individuals from whom she had heard this. Neither MC nor LC clarified who it was they were alleging the claimant had spread the rumour to.

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68. The second allegation in LC's email was that the claimant had told a staff member that another colleague had been having an affair. At the meeting, the claimant indicated an assumption about the identity of the individual who was identified by their initials in LC's email. LC corrected her and said she was referring, in fact, to another individual with the same initials. The claimant advised she had not heard this rumour about that other individual, and therefore had not circulated it.

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69. The claimant went on to voice concerns about some of the respondent's practices. She told MC and LC she believed the level of care had dropped due, in part, to a reduction in the number of spot checks carried out by the respondent's senior staff as a result of Covid 19. She said this had led to staff becoming lackadaisical about ensuring service users were washed and changed as often as they ought to be.

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70. The claimant said there had been many errors with the administration of medication picked up all over the place, some of which were made by senior care workers employed by the respondent.

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- 5 71. The claimant identified a particular fellow care worker by name who, she said, had very poor hygiene standards and who often did not change her gloves across multiple appointments at different service users' homes. Apart from normal hygiene considerations, this practice carried a particular Covid risk during the pandemic.
- 10 72. MC asked the claimant about discussions she had had with EAM concerning the first allegation of gossip set out in LC's email. The claimant told him about conversations she'd had with EAM regarding gossip in the team. The claimant said gossip was constant in the team and LC and MC acknowledged this was so. LC told her she should be reporting all gossip to LC. Neitehr MC nor LC indicated to the claimant at the end of the meeting or at any time thereafter that they did not accept the claimant's response to the gossip allegations or that they were in any way dissatisfied with what she had told them.
- 15 73. After the meeting, the claimant became ill and was off sick from Friday 29 October.
- 20 74. MC emailed the claimant on Monday 2 November to ask her to confirm in writing what she had told him about the conversations she'd had with EAM concerning gossip in the team. MC did not ask that the claimant record in writing any of the other matters discussed at the meeting, such as the concerns she had raised about the respondent's practices. The claimant emailed MC with confirmation of what she'd told him at the meeting on 26
- 25 October concerning her discussions with EAM about team gossip.
- 30 75. The claimant's health deteriorated, and she was taken to hospital in the early hours of 3 November 2020. During the coming week, the claimant was sedated with morphine and underwent surgery. On or about 8 November 2020, she checked her emails. She noted that MC had sent her an email dated 3 November 2020 at 10:54 am. It was, so far as relevant, in the following terms:

Amanda,

I am writing to inform you that I have taken the decision to terminate your employment. This is due to a breakdown in the implied duty of trust and confidence between employer and employee.

The terms of your contract state that you are entitled to 1 week's notice which means your termination date will be 10/11/2020. We do not wish you to work any of this period...

Regards

Mike

10 76. The claimant emailed MC soon after she read this to say she was upset by his decision and to ask him to confirm what breakdown of trust he was alleging. MC did not reply.

15 77. MC took the decision to dismiss the claimant late on 2 November or early on 3 November 2020. He did not discuss the decision with LC but had previously discussed the claimant with LC before and after the meeting on 26 October 2020.

20 78. The principal reason MC dismissed the claimant was that she had made disclosures of which MC was aware on 27 and 29 July 2020 and, more recently, on 22 and 26 October 2020. Taken as a whole, these caused MC to dismiss her. The disclosures of which he had knowledge in October 2020 featured most prominently in his decision to dismiss, but the July disclosures of which he was aware were also a contributing factor. The reasons for the
25 Tribunals findings in this regard are set out in the section headed 'Observations on the evidence'.

30 79. The claimant lodged her ET1 on 23 November 2020 and the respondent lodged an ET3 response on 4 December 2020. Some time after that date, in anticipation of this hearing, MC reviewed the claimant's personnel file. He discovered a form relating to pre-employment checks completed at the time of her recruitment which contained information of which he personally had not previously been aware, though it was contained in the respondent's records.

This prompted MC to google the claimant to seek further information about her. He found nothing about the matter on her personnel file but discovered some newspaper articles which carried historic allegations about the claimant allegedly defaulting on payments. These dated back to 2014 and 2017 and predated the claimant's employment with the respondent.

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80. MC did not dismiss the claimant to any extent because of what he found in her personnel file or online. He was not aware of these matters until long after the dismissal took place.

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81. The allegations concerning the claimant's participation in staff gossip were taken into consideration by MC in his decision to dismiss the claimant, but they were very much subsidiary and were not the principal reason for the dismissal.

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Relevant Law

Automatic Unfair Dismissal under section 103A

82. Employees may claim a dismissal is automatically unfair if the reason or principal reason for the dismissal is that they made a protected disclosure. The relevant provision is section 103A of ERA which is in the following terms:

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103A Protected disclosure

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. The question of whether the principal reason for dismissal was a protected disclosure is a question of fact for the Tribunal. Where multiple disclosures are made, the approach is to ask whether the disclosures, taken as a whole, were the principal reason for dismissal (**El-Megrisi v Azad University (IR) in Oxford** [2009] UKEAT 0448/08/0505).

30

84. If the employee does not have 2 years' service, the burden of showing, on the balance of probabilities that the reason for dismissal was an automatically unfair one rests with the claimant (**Ross v Eddie Stobart Ltd** UKEAT/0068/13/RN).
- 5 85. A Tribunal must to ask two questions:
- i. firstly, what is the reason for the dismissal? and
 - ii. secondly, (if it was because of a disclosure or disclosures), were those disclosures protected?
- 10 86. It was confirmed in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240 CA that the first question requires the Tribunal to consider what facts or beliefs caused the decision maker to dismiss. The second question about whether the disclosure is protected is a matter of objective determination by the Tribunal and the belief of the decision maker is
- 15 irrelevant.

What disclosures qualify for protection?

87. Section 43B of the Employment Rights Act 1996 ("ERA") sets up 6 categories of qualifying disclosure.
- 20 *'(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,*
 - 25 *(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

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

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere,

10

88. In the case of **Cavendish Munro Professional Risks Management Limited v Geduld** 2010 ICR 325, the EAT held that to be a disclosure of information, it must contain facts rather than simply make an allegation. As long as the worker ‘reasonably believes’ that the information tends to show one of the matters required in section 43B(1), the disclosure will be qualified even if the information turns out to be untrue or inaccurate.

15

89. In the case of **Soh v Imperial College of Science Technology and Medicine** EAT 0350/14 it was confirmed that there was a distinction between the worker saying “I believe X is true” and “I believe that this information tends to show that X is true”. It may be impossible for a worker to assess whether information from a third party is true or not. As long as the worker ‘reasonably believes’ that the information tends to show one of the matters required in section 43B (1), the disclosure will qualify even if the information turns out to be untrue or inaccurate. In **Kraus v Penna PLC and anor** 2004 IRLR 260 EAT said that ‘likely’ should be construed as ‘requiring more than a possibility, or a risk, that an employer (or other person) might fail to comply with the relevant legal obligation

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25

90. Where a Tribunal concludes a dismissal was unfair, it may find that the employee would have been dismissed fairly in any event, had the employer acted fairly, either at the time of the dismissal or at some later date. The Tribunal must assess the chance that the employee would have been dismissed fairly in any event then the reduce the losses accordingly. Such reduction may range from 0% to 100% (**Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL).

Contributory conduct by an employee

91. If the Tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). Any such deduction can only be made in respect of conduct during the employment which caused or contributed to the dismissal. If the Tribunal determines that there is culpable or blameworthy conduct of the kind outlined, then it is bound to make a reduction by such amount as it considers just and equitable (which might range from 0 to 100%).

Observations on the evidence

92. The Tribunal heard substantial evidence and was taken to lengthy emails the claimant sent on 15, 16 June and 14 July 2020 in relation to service user B. Given the Tribunal accepted MC's evidence that he had not read those emails nor been specifically briefed on them before he made the decision to dismiss the claimant, it was not necessary to make detailed findings of fact in relation to this sequence. Nor is it necessary to decide whether these emails contained qualifying disclosures for the purposes of section 43B of ERA.

93. The Tribunal also heard much evidence regarding events in October prior to 22 October 2020 and was taken to emails the claimant sent on 16, 17 and 20 October 2020. Again, the Tribunal accepted MC's evidence that he had not read those emails nor been specifically briefed on them before he made the decision to dismiss. Therefore, detailed findings of fact have not been made

about the emails' contents, and it is unnecessary to determine whether they included disclosures qualifying for protection.

5 94. Nevertheless, some findings of fact have been made about these events which provide relevant background. Although MC was not himself specifically aware of the detail of these communications, LC, his care manager, was. She discussed the claimant with MC prior to inviting to the meeting which took place on 26 October 2020 and after that meeting, and the Tribunal has found, on the balance of probabilities, that she indicated frustration she felt with the claimant's approach and her propensity to report matters.

15 95. In her emails of 27 July and 22 October 2020, the claimant identified by name two colleagues who she suspected of involvement in possible wrongdoing. In the text of those emails which has been reproduced in the judgment, their names have been removed and substituted with the words 'a named colleague'. The individuals' identities are not relevant to the reasoning in this judgment.

20 96. There were relatively few areas of factual dispute between the parties outside of the fundamental question of the reason for the claimant's dismissal. The contents of the emails the claimant sent to the respondent were undisputed. MC also agreed with the claimant's account of the two telephone conversations she had with him on 29 July 2020 regarding service user A. The claimant's account of the content of the conversation between her and MC and LC at the meeting on 26 October 2020 was also largely accepted, save for two or three differences of recollection which were not material to the issues in this case.

97. Material areas of dispute are discussed below.

30 *Conversation between MC and EAM when MC asked to see EAM's phone*

98. The claimant gave evidence, as did EAM, that a conversation had taken place between EAM and MC in late July 2020 when EAM had been about to leave

the office. At this time, the claimant had raised concerns about service user A which had been referred to MC and he had had two phone calls with her the day before about concerns over money being missing from A's home.

5 99. In his evidence, MC initially denied having spoken to EAM at all about the matter. He denied asking to look at her phone to see text messages between EAM and the claimant. Later, MC suggested that part of the account given of the conversation sounded accurate, namely that he had asked EAM whether she knew the claimant outside of work. MC appeared to accept, therefore,
10 that he had in fact spoken to EAM about the claimant at that time.

100. MC was vague about how he had become aware that the claimant was considering resigning. He referred to being aware of this in his email dated 31 July 2020. He could not recall how he knew this. MC was permitted to check
15 his old email messages during evidence, and he identified that SMcC had forwarded to him an email from EAM on 30 July 2020 where she explained her concern that the claimant had told her she was considering resigning.

101. The Tribunal accepted it was likely that, having received such an email on 30 July, MC would take the opportunity to speak to EAM about the claimant when they were both in the office. As to the content of that conversation, the evidence of the claimant and EAM was preferred. EAM recalled being asked to show MC her phone and reported this at the time to the claimant who gave
20 evidence of her recollection of EAM telling her about the exchange.

25 102. EAM's evidence was specific and detailed; she remembered that she wasn't happy about being asked to show the messages but that there was no malice in them so she had agreed to do so. She remembered MC telling her this was an 'informal discussion' and she remembered telling him, in response to his
30 questioning that she didn't know the claimant outside work, that she was a carer employed by the respondent like any other. She remembered telling him the claimant had worries about service users and about the attitudes of people in the office when she called to report them.

103. The claimant said she remembered EAM saying she didn't think she had the right to refuse MC's request to look at her phone because MC was her employer and because of the nature of the job she did. She gave evidence that EAM told her about MC asking how well they knew each other. The claimant also recalled EAM saying that, in future, they would limit the communications put in text messages.

104. EAM's and the claimant's evidence was consistent. It was also more convincing and detailed than MC's. Further, the incident, as they recalled it, seemed to fit with a pattern whereby both LC and MC showed a particular interest in - and disapproval of - the claimant's communications with EAM. MC discouraged the claimant from discussing any 'employer / employee' issues with EAM in his email on 31 July 2020. Later, on 26 October 2020, he extensively enquired about conversations the claimant had had with EAM.

Reason for dismissal

105. The main area of factual dispute relates to MC's reason for dismissing the claimant. This goes to the nub of the case. Given the claimant's length of service, the burden lies with her to show on the balance of probabilities that the principal reason for the dismissal was the disclosure(s) she had made. MC denies this was the reason or principal reason.

The reason given by MC

106. The Tribunal did not accept the reason for the dismissal given by MC in his evidence to the Tribunal.

107. He was asked why he had decided to dismiss the claimant. MC told the Tribunal that he decided to dismiss her because, on 2 November after speaking to EAM on the phone, he decided to check the claimant's personnel file. In it, he said he found a form completed at the time of her recruitment regarding pre-employment checks. He told the Tribunal that an issue on that form prompted him to carry out a Google search on the claimant. He said that

5 although he found nothing linked to the form, he found news reports from 2014 and 2017 which contained allegations about the claimant defaulting on rent and being late in paying staff and a band when previously employed as a bar manager. MC's evidence to the Tribunal was that, learning all of this information, and knowing that the claimant would require to work with vulnerable adults, he was not prepared to trust her to support the respondent's service users.

10 108. The Tribunal considered the documentary evidence at the time of the dismissal. MC's email dismissing the claimant included the following sentences:

15 *I am writing to inform you that I have taken the decision to terminate your employment. This is due to a breakdown in the implied duty of trust and confidence between employer and employee.*

20 109. It did not specify why he considered trust and confidence had broken down. MC declined to answer the claimant's email request in November 2020, seeking clarification.

25 110. The respondent's ET3 was lodged on 4 December 2020. It gave notice at section 6.1 that the respondent relied on the following facts to defend the claim:

The reason stated to her was a breakdown of trust and confidence between the employer and the employee, not a serious breach of contract as she had stated.

30 *We have been made aware that she had informed other staff that she was going to start her own business , had asked someone if they would work with her. She had also asked a member of our admin team to give her a reference when this should be directly requested from the care manager . She has repeatedly been involved in the spreading of gossip and rumour some of which she has admitted to others which*

she has denied [sic]. Some of these other colleagues have also been disciplined regarding these matters separately, but again we are not obliged nor legally permitted to discuss any of that with her.

5 *The allegation that whistleblowing is the reason for her dismissal is totally fabricated and without merit.*

111. These were the only facts averred in the ET3 which related or appeared to relate to the respondent's reasons for the dismissal decision.

10

112. MC, when asked why he dismissed the claimant, did not refer to any of the matters set out in the ET3 until the terms of that document were put to him. He was asked about the breakdown in trust mentioned in his dismissal email, and what this referred to. He repeated he was not willing to employ someone with the claimant's characteristics in the company. He was asked why he did not explain that in the email of dismissal. MC was slow to answer. He said, "honestly, I can only say I wanted to have a clean swift break".

15

113. MC was asked why he did not mention the pre-employment form, or the documents disclosed by his Google search, in his ET3 when invited to set out the facts relied upon in defending the claim. He replied, 'Naively I presumed if my trust and confidence in an employee is not workable then that is my judgment to make. I didn't think I needed to have those things there.'

20

25 114. The Tribunal considered MC's evidence was lacking in credibility. It was not credible that the respondent would include in the written defence to the claim matters which he said in evidence were either not relevant or less relevant than the material he claimed prompted the decision, but that he would omit any detail of that material which he later told the Tribunal caused him to dismiss. The omission was conspicuous in the email dismissing the claimant and in the ET3. Nor was it mentioned by MC at either of the two preliminary hearings on case management.

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115. When asked about the allegation of gossip-spreading mentioned in the ET3, MC said this was 'reasonably relevant' to his decision. However, he had not referred to it in evidence at all initially, when asked why he dismissed the claimant. Further, his evidence lacked specification as to which piece or
5 pieces of gossip he had found the claimant to be guilty of spreading and to whom. Nor did MC lead any evidence as to how that conclusion was reached.

116. On the balance of probabilities, the Tribunal did not accept MC had reviewed the claimant's personnel file or conducted his Google search until sometime
10 after he dismissed her and indeed after he lodged his ET3 response. This would account for his failure to mention these allegedly crucial matters at an earlier stage.

Establishing the true reason for the dismissal

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117. Having rejected the reasons advanced by MC for dismissing the claimant, the Tribunal appreciates that it is not bound to accept the reason put forward by the claimant, namely the making of disclosures (**Kuzel v Roche Products Ltd** [2008] ICR 799, CA).
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118. However, the Tribunal has concluded that, on the balance of probabilities, those disclosures which were within the knowledge of MC were, taken as a whole, were the principal reason for her dismissal.

25 119. In reaching this conclusion, the Tribunal drew inferences which were adverse to the respondent's position from various aspects of the evidence:

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a. That the claimant's dismissal followed shortly after the making of the disclosures on 22 and 26 October 2020.

b. That there was no dispute that the claimant was committed to her role and good at her job. No issues had been raised with her at the conclusion of her probationary period or at any other time until 23 October 2020 when

she was invited to an informal meeting expressly in response to her email of 22 October which raised disclosures.

- 5
- c. That there was a lack of compelling evidence for reasons other than the disclosures. The Tribunal has rejected MC's suggestion that the dismissal was prompted by historic material he claimed to have unearthed on 2 November. The only other reason put forward in his evidence was the allegations of gossip in LC's email of 23 October, albeit MC implied these were secondary to the internet material and pre-employment check form.
- 10
- At the meeting on 26 September 2020, MC had accepted that gossip was constant across the team. There was no evidence before the Tribunal as to why the claimant, in particular, was found guilty of gossip; what gossip, in particular, she was found guilty of having spread; or to whom.
- 15
- d. That MC's evidence about his state of knowledge in relation to the claimant's disclosures lacked candour. He initially said that when LC contacted him to tell him she proposed to invite the claimant to an informal meeting to discuss allegations, that he, MC, was not '*overly aware*' of any concerns the claimants had been raising about service users. He said he
- 20
- couldn't recall whether he was copied into LC's email dated 23 October 2020, inviting the claimant to the meeting. He later conceded he was, when the email was produced in full. He also initially said he couldn't recall if he had seen the claimant's email dated 22 October 2020. He later gave evidence on reviewing his old emails, not only that he had been
- 25
- forwarded her email on the date it was sent, but that he and LC had also discussed it that day.
- 30
- e. That there was no evidence that MC was at all perturbed by LC's decision to reduce the claimant's hours directly in response to the claimant's email of 22 October 2020 which contained disclosures. That reduction breached the claimant's contract and affected her take home pay. LC's email of 23 October 2020 was clear as to the reason for this treatment:

I would like you to attend an informal meeting with myself and Mike on Monday at 13:00 to discuss the email you sent yesterday in further detail – this is why I haven't put you on shift.

- 5 f. That MC's suggestion to the Tribunal that, at the meeting on 26 October 2020, his principal concern was the issues the claimant had raised about service users did not seem to accord with the evidence. Having initially suggested he hadn't seen it, MC gave evidence that, for him, the disclosures about A in her email of 22 October 2020 was the main issue.
- 10 He downplayed to the Tribunal the prominence of the questioning of the claimant about the gossip allegations. After referring to the drugs issue as his main concern, he said, "*while Amanda was in, Lisa chose to use the time to discuss with her what she [Lisa] had heard from [another colleague]*" about the claimant's involvement in gossip. Yet MC accepted
- 15 he did not take notes in the meeting of the concerns the claimant raised nor follow up with her to seek a written report either regarding service user A or regarding the other concerns raised about the care given to service users. There was no evidence MC asked extensive questions about these matters. There was no evidence that he asked for examples of medication
- 20 errors or instances of service users being left unwashed or unchanged. He did ask questions about apparent gossip discussed between the claimant and EAM. His only follow up was to request written confirmation of what the claimant told him about those discussions with EAM.
- 25 g. That MC's response to the disclosures could be construed as suggesting he was less than encouraging of the information:
- 30 i. On the drugs issue, MC's response in the meeting was to rebuke the claimant and tell her she was being "accusatory and suggestive" by stating that another member of staff had mentioned something about a smell of cannabis from the colleague who had attended at A's home during the period when the joint ends appeared. He told her she had partaken in gossip. The context, of which he was aware, was that A was completely immobile and

could not, on his own account, have procured the cannabis and built joints. The claimant told MC she had checked that service user A had received no visitors during the period when the joint ends appeared on the back steps other than the respondent's own care support workers. On the one hand during that meeting the claimant was instructed by LC to report all gossip; on the other, she was rebuked by MC for bringing to the respondent's attention this information which, albeit unsubstantiated, appeared to her to be relevant to the unexplained appearance of joint ends at A's home.

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ii. In July when the claimant had raised concerns over money missing at service user A's home, MC had asked EAM to see her phone and reviewed the text messages she had exchanged with the claimant on the subject. Further, MC's email on 31 July 2020 risked being discouraging the claimant from receiving any further concerns from service user A. Asking her to discourage A and his relative from passing 'questions, comments, and suggestions' to her risked the possibility that A would be more reluctant to raise concerns with members of the office staff with whom he was less familiar. It also risked the possibility that the claimant would become more reticent about reporting on any future concerns that A did raise through her.

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h. That the Tribunal has found that LC had made comments, witnessed by EAM, which showed she found the claimant's frequent calls to the office, raising concerns, to be a nuisance. The Tribunal considers it is reasonable to infer that, LC also shared her frustrations with MC when she discussed the claimant with him on 22 October 2020.

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120. Weighing the evidence as a whole, and drawing inferences from the findings mentioned, it is concluded, on balance, that the principal reason MC dismissed the claimant was that she had made the disclosures on 22 and 26

October, and that she had made previous disclosures in July 2020, of which he was also aware.

Submissions

Respondent's submissions

5 121. MC declined to make any submission.

Claimant's submissions

122. The claimant made a brief oral submission. She said she believed that the disclosures she made to the respondent qualified for protection under ERA and that she was dismissed for making them. There was nothing, she submitted, to back up the reasons put forward by the respondent in the ET3 for the dismissal and EAM's evidence to the Tribunal did not support the respondent's account in the ET3. The claimant invited the Tribunal to accept that she had been dismissed for making qualifying disclosures.

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Discussion and Decision

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Were the disclosures which caused MC to dismiss the claimant 'qualifying disclosures' for the purposes of ERA?

123. The Tribunal must go on to consider the second question, which is whether the disclosures (or any of them) were protected (**Beatts**). In determining that question, MC's belief about whether they were protected or not is irrelevant.

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124. The respondent did not suggest at any stage that the claimant did not believe the information that she disclosed verbally and in writing to the respondent. The Tribunal finds as a fact that the claimant did believe all information she disclosed and that all suspicions voiced were genuinely held. The claimant sent lengthy emails to the respondent, setting out her concerns. These were mostly prepared in the evenings after her shift was finished. The Tribunal further finds that the claimant was motivated to make the disclosures by

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concerns for the interests and / or welfare of the respondent's service users.
There was no evidence, or indeed suggestion, to the contrary.

22 and 26 October 2020 (Service Users A, B and others).

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Service user personal care standards and medication errors

125. At the meeting on 26 October 2020, certain of the claimant's concerns were discussed in specific detail while others were raised more generically. The claimant said a lack of spot checks had led to staff becoming lackadaisical about ensuring service users were washed and changed as often as they ought to be. She also told LC and MC that there had been many errors in the administration of medication, some of which were made by senior care workers. On the evidence before it, the Tribunal was not satisfied that these disclosures contained sufficient facts as opposed to general allegations to fall on the right side of the distinction identified in **Cavendish**. There was insufficient 'information' as opposed to allegations.

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Glove hygiene of a named care worker

126. The disclosure at the meeting on 26 October that a named care worker had very poor hygiene standards and often did not change her gloves across multiple appointments at different service users' homes did contain sufficient facts to be characterised as 'information' within the ambit of section 43B. The Tribunal accepts that the claimant believed this information showed or tended to show that the health or safety of service users of the respondent had been or was likely to be endangered. This practice carried a particular Covid risk during the pandemic. The respondent and the claimant were both aware that many of the respondent's service users were of an age and demographic that made them particularly vulnerable to Covid 19. The claimant's belief that her disclosure tended to show such endangerment was objectively reasonable in all of the circumstances, including the well-publicised health risks and warnings about poor hand hygiene.

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Cannabis joint ends

127. The disclosures at the meeting on 26 October and in the email of 22 October concerning the joint ends found at service user A's house contained sufficient facts to meet the requirement for 'information'. She told LC in the email that one of the new girls had said her car was smelling of grass after having a particular named colleague in it. It is accepted that the claimant believed this information showed or tended to show that a criminal offence had been committed and / or that a legal obligation had been breached. On 26 October 2020, the claimant explained she'd waited two days to report the matter because she wished to be sure that A had not received any other visitors who might be responsible for the joint ends. She told them she'd checked, and he had not. The context of these communications was that the claimant and the respondent both knew that service user A did not have the facility to physically go out on his own account and procure cannabis. In the circumstances, the claimant's belief that the information disclosed tended to show an offence had been committed or a legal obligation breached was a reasonable one. Cannabis is an illegal drug. The respondent had a primary duty to protect the interests of its service users and its care support workers had a contractual obligation to act in a reasonable manner in approaching their duties.

27 and 29 July 2020 (Service User A)

Cheque cashing and the power of attorney

128. In her email on 27 July the claimant raised the proposal to take A to cash a cheque in order to purchase tobacco. There were sufficient facts disclosed to meet the **Cavendish** requirement for "information". The claimant explained that A's relative had financial power of attorney over A. She said in her email, "I told her she had to be careful as [A's relative] has financial power of attorney and I wasn't sure A was allowed to go and cash a cheque like that". The Tribunal accepts as a matter of fact that the claimant believed the information

she disclosed showed or tended to show that a person was likely to fail to comply with a legal obligation to which they were subject. Her evidence was that she believed that ignoring the POA was some kind of offence. The Tribunal accepts that her belief in this regard was reasonable. It was reasonable to believe that a care worker was obliged to refer to the holder of the power of attorney before supporting A to carry out a financial transaction, in all of the circumstances, having regard to the vulnerability of the respondent's service users.

10 *Money missing from service user A's home*

129. In the email of 27 July and in follow up conversations with MC on 29 July, the claimant disclosed that money had been identified as missing from service user A's home. She set out facts regarding the amount of money that was missing and unaccounted for. She explained in the email that she was not comfortable with that but allowed for the possibility that A had forgotten a trip to the shop or some such thing. However, in the subsequent conversation, the claimant told MC that the money was definitely missing and that she had checked the financial record. The context, again, was that she and MC both knew that A did not have the mobility to go out and spend the cash on his own account. The only plausible inference from the information disclosed was that the claimant believed it tended to show that the money had been taken. It is accepted, therefore, that she believed the information tended to show that a criminal offence had been committed (namely theft). The Tribunal further accepts her belief was reasonable in the circumstances. The claimant explained that she knew exactly how much cash was there before her time off and in what denominations. She explained how this had reduced on her return and the reduction was not accounted for in the financial records that the care workers who visited A were required to keep. She explained that A himself had raised the discrepancy with her and did not know the explanation. It was reasonable for the claimant to believe that the totality of this information tended to show that a theft had been committed.

Allegation that care worker told a tobacco vendor they could charge A what they wanted

130. On 29 July 2020, the claimant told MC that service user A had told her he
5 believed a named colleague was discussing the tobacco deal with the
'tobacco guy' on a call which A had overheard. The claimant told MC that A
said he had CCTV footage of the call, which she believed had audio. She told
MC that A believed the colleague could be heard saying to the person on the
other end that A's parents were worth a fortune, and they could charge him
10 "what they wanted". There was sufficient factual content in this disclosure to
meet the requirement for 'information'. The Tribunal accepts that the claimant
believed that the information showed or tended to show that a criminal offence
had been or was likely to be committed and or that a legal obligation had been
breached or was likely to be so. The Tribunal accepts that her belief in this
15 regard was reasonable. It is unrealistic that lay individuals such as the
claimant should have a detailed knowledge of the criminal law so as to identify
by name the precise offence suspected but it was reasonable for her to
believe that conspiring to inflate the price of a transaction being arranged for
a vulnerable service user was against the law.

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Public Interest

131. It is not for the Tribunal to determine whether a disclosure was in the public
interest but whether the worker believed it to be so and whether that belief
25 was reasonably held. The Tribunal accepts that the claimant believed that
the interests and / or welfare of the respondent's service users were at issue
and that there was a public interest in safeguarding the interests / welfare of
this vulnerable group. The Tribunal accepts that the claimant believed that
making the disclosures she did served that interest. It was readily accepted
30 that her belief in this regard was reasonable. The disclosures raised serious
issues worthy of investigation.

Conclusion on whether disclosures 'protected'

132. It is concluded that the vast majority of the disclosures which the Tribunal has found caused MC to dismiss the claimant qualified for protection under section 43B of ERA. The principal reason for the claimant's dismissal was that she made these qualifying disclosures, and the claimant was therefore unfairly dismissed pursuant to section 103A of ERA.

Alternative Events and Polkey

133. The Tribunal must assess the chance that the claimant would have been dismissed fairly in any event and (if applicable), reduce her losses accordingly.

134. The Tribunal does not accept that the respondent would have been prompted to discover the pre-employment checks form or the historic internet materials if the claimant had not made protected disclosures, leading to the dismissal and Tribunal complaint. Even if MC had discovered these matters by chance in due course, the Tribunal does not accept, on balance, that they would have caused him to dismiss the claimant had she not made the protected disclosures she did.

135. The Tribunal, therefore, assesses the chance that the claimant would have been fairly dismissed in due course in any event due to the matters raised by the respondent to be zero.

Contributory conduct

136. It is necessary for the Tribunal to consider whether the claimant has, by any action, caused or contributed to her dismissal for the purposes of section 123(6).

137. The Tribunal does not accept that the claimant engaged in any action which caused or contributed to her dismissal except the making of disclosures, many of which qualified for protection under section 43B of ERA. These disclosures and the others which did not qualify for protection due to an insufficiency of

factual content, were not culpable or blameworthy. Only conduct that is at least to some extent blameworthy can lead to a reduction of the compensatory award (**Nelson v BBC (No 2)** [1979] IRLR 346).

5 138. It was found that the allegations concerning the claimant's participation in staff
gossip were taken into consideration by MC in his decision to dismiss the
claimant, but they were very much subsidiary. The contribution of these
allegations to the dismissal decision was marginal. There was insufficient
evidence available to the Tribunal that the claimant's actions in this regard
10 were culpable or blameworthy.

139. Standing the findings above, no deductions fall to be made from any
compensatory award to follow hereon on the basis of **Polkey** or on the basis
of contributory fault.

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Employment Judge: Lesley Murphy
Date of Judgment: 04 October 2021
Entered in register: 13 October 2021
20 and copied to parties