5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4107411/2019

Held on 14, 15 and 16 September 2021

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Employment Judge R Gall
Tribunal Member L Millar
Tribunal Member P Kelman

15	**Mrs C Rafferty**	**Claimant** **Represented by:-** **Mr S Smith -** **Solicitor**
20	**Mansfield Care Limited**	**Respondents** **Represented by:** **Mr G Bathgate–** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Unanimous Judgment of the Tribunal is that the claim of unfair dismissal brought in terms of Section 103A of the Employment Rights Act 1996 is unsuccessful.

REASONS

1. This claim was heard on 14, 15 and 16 September 2021. The claimant was represented by Mr Smith. She gave evidence. Her husband, Mr Booth, also gave evidence. Mr Bathgate represented the respondents. Evidence for the respondents was given by Mr McKay and Ms Woods. A joint file of documents was submitted.

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2. It may be helpful to record the job titles of the respondents' witnesses and also to identify other relevant parties who did not give evidence.

- Mr McKay gave evidence. He is the Operations Manager of the respondents. He held that position at time of the claimant's dismissal. He carried out an investigation following upon a drug error in relation to a resident. At some point in his working life Mr McKay had worked in a prison, supervising prisoners.

- Ms Woods gave evidence. She was, at time of the claimant's dismissal, Head of Operations with the respondents. She took the decision to dismiss the claimant. She is no longer employed by the respondents having moved on elsewhere.

- Ms O'Rourke was, at time of the claimant's dismissal, the care home manager at the care home where the claimant worked. She is no longer employed by the respondents.

- Ms Dale was an employee of the respondents at time of the claimant's dismissal. Whether she continues to be employed by the respondents is unknown.

- Ms Donaldson was manager of a care home operated by the respondents, one in which the claimant did not work. It was Belhaven Care Home. She sought to carry out a further investigation flowing from that carried out by Mr McKay. It is not known whether or not she continues to be employed by the respondents.

- Mr Hume was the CEO of the respondents at time of the claimant's dismissal. He is believed to remain in that position.

Brief Background

3. The claimant did not have 2 years of service at time of her dismissal. She had been employed for 11 months with the respondents at that point. She accepted that she did not have qualifying service enabling her to bring a claim of unfair dismissal in terms of the Employment Rights Act 1996 ("ERA").

4. The claimant said that she had made protected disclosures and that the reason, or principal reason, for her dismissal was that she had made protected disclosures. The respondents accepted that the claimant had been dismissed and that, prior to dismissal, she had made protected disclosures. It was their position that the making of those protected disclosures was not the reason, or principal reason, for her dismissal. It was, they said, the behaviour and attitude of the claimant which had led to her dismissal.

5. The claimant did not say that she had been subjected to a detriment on the ground that she had made a protected disclosure, a claim under Sections 47B and 48 of ERA. Her claim was advanced solely under Section 103A of ERA.

6. There was a dispute in relation to loss. That centred in the main upon the sum claimed by way of injury to feelings. Given the decision the Tribunal reached, findings in fact and arguments in this area are not set out.

7. The claim had been scheduled to proceed to a hearing on 2 April 2020 and subsequent days. That hearing could not proceed due to the consequences of the pandemic. For various reasons, the dates on which this hearing took place became the hearing dates.

8. Statements were submitted on behalf of all witnesses. Those statements constituted almost all the evidence of the witness by way of evidence in chief. They were taken as read. There were a few supplementary questions asked by way of evidence in chief. Each witness was then cross examined and, if desired, re-examined. Submissions by each solicitor were made at the end of the case.

Facts

9. The following relevant and essential facts were found by the Tribunal as admitted or proved. Facts found have been determined by applying the principle of balance of probabilities. The Tribunal has been alive to and has considered implications which might then properly be drawn from facts found or admitted.

Background

10. The claimant, Ms Rafferty, was employed by the respondents as a registered nurse from 23 March 2018 until 28 February 2019. She worked at a care home operated by the respondents and known as Argyll. The claimant worked 22 hours each week, doing this over 2 night shifts.

11. The manager of the care home at which the claimant worked was Ms O'Rourke.

12. In early January 2019, around 7 January, an error was made by a nurse in administration of a drug to a resident. It did not result in any harm to the resident. It consisted of changing a medicated patch on the resident earlier than the change ought to have occurred. It did not result in there being an overdose or underdose of the drug being given.

13. The nurse in question reported the event to Ms O'Rourke when the incident happened. The pharmacist had been contacted by Ms O'Rourke and had confirmed that no harm would be caused to the resident.

14. The manager, Ms O'Rourke, ought to have reported the incident to others. Specifically the incident ought to have been notified to the Care Inspectorate, to the GP and to the family. It also ought to have been notified to the social work section of the local authority and to senior management within the respondents. It also ought to have been noted on the records kept by the respondents for the resident. None of these steps to notify and record the incident were taken by Ms O'Rourke.

15. The nurse who had made the error informed the claimant of the error on 10 January 2019. The claimant checked the care notes for the resident and was then aware that the incident had not been recorded there. She was aware from the nurse who had made the error that it had been disclosed to Ms O'Rourke. The claimant became aware of the failures to inform and notify the parties as mentioned in the preceding paragraph. She spoke with Ms O'Rourke about this on 31 January. Ms O'Rourke did not show willingness to report the matter or to give notification of the event.

16. On 12 February the claimant spoke with the nurse who had made the error and said that the nurse should alert the respondents to the error and that if this was not done, she would take that step.

17. On 12 February the nurse who had made the error contacted Mr McKay by telephone and reported brief details of the error. Mr McKay arranged to meet the nurse that day at Argyll Care Home to obtain further information on the error.

Respondents' actions on and after 12 February 2019

18. Mr McKay met with the nurse who had made the error on 12 February. He was fully informed at that point of the error made. The nurse in question confirmed that Ms O'Rourke had been made aware of the error when it happened.

19. Mr McKay established that the error had not been notified by Ms O'Rourke to the relevant parties mentioned above. Steps were taken to do that immediately. Those parties were notified by the respondents that day.

20. The respondents viewed there as being an issue which required investigation. They were concerned at the failings of Ms O'Rourke in particular. They were also concerned that the nurse who had made the error had only taken the step of alerting senior management due to the claimant's position that she would alert the respondents if that was not done. The nurse informed them that this was what had led to contact with senior management being made at this point.

21. Unknown to the claimant, the respondents had earlier had concerns as to notification of issues not being given by the manager to the relevant parties. They viewed the information from the nurse who had made the error as providing evidence of circumstances which would allow them to investigate this type of matter further, in particular with Ms O'Rourke.

22. The respondents had no difficulty with the matter having been reported to them. In fact they welcomed that as it ensured that the relevant parties were

notified or informed and also enabled them to tackle what they regarded as an internal issue with matters of this type.

Meeting 12 February between Mr McKay and the claimant

23. Having met with the nurse who had made the error, Mr McKay wished to meet with the claimant. He understood that she had been working nightshift and would just have finished her shift at that point. She was available however, and Mr McKay asked to meet her before she went home. He had not previously met the claimant.

24. The claimant was tired at this time. She had completed her shift and had been involved in palliative care of a resident.

25. The meeting between the claimant and Mr McKay did not go well. The claimant was defensive and also adopted a challenging tone. Mr McKay was concerned and upset by her approach towards him. She was, in his view, disrespectful and offhand with him. She mimicked him and mirrored his hand movements. She interrupted him. He did not however adjourn the meeting or ask anyone else to attend. On conclusion of the meeting, which lasted around 5/10 minutes, Mr McKay contacted Ms Woods and said that he was shaken by the attitude and behaviour of the claimant.

26. Mr McKay was of the view that the claimant had not made protected disclosures as he viewed it as necessary that, for a disclosure to be a protected disclosure, it required to be made to an external body.

Investigation Report by Mr McKay

27. Mr McKay asked the nurse who had made the error to prepare a statement in relation to the error and events around it. The nurse prepared and sent on 2 statements and a further email. Those appeared at pages 10, 13, 14 and 15 of the file.

28. Ms O'Rourke was asked to submit a statement to Mr McKay and did so. Her statements given to him appeared at pages 9 and 12 of the file.

29. In course of gathering the statements and in particular from the information from the nurse who had made the error, Mr McKay became concerned at the behaviour of the claimant as commented upon by others. He had also his own experience to contribute to the process, that being as mentioned above.

30. Mr McKay also obtained a statement from Ms Dale. It spoke of her over hearing the claimant having an argument with the manager. A copy of that statement appeared at page 16 of the file.

31. The report prepared by Mr McKay appears at pages 20 and 21 of the file. It sets out his findings. It records his recommendations at conclusion of paragraphs 1, 2 and 3.Those are:-

   1 "*I recommend that [the nurse who had made the error] has a case to answer and should receive a "Record of Conversation" in regards to his recording of drug errors and management of these"*

   2 *"I recommend that Manager O'Roarke (*sic) *has a formal case to answer through Mansfield's Care's Disciplinary Procedures."*

   3 *"I recommend that RN Rafferty's behaviour is investigated further to understand the full extent of her interactions between her colleague and wither (*sic) *these interactions are having a detrimental effect on them and the business."*

32. The reason Mr McKay so recommended in relation to the claimant was because of her behaviour in the meeting with him and because of the comments made by other staff members to him in their statements or emails, as detailed above. He did not so recommend due to the protected disclosures made by the claimant.

33. The report from Mr McKay was considered by the respondents. All 3 recommendations were acted upon. Disciplinary proceedings were taken in relation to the nurse who had made the error. Retraining was also put in place for him. Similarly, disciplinary proceedings were taken in relation to Ms

O'Rourke. Those resulted in a final warning being issued to her. Retraining was also undertaken for her.

34. It was decided, in line with recommendation 3 of the report, that there should be an investigation into the behaviour of the claimant.

5 *Investigation attempted by Ms Donaldson.*

35. The standard arrangement if an employee of the respondents at Argyll was to be investigated was that the investigation was carried out by Mr McKay. Given, however, the difficult interaction between Mr McKay and the claimant on 12 February described above, it was decided that the investigation should
10 be carried out by someone other than Mr McKay. Ms Donaldson, manager of the respondents' care home known as Belhaven was asked to carry out the investigation. She had had no previous involvement or contact with the claimant.

36. Ms Donaldson contacted the claimant on 25 and also 26 February 2019. A
15 note of those calls prepared by her appeared at page 17 of the file. There was a further call between the claimant and Ms Donaldson on 27 February.

37. In those calls Ms Donaldson sought to arrange an investigatory meeting with the claimant. The claimant was informed of the subject matter of the investigation, namely that it was in relation to her aggression and attitude
20 towards her colleagues. The claimant expressed her view that she spoke her mind and that she was direct. She was concerned about any meeting of this type taking place without time for preparation and without the presence of her union representative. She referred to the situation at Argyll house which she said was about to implode. The claimant expressed hostile views about the
25 respondents. She asked that the meeting be on 8 March if possible. The claimant also said she would have preferred a letter inviting her to the meeting or a phone call from senior management. The relevant extract in the respondents' policy in relation to investigatory meetings appeared at page 6 of the file. It is set out below. The claimant said to Ms Donaldson on 26 and
30 27 February that she wished Ms Woods to telephone her.

38. Although not reflected in the notes, Ms Donaldson had a conversation with Ms Woods in relation to her contact with the claimant. Her view as expressed to Ms Woods was that she was somewhat shaken by the claimant's approach. Ms Donaldson said to Ms Woods that she was concerned at potentially remaining involved in the investigation.

39. No investigation meeting took place between Ms Donaldson and the claimant.

Telephone call between Ms Woods and the claimant 28 February 2019, the dismissal.

40. Ms Woods had seen the statements of Ms Dale, Ms O'Rourke and the nurse who had made the error. She had Mr McKay's note of the interaction with the claimant on 12 February. She had also spoken with Mr McKay following his meeting with the claimant, as mentioned above. She had Ms Donaldson's notes and had also spoken with her following her interaction with the claimant.

41. On 28 February Ms Woods telephoned the claimant. She did so with Mr McKay in the room with her. The phone call was conducted on the loud speaker rather than the phone handset. Mr McKay therefore heard the entire conversation.

42. This telephone call did not go well. Ms Woods and the claimant each thought that the other was not listening to them. The claimant expressed her view as to the respondents, which was not at all favourable. Ms Woods sought to bring the call back to its purpose, namely to discuss the situation where statements had been made as to the aggressive attitude of the claimant towards other staff members, her actions being of a bullying type, it was alleged. The claimant sought time to respond to those allegations. Ms Woods was keen to hear her comments at that time. The call developed such that each party was trying to speak over the other.

43. Given the way the call developed, Ms Woods decided that the claimant's employment with the respondents should be ended. She reached this decision due to what Ms Woods perceived to be aggression and lack of respect shown by the claimant towards her, the information in the statements

gathered from Ms O'Rourke, from the nurse who had made the error, from Ms Dale, the information given to her by Mr McKay and Ms Donaldson as to their interactions with the claimant, the behaviour of the claimant on the call with Ms Woods and the claimant's strongly held negative views on the respondents. She recalled that the nurse who had made the error had stated that the claimant had said to him, in relation to their manager Ms O'Rourke, "*she's no manager of mine".* Ms Woods also had in mind the fact that the claimant had not initially reported her concerns as to the drug error to management. Rather she had pressurised the nurse who had made the error to make the report submitted on 12 February by saying she would report the matter if this did not happen.

44. Ms Woods made the decision to terminate the claimant's employment during the call on 28 February. The reason for dismissal was the conduct of the claimant, her behaviour and attitude. The reason, or principal reason was not that the claimant had made protected disclosures.

45. Ms Woods communicated her decision to end the claimant's employment to the claimant on this call. She said to the claimant that she was not needed for the shift for which she was scheduled the following Sunday as she was summarily dismissed.

Dismissal Letter

46. At pages 18 and 19 of the file the letter confirming dismissal appeared. It is dated 28 February 2019. The reasons for dismissal are set out in that letter as being:-

    1. *"Inappropriate conduct towards junior staff*
    2. *Bullying conduct towards a colleague*
    3. *Aggressive conduct towards your manager*
    4. *Aggressive conduct towards your operations manager*

5. *Threatening colleagues and the company with referral to external regulatory bodies"*

47. The reasons detailed in the letter summarised the reasons which led Ms Woods to terminate the claimant's employment with the respondents.

48. The dismissal letter stated that the claimant had the right of appeal.

Appeal

49. The claimant submitted an appeal. She did this by letter of 12 March 2019 addressed to Mr Hume. A copy of that letter appeared at page 22 of the file. The claimant had consulted her trade union representative before completing this letter of appeal. The claimant's union representative helped the claimant draft the letter of appeal.

50. In this letter the claimant set out her grounds of appeal. They were stated to be as follows:-

> *"The decision to dismiss me was taken without due process being followed and it is my view that the decision to dismiss was unduly harsh and not a reasonable response given the circumstances of the situation."*

51. There was no mention in the letter of appeal of the claimant having made protected disclosures to the respondents or of any view on her part that her dismissal was because of having made protected disclosures or was associated with having made protected disclosures.

52. The letter of appeal was never acknowledged or responded to in any way by the respondents.

Possible disciplinary proceedings involving the claimant, after dismissal

53. By letter of 13 March 2019, at page 25 of the file, Ms O'Rourke wrote to the claimant in relation to an investigatory meeting in relation to alleged

inappropriate restraint of an employee by the claimant on 25/26 February 2019.

54. The claimant replied by letter of 18 March. A copy of that letter appeared at page 28 of the file. She expressed surprise and confusion at receipt of the letter given that her employment had ended. She referred to her appeal against dismissal saying that she had not received any reply to her appeal letter at that point. As mentioned above, no reply was ever sent by the respondents.

55. At page 34 of the file a letter from Ms O'Rourke to the claimant appeared. That was intimation of a disciplinary meeting in relation to the allegation mentioned in paragraph 53 of this Judgment. No such disciplinary meeting took place.

Respondents Policies

56. At pages 1 – 8 of the file the claimant's contract of employment appeared. Page 6 of the file contained clause 11 of that contract. It specified that the disciplinary procedure would apply only to employees who had 24 months' continuous service at date of commission of any offence. For those with less service, it was said that they might be liable, at the management's discretion, to dismissal where appropriate, in accordance with non-contractual procedure then set out.

57. The procedure set out stated that stage one was notification of the allegation being given in writing to the employee, the company also inviting the employee to an investigatory meeting to discuss the matter. It also said that the company would notify the employee of the basis for the complaint of alleged misconduct or poor performance.

58. Contact numbers for Mr McKay and Ms Woods were displayed and known to staff. There was no whistleblowing policy produced to the Tribunal, nor was it clear what training, if any, staff and management had in this area.

Care Inspectorate Report

59. Pages 29 to 31B of the file contained copies of a letter to the claimant from the Care Inspectorate of 21 March 2019 and the report from the Care Inspectorate. The letter referred to the contact from the claimant with them on 18 March 2019 as to concern about Argyll House Nursing Home.

5 60. From the report, 3 allegations were made by the claimant. 2 complaints were not upheld. One complaint was upheld. That related to the drug error referred to in this Judgment. The conclusion of the Care Inspectorate appears at page 31 of the file. It states

> "*The service manager had a responsibility to ensure that all relevant*
> 10 *parties were notified about the error at the time. The drug error should have been recorded at the time."*

It goes on to say:-

> *"This drug error was identified by the complainant. The complainant alerted the external manager to the drug error. The external manager*
> 15 *made all the required notifications. The nurse responsible and the service manager have both been subject to re-training and disciplinary action. No further actions are required."*

The Issues

61. The first issue for the Tribunal was to determine whether the reason or
20 principal reason for dismissal was that the claimant had made a protected disclosure. If the Tribunal determined that issue in favour of the claimant, then compensation would require to be assessed and awarded to the claimant.

Applicable Law

25 62. Section 103A of ERA states:-

"*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.*"

5 63. It is for a claimant to adduce evidence to persuade the Tribunal, on the balance of probabilities, that the reason, or principal reason, for dismissal was that the employee made a protected disclosure.

Submissions

64. The evidence concluded towards the end of 15 September. Mr Smith asked
10 for time to gather his thoughts prior to submissions being made. The Tribunal had 16 September as a diet of hearing in the case and decided that submissions would be heard on the morning of 16 September. That is what happened.

65. Both Mr Smith and Mr Bathgate addressed the Tribunal in relation to loss.
15 Given the decision of the Tribunal on liability, no findings in fact are made as to loss and the submissions made upon loss by both parties are not reflected in this Judgment.

Submissions for the claimant

66. Mr Smith tendered a document setting out the submissions on behalf of the
20 claimant. He spoke to that. Unfortunately, due to a migraine headache, the claimant was unable to be present in the Tribunal room on 16 September. She observed and listened via video link and communicated by text with Mr Smith with her comments/instructions on submissions on her behalf and also upon the respondents' submissions. What is now set out is a summary of the
25 submission made by Mr Smith.

67. Mr Smith confirmed that, for success in the claim, it was accepted that the claimant had to show, on the balance of probabilities, that the reason or principal reason for dismissal was that she had made a protected disclosure(s).

68. It was recognised that the respondents had various employees who provided material to the Tribunal to support their position as to the reason for dismissal. The Tribunal had to decide as to whether it accepted that evidence. The claimant had no direct evidence to support her position. There was evidence, however, which should lead the Tribunal to infer that the making of the protected disclosures was the reason for dismissal, Mr Smith said.

69. Mr Smith highlighted the claimant's position and background qualification and record of employment. It was accepted by the respondents that she was correct in saying that the manager ought to have reported the drugs error. The Care Inspectorate had upheld this element of her complaint. She had said in her evidential statement that she was worried when she took the steps she did to raise the matter that her job would then be at risk. Her husband had given evidence of her having that concern before raising the matter. Sure enough, she had then lost her job after raising the issues.

70. The Tribunal should, Mr Smith submitted, accept the claimant's version of the meeting between her and Mr McKay on 12 February. He had not viewed her as a whistle blower. He had commenced the meeting without notice as to its subject matter and at the end of her 12 hour shift. She was tired and was understandably unhappy about being asked the questions she was. She had explained her concerns. She was not offered support. She was not asked further about the matter. What came out of that meeting was an investigation into the claimant's own conduct.

71. Mr McKay had, Mr Smith said, given a very colourful opinion as to the claimant's behaviour when they met. The meeting had been relatively brief. Mr McKay had, in earlier employment, dealt with prisoners and situations involving them. He described the claimant as being worse than the prisoners, saying he was frightened whilst meeting her. He had a notebook with him, had taken notes it seemed, yet those notes had not been produced.

72. Mr McKay had obtained statements. The nurse who made the error and Ms O'Rourke had reason, however, to be unhappy with the claimant. That could

well have affected what they said. Mr McKay had then recommended investigation of the claimant.

73. Ms Donaldson had given a statement to the respondents. That appeared in the file. It was a factual account of her discussions with the claimant. The claimant had asked for more information according to Ms Donaldson. She was entitled so to do, looking at the respondents' policy. There was no mention by Ms Donaldson in her note of the claimant being difficult or of Ms Donaldson having an issue with her.

74. Ms Woods had tried to force the claimant to meet with her on 28 February, although there was no need for the meeting to be that day.

75. It was accepted that the respondents had two people to speak to the call between the claimant and Ms Woods given that the call was on loudspeaker and that Mr McKay was present.

76. The Tribunal should consider various points in relation to the call. It was the first interaction between Ms Woods and the claimant, although Ms Woods ended it by dismissing the claimant. Ms Woods had been colourful in her description of the claimant and her tone. She had referred to the claimant "*ranting*", to the claimant "*hating Mansfield Care Limited with a passion"* and to the claimant talking by saying "*she presented a word salad"*. She said the claimant had "*bruised everyone with whom she had come into contact"*. There had been no issues however involving the claimant in the preceding 11 months. The decision did not need to be taken there and then. Time for reflection was more appropriate.

77. It appeared that Ms Woods had simply accepted everything Mr McKay said. She had referred to him in evidence as the "*nicest man*". Ultimately, Mr Smith said, as he had put it to Ms Woods, dismissal was the path of least resistance.

78. After dismissal, the claimant's intimation of appeal had been ignored. There had been a letter sent to her about an investigation. She had been prepared to co-operate and had said that. She had referred to her appeal when replying.

There was still no acknowledgement of her appeal. A disciplinary hearing had then been arranged in relation to the claimant. This was said to have been without the knowledge of Ms Woods or Mr McKay. Mr McKay was, however, referred to in that letter as the person who was to hear the details and to decide the disciplinary outcome.

79. The Tribunal should therefore not accept Mr McKay and Ms Woods as being credible. All the decision making of the respondents was "*off the cuff*". The evidence about the post dismissal investigation and potential disciplinary hearing should lead the Tribunal to consider carefully the evidence about the exchanges leading to dismissal of the claimant as those were spoken to by Mr McKay and Ms Woods.

80. There had been exaggeration by Mr McKay in particular, Mr Smith submitted. The Tribunal should reject the evidence that the respondents were happy to hear from the claimant by way of whistleblowing. When they met with her an investigation into her conduct resulted. That led to dismissal. There was a motive for those staff who had spoken against the claimant to do so. Mr McKay was an experienced manager with, it seemed, experience of difficult situations with prisoners. He had however moved quickly in relation to the claimant on the basis of one meeting. Ms Woods then took over the mantle.

81. Put simply the claimant's face no longer fitted, Mr Smith said. The respondents did not react well to the claimant pointing out what they required to do. There was no need to find that there had been a conspiracy. The respondents simply did not know what to do with the claimant. They could have stood back, they could have suspended her. They could have taken time and given her notice in writing of the investigation meeting, as she asked. Instead they moved quickly. They dismissed her on the basis of her alleged behaviour, assassinating her character in the process. Their evidence was barely credible. Given that the allegation in relation to restraint had not been pursued or referred to the NMC, the desire on the respondents part to damage the claimant was again illustrated.

82. The Tribunal should find the claim established, Mr Smith submitted.

Submissions for the respondents

83. Mr Bathgate emphasised that the onus was on the claimant to persuade the Tribunal of her case. She had however, he said, failed to discharge that onus. Further, the respondents had established on the balance of probabilities, that the principal reason for dismissal was the behaviour of the claimant.

84. For the claimant to succeed, Mr Bathgate submitted, the Tribunal would need to find that the reasons of the respondents and the evidence from their witnesses were fabricated. On that basis the information from Ms O'Rourke, the nurse who had made the error, Mr McKay, Ms Donaldson and Ms Woods as to the interaction each of them had had with the claimant in January and February 2019 would have to be viewed as wholly false. In addition, the evidence of Mr McKay and Ms Woods as to what had happened in February would have to be viewed as wholly incredible.

85. Contrary to this, however, the evidence from the respondents was credible and measured, Mr Bathgate said. Indeed when asked in cross examination, the claimant had been unable to give a reason as to why any of those who had given statements to the respondents would have given inaccurate statements.

86. The claimant had been angry with the respondents. She had made allegations to the Care Inspectorate after her dismissal. 2 of those had not been upheld.

87. There was in fact no evidence to support the claimant's position in her witness statement that she "*wholeheartedly believed*" her dismissal was because of protected disclosures she had made. This might be her own perception, but that did not enable her case to be successful.

88. Regard should be had to her letter of appeal. There was no mention in that letter to her dismissal having been because of protected disclosures made.

89. The Tribunal should also have regard to the respondents' reaction when they were told of the drug error. That reaction undermined there being a causative link between disclosures and dismissal. The respondents had acted positively

on being told. They had alerted the appropriate bodies that day. The person who ought to have reported the issue earlier, Ms O'Rourke, was investigated and then subjected to disciplinary action. She had received a final warning. Ms Woods said in evidence that the respondents welcomed this matter being drawn to their attention. It had enabled them to do something about it and to take it up with the relevant manager.

90. Had the respondents reacted negatively to the disclosure, then there might have been a basis for inference which might have supported the claimant, Mr Bathgate said. That however was not what happened.

91. It was simply not credible that dismissal was due to the disclosures being made. The only element supporting that view was the view expressed on 12 February by Mr McKay that the claimant's behaviour should be investigated. That was only potentially connected to the disclosures by proximity in time of events. That was not enough in all the circumstances for the Tribunal to find that a causal connection existed.

92. Any attempt to suggest an inference be drawn was wholly undermined by how the respondents had dealt with the disclosures.

93. The Tribunal should, Mr Bathgate submitted, accept the evidence of Mr McKay and Ms Woods when they described the claimant as being argumentative, obdurate, disrespectful and uncooperative. She had been guilty of vituperative behaviour towards her colleagues. She had exhibited hatred towards the respondents, Mansfield Care Limited. These behaviours were the reasons for her dismissal. Her claim must fail, Mr Bathgate said.

94. Mr Bathgate commented on the submission on behalf of the claimant. He referred to the emphasis placed by the claimant on the failures in relation to investigation and also the post dismissal disciplinary procedure in relation to which the claimant had been written. He accepted that there were failures by the respondents in both those areas and that those did them no credit. The question was, however, what was the reason for dismissal? Those matters

and in particular the post dismissal allegation, had no impact on the reasons for dismissal.

95. Although Mr Smith said the Tribunal would not require to find that there had been a conspiracy, it would need to find, said Mr Bathgate, that the evidence of Mr McKay and Ms Woods was fabricated or false. That was fanciful looking to the evidence and the way in which it was given.

96. References to decisions being made off the cuff and to the line of least resistance would, even if true, not get the claimant "*over the line*" in proving her case that dismissal was because she made protected disclosures.

97. In summary, Mr Bathgate submitted that the claimant had not established her case on the balance of probabilities and the Tribunal should therefore dismiss it.

Discussion and Decision

98. As the claimant did not have qualifying service, for her claim to be successful she required to persuade the Tribunal that the reason for her dismissal was the fact that she had made protected disclosures.

99. The Tribunal considered the evidence very carefully. It was alert to the fact that an employer will seldom make it obvious that dismissal of employee who has made protected disclosures was a step taken because those protected disclosures were made. There will generally be alternative reasons advanced. The Tribunal in that situation requires to consider carefully the evidence given to it by both parties and to consider if, from the facts found, inferences can properly be drawn as to the real reason for the respondents ending the employment of an employee.

100. The Tribunal is also keenly aware of the desirability of those who make protected disclosures being protected from harmful consequences, such as job loss. There is a public interest in this area, particularly, in many ways, in the healthcare sector where it is important that issues of the type which are properly labelled protected disclosures are brought to light.

101. The respondents in this case did not have robust procedures in place, in the view of the Tribunal, when it came to whistle blowing. There was no distinct policy to which the Tribunal was taken. Mr McKay misunderstood what whistle blowing involved. He believed for there to be whistle blowing the reporting had to be to an external body. That is not so. There did not appear to be any training given to staff or management in this important area. There was reference to notices being present giving the out of hours contact details for Ms Woods and Mr McKay. That did not however, without more, strike the Tribunal as being sufficient to provide a clear route which could readily and easily be followed by a whistle blower. The phone information seemed to relate to workplace issues in general which might arise. It seemed to the Tribunal that there should be some level of encouragement given by the respondents through training, with firm and genuine assurance that contact at any point whatsoever would be welcomed and would result in appropriate steps being taken if there was contact in relation to a whistle blowing scenario.

102. There were other aspects of the respondents' handling of this matter which did not represent best practice or anything close to that, as indeed Mr Bathgate accepted in submission. The disciplinary policy had not been followed. There was some evidence that it has been revisited and revised. It is far from ideal to distinguish as plainly as the policy of the respondents then in place did, between those employees with 2 years' continuous service and those employees without that. More importantly, the policy was not followed. It seemed that managers were unfamiliar with its requirements. Even on the claimant highlighting those terms and seeking information in line with the policy, that was not given to her.

103. It also struck the Tribunal as odd that, particularly with the experience he has, Mr McKay did not handle the meeting on 12 February with claimant better than he apparently did. He could have halted it and sought to arrange it. He could have adjourned it to enable a third party to be in the room. It is accepted that he was surprised at the reaction of the claimant. Given, however, that she had finished a long shift involving a difficult and draining experience in providing palliative care to a resident, a different approach might have

defused the situation and either avoided subsequent events or made them smoother. Similarly Ms Woods might have tried again on the telephone call on 28 February rather than dismissing the claimant at its end.

104. The respondents will hopefully reflect on the experience and learn from it.

105. It requires to be said that the claimant also bears responsibility for escalation of this situation. She was, on the evidence the Tribunal heard and accepted, more confrontational in her approach than might have been expected or was warranted. That did her no favours with the respondents. One thing led to another.

106. All of that is relevant to a degree to the decision the Tribunal had to take. The evidence from the claimant did not persuade the Tribunal that the reason or principal reason for her dismissal was that she had made protected disclosures. The Tribunal kept in mind that the drug error had been drawn to the attention of the respondents not long before the claimant was dismissed. It could not see however that there was anything from which a causative link could properly be implied.

107. The Tribunal had regard to the facts as to what had happened when the senior management of the respondents became aware of drug error. Ms O'Rourke had not taken the steps required. Mr McKay had, however, taken appropriate steps immediately on being alerted to the drugs error. The drugs error was reported to the appropriate bodies on the day senior management became aware of it. The respondents had commenced an investigation into what had happened. They established that Ms O'Rourke had been informed. She had not however taken the required steps, including, importantly, that of informing senior management. The failing on the respondents' part therefore lay with her in that she had not informed the relevant bodies as she ought to have. Mr McKay recommended that an investigation was undertaken in relation to her actions or lack of them. That followed and disciplinary action was taken against her. A final warning was issued. Similarly investigatory steps were recommended and taken in relation to the nurse who had made the error, who ought to have reported the matter to Mr McKay given that he was aware Ms

O'Rourke had not referred the matter to the relevant bodies. Again disciplinary action followed.

108. The Tribunal did not detect from the papers at the time or from the evidence of Mr McKay or Ms Woods as given to it, any annoyance on their part that the protected disclosures were brought to their attention. Their annoyance and concern was directed to the fact that they were not informed, as they should have been, at the time when the drugs error occurred.

109. The investigation report prepared by Mr McKay made the recommendations in relation to Ms O'Rourke and the nurse who had made the error before making the recommendations in relation to investigation of the claimant. The Tribunal accepted that the behaviour of the claimant was not what Mr McKay had set out to uncover or focus upon. It had very much been a by-product of his investigation. He took the view that he required to address it however, by recommending it be further investigated. That decision was based on what had been said to him by other employees. Investigation of those comments was appropriate and was unrelated to any protected disclosures made by the claimant.

110. As mentioned above, the Tribunal was not impressed by some of the respondents' handling of the investigation and dismissal. It kept in mind, however, that this was not a claim of unfair dismissal which the Tribunal was considering in terms of Section 98 of ERA. The Tribunal therefore focussed on the claim before it.

111. There was no evidence to support the reason or principal reason for dismissal having been the making of protected disclosures by the claimant, other than the fact that dismissal had taken place reasonably soon after those disclosures had been made.

112. Proximity of time might, with some other factors or with non-acceptance of the respondents' evidence as to the reasons, have led to the Tribunal drawing the inference which the claimant required it to draw if she was to be successful in her claim. On its own however, and particularly given the contrary evidence

from the respondents accepted by the Tribunal, it did not establish the claimant's case.

113. The Tribunal accepted that the decision to dismiss the claimant the claimant was taken due to the view the respondents had reached as to her behaviour with other members of staff, and her behaviour and attitude towards Mr McKay, Ms Donaldson and Ms Woods.

114. The evidence of Mr McKay when he described the meeting with the claimant was, however, difficult to accept in full. The meeting, as the Tribunal regarded it on the evidence, had not been an easy or pleasant one. The description given by Mr McKay of his interaction with the claimant on 12 February struck the Tribunal as being "overegged" to an extent, however. The Tribunal's conclusion on the evidence was that the claimant had "stuck to her guns". She herself accepted that as a person she was direct and spoke her mind. That was perhaps not what Mr McKay had anticipated. He did not welcome that approach by the claimant.

115. The decision of the respondents did not however turn solely on that meeting. They had the information from other employees. They had the information from Ms Donaldson. Further, Ms Woods, who decided to dismiss the claimant, had the experience of the phone call on 28 February 2019. That call had not gone well. Both parties in evidence at the Tribunal referred to that. Each party had tried to talk over the other.

116. The procedural aspects of the decision to dismiss would have been subject to more scrutiny in a Section 98 unfair dismissal claim. It appeared to have been a reaction to the way the call on 28 February went, with the background information as to the behaviour and attitude of the claimant, as Ms Woods had been informed of that, feeding into the decision.

117. The Tribunal was clear, however, in reaching the view that there was no relevant evidence supporting the reason, or principal reason, to dismiss as being that the claimant made a protected disclosure(s).

118. It was of significance that the investigation of the claimant was not the purpose of Mr McKay when he became involved. It was not the focus of his report. The reaction of senior management on being informed of the drug error did not reveal any issue with the drug error being brought to their attention. The reverse was true. The issue they had was that it had not been brought to their attention when it happened. That was what irritated and concerned them rather than the matter being drawn to their attention on 12 February. Steps were taken after 12 February in relation to those who had failed in their responsibilities in that regard, Ms O'Rourke and the nurse who had made the error. There was no evidence before the Tribunal of there being any "agenda" on the respondents' part in terms of which they were then pre-set on a course to end the employment of the claimant as result of her bringing the drugs error to their attention in the investigation process, the nurse who had made the error having initially informed Mr McKay on 12 February after the claimant had effectively given him an ultimatum on that.

119. The Tribunal accepted that a letter intimating an appeal against dismissal will often not detail every point on which an appeal is based. It was, however, of relevance that in appealing the claimant did not refer at all to any view on her part that she had been dismissed due to having made protected disclosures. She referred in her letter of appeal to due process not having been followed and to the decision being unduly harsh and unreasonable. She had union advice at this point and her union representative was involved in the drafting of the letter of appeal. It was therefore surprising that, if her view was that the reason or principal reason for her dismissal was that she had made protected disclosures, that was not a matter mentioned at all in the appeal letter.

Conclusion

120. For the reasons set out above, the tribunal unanimously concluded that the reason or principal reason for dismissal was not that the claimant had made protected disclosure(s). The claim is therefore unsuccessful.

Employment Judge: Robert Gall
5 Date of Judgment: 11 October 2021
Entered in register: 12 October 2021
and copied to parties

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