Case No: 1405729/2020

EMPLOYMENT TRIBUNALS

Claimant: Miss A Senior

Respondent: West Bank Residential Home Ltd T/A Buckland Care

Heard at: **Bristol** **On:** **15 and 16 November 2021; 25 November (Chambers).**

Before: Employment Judge Midgley
Mr J Shah
Mr C Williams

Representation
Claimant: In person
Respondent: Mr G Graham, Counsel

JUDGMENT

The unanimous decision of the Tribunal is that the claims are not well founded and they are dismissed.

REASONS

Claims and Parties

1. By a claim form presented on 29 September 2020, the claimant brought a claim of automatic unfair dismissal contrary to section 103A ERA 1996 on the grounds that the reason or principal reason for her dismissal was a protected disclosure.

2. The respondent is a limited company which operates residential care homes for persons who require nursing or additional care, primarily but not exclusively in the Southwest.

3. The Claimant was employed as a care worker from 5 December 2019 until her dismissal on 11 August 2020. The Claimant's role included supporting service users with washing, dressing, toileting, continence care, and similar.

Procedure, Hearing and Evidence

4. The hearing was listed by CVP, but it emerged that the claimant was reliant on her mobile data to join the hearing: in consequence we proposed that she participated by telephone but connected to the video platform when required to give her evidence. The respondent agreed to that proposal. In the event, although we could see and hear the claimant, the audio she received was not sufficient to enable her to participate in the hearing effectively: we therefore permitted the claimant to give evidence by telephone. Again, the respondent consented to that course.

5. Furthermore, the claimant did not have paper copies of the statements or the bundle, but only had them in electronic form as attachment to emails which she needed to access using her phone, and which she therefore could not read easily whilst still participating in the hearing. The parties agreed that this could be overcome by reading out the relevant sections of any documents or statements. This was possible as there were very few documents in the bundle: most of the documents consisted of the pleadings, the disciplinary policy, and wage slips. Mr Graham did not refer the claimant to any documents during his cross examination.

6. The respondent's counsel, solicitor, and witnesses and the Tribunal participate by CVP without incident.

7. The claimant had prepared a witness statement and the respondent had prepared statements from: Mrs Joy Birkett, Director; Mrs Tina Bartin, Area Manager; Miss Kimberley Rabbage, Care Assistant; and Miss Jenna Nortje, General Manager.

The respondent's concessions

8. Prior to the claimant's evidence commencing the respondent made the following concessions *if* the claimant proved the disclosures of information detailed in the list of issues: First, that the claimant reasonably believed both that the information tendered to show a breach of a legal obligation and that an individual's health and safety was put at risk; secondly, that it was in the public interest to make the disclosure. Separately, the respondent conceded that the CQC was a prescribed body for the purposes of s.43F ERA 1996; that the relevant failure fell within matters in respect of which it was a prescribed body; and, lastly, that the information disclosed and any allegation within it were substantially true.

The evidence

9. The claimant gave evidence by affirmation and answered questions from Mr Graham and from the Tribunal. Each of the respondent's witnesses gave evidence by affirmation and, with the agreement of the parties, to assist the claimant, the Tribunal asked questions of them before the claimant asked her questions. Mr Graham then re-examined the witnesses where he felt appropriate.

10. On the morning of the second day the respondent applied to adduce new evidence which consisted of text messages which had been exchanged between Miss Nortje and Miss Aggett, the Night Senior at the Dunmore Care home, on 10 August 2020 concerning the claimant notifying Ms Aggett that she was sick, and a further text message exchange between Miss Nortje and Mrs Bartin relating to the decision to dismiss the claimant. The claimant did not object to the messages being adduced in evidence.

11. Having concluded evidence on the second day, we heard oral submissions from the claimant and then from the respondent.

Factual Background

12. We make the following findings on the balance of probabilities, having considered the documents and the evidence we heard.

13. The respondent operates three care homes within Devon; a home in Budleigh Salterton, which was its first in the area; Dunmore in Newton Abbot; and Mulberry in Bovey Tracey which was opened in 2018. The claimant was employed by the respondent as a care worker in or about December 2019, commencing work on 5 December 2019 at the Dunmore care home. She was a popular, careful and well like worker: the respondent had no concerns about the care she provided, and she had not received any disciplinary warnings at the time of her summary dismissal.

14. The respondent has a template contract of employment, but did not complete a contract for signature by the claimant. The relevant terms of the template contract provide as follows:

> *Absence Reporting:*
>
> *You are required to notify the Company of your sickness absence. You should do this personally, by telephone, to your manager by no later than four hours before your scheduled start time on the first day of absence.*
>
> *Disciplinary Procedure:*
>
> *The Company's Disciplinary Procedure, Code of Conduct and Standards are set out in the Employee Handbook. You are strongly advised to familiarise yourself with them.*
>
> *The Company reserves the right to discipline or dismiss you without following the Disciplinary Procedure if you have less than a certain minimum period of continuous service as set out in the Employee Handbook.*

The respondent's policies

15. The respondent has a disciplinary policy. As is to be expected, the policy requires that before any formal action is taken an investigation should be carried out to establish the facts, providing "Even in the most serious allegations of gross misconduct (see below), a full investigation will be held." The policy also contains reference to the safeguards enshrined in the ACAS Code of Practice on Employment, namely that the employee will be

- *Told in writing of the allegations/complaints against [them], and the basis of those allegations*
- *Given a reasonable opportunity to consider [their] response to that information*
- *Offered the opportunity to be accompanied by a work colleague or a trade union representative*
- *At the meeting, you will be given a full opportunity to comment on the allegations, to put forward any defence or arguments you want, and to comment on what disciplinary sanction (if any) is appropriate*

16. The policy provides examples of conduct which will be regarded as gross misconduct and therefore which potentially merit summary dismissal, which include "actions which may harm the well-being of a Service User," and "being under the influence of, or possessing alcohol." It also provides examples of serious misconduct which does not merit summary dismissal, which include 'one occasion of absence without permission', or 'persistent absence.'

The claimant's working hours and performance.

17. The claimant was only employee at the Dunmore to be offered a 48-hour contract. During the course of her employment, she worked 13 hour shifts with regularity, and a consistently high number of hours a month, averaging approximately 271 a month, and working in excess of 300 hours on some occasions. Those hours included additional shifts at the Mulberry Care home in Bovey Tracey. Throughout the entirety of her employment the claimant was never informed by the respondent that her work was anything apart from satisfactory or that there were any concerns with her attendance. At one stage, shortly after the appointment of Miss Nortje, the claimant was invited to consider applying for the role of senior carer. That formed part of a general approach to all staff to understand whether they were interest in promotion, but equally reflects the fact that the respondent had no concerns about the claimant's general suitability or standard of work.

The CQC investigation

18. On 29 June 2020 Miss Jenna Nortje was appointed as the General manager for the Dunmore care home, however, she was not registered with the Care Quality Commission ("CQC") in that position until 7 September 2020, following an application on 16 July 2019. In the intervening period Mrs Tina Bartin, the Area Manager for the respondent, was the nominated individual and was responsible for the day-to-day running of the home; acting as the claimant's mentor until the claimant's registration with the CQC on 7 September 2020. Miss Nortje did not receive any effective induction upon her appointment. She was not provided with any handover in relation to the staff that she was to manage, nor was she given any training or information as to even the existence of the respondent's policies, including the disciplinary policy, and their location on the intranet. In consequence she did not see the respondent's disciplinary policy until after the claimant's dismissal.

19. On 29 June Levi Moore, who works in the respondent's laundry at the Dunmore home, made a protected disclosure to the CQC in relation to elements of care that were provided at the Dunmore home. In so doing, he raised allegations in respect of the conduct of his co-workers towards a service user who was resident in Dunmore. The nature of the information he disclosed and the concerns he raised led the CQC to place the respondent under Whole Service Safeguarding between 30 June 2020 and 5 November 2020.

20. Mrs Joy Burkett, the respondent's Director, sought to portray those concerns as being limited to a member of the respondent staff "not being very nice to a resident", but the concerns must have been far more serious than that to merit the Whole Service Safeguarding, and her evidence to that effect was at best disingenuous, and at worst misleading and inaccurate. The concerns were so serious that the respondent was placed under close observation of various agencies, including district nurses, GP's, safeguarding, social workers, and similar, and any correspondence between the care home and the service users or their families had to be copied to the CQC. A consequence of the investigation was that the CQC investigators took the contact numbers of the staff and called them to ask them questions relating to the care of various individuals and their experience of working in the home. The claimant was called whilst working a shift at Dunmore.

21. Furthermore, it had been recognised by the respondent even prior to the CQC inspection and investigation that the management of the Dunmore care home was inadequate, with many shortcomings; it was for that reason that Miss Nortje was appointed in place of her predecessor. In consequence of those shortcomings there was a significantly high turnover of staff, and the respondent was reliant to a large degree upon the use of agency staff to ensure that the required ratios between service users and care workers were met.

22. The respondent called a meeting of all its staff at or about that time to enable Mr Moore to clear the air by explaining that he had blown the whistle on his colleagues, and that he had done so because he was concerned about their conduct: rumours were circulating amongst the staff to that effect in any event. The respondent hoped the meeting would to put an end to the damaging and divisive speculation as to who had blown the whistle and why. Whilst the respondent indicated that it supported Mr Moore, we are not satisfied, as was suggested by Mr Graham during his cross-examination of the claimant, that the respondent actively encouraged employees to blow the whistle. The meeting was to manage the fall out from one such disclosure, not to encourage more. None of the respondent's witnesses gave evidence suggesting that they had asked the staff to whistleblow at the meeting.

23. In the period July to August 2020 the claimant became increasingly upset, frustrated, and disillusioned with the level of care that was being provided at Dunmore. In particular, the claimant was concerned that medication for the service users was left unattended and unsupervised in the region of the service users; that the service users' nutritional needs, particularly food intolerances, were being overlooked or ignored on a weekly basis; that due to staff shortages, service users were either not provided with the necessary incontinence pads or those pads which were provided were not changed frequently enough; and that on a daily basis, again due to staff shortages, the service users' personal care was not properly conducted leading to a fall in hygiene standards; and, lastly, that senior carers were required to dispense medication in circumstances where they lacked appropriate qualifications or training to do so.

24. The claimant sought to raise those concerns with the senior carer, and with her line manager, Georgia Harley, the Deputy Manager for Dunmore, but she was not informed that the respondent was taking any action to remedy the situation. She became increasingly distressed, and on one occasion broke down whilst at work and had to be comforted.

The events leading to the claimant's dismissal.

25. On 10 August 2020, the Claimant was scheduled to work a 13-hour shift commencing at 7:45am. On or before 6am on the day, the claimant contacted the night senior, Mrs Julie Aggett, and advised her that she was unable to attend as she had been up all night with toothache. Mrs Aggett texted Miss Nortje to advise her that the claimant would not be attending.

26. The consequence of the claimant's inability to attend was that all but one of the carers in the care home on that day were agency staff. At 6:12am Miss Nortje decided that the claimant's shift for that day should be filled by a further member of agency staff. The precise sequence of events that followed is unclear. However, we are satisfied that the claimant telephoned Mrs Bartin and asked for a meeting to discuss concerns she had about the care that was being provided at the Dunmore care home, proposing that they meet at 11am at Wetherspoon pub, being a neutral venue close to the claimant's home. We accept the claimant's evidence that during the course of that discussion she raised, in a general sense, the fact that she wanted to discuss the poor levels of care and issues with it, and that she had previously raised those concerns, to no avail, with her line management and that the consequent anxiety and frustration was negatively affecting her mental health. The claimant was distressed and frustrated, and at times was loud and difficult to follow, but she intimated that she was prepared to raise concerns with the CQC if necessary. Mrs Barton agreed to meet with the claimant at the Wetherspoons pub at 11am.

The decision to dismiss

27. Sometime thereafter, in the early morning, Miss Nortje telephoned Mrs Bartin to

advise her that the claimant had reported sick in relation to her shift that morning at short notice. Miss Nortje expressed concerns about the impact of the claimant's sickness absence at short notice on the respondent's service, and that previously concerns have been raised about the claimant's reliability. Mrs Bartin instructed her that she should dismiss her. During her evidence Mrs Bartin sought to suggest that the decision was Miss Nortje's, but we reject that evidence. Miss Nortje was in a subordinate position to Mrs Bartin, was unfamiliar with the respondent's policies, and was reliant upon Mrs Bartin in her role as her mentor: by way of example, it was Mrs Bartin who decided that the claimant should be required to work one months' notice.

28. The conversation between Mrs Bartin and Miss Nortje was a relatively short one. It was continued by text message: at 10:50am on 10 August Miss Nortje texted Mrs Bartin, stating "do I need to ring [C] or just hand deliver the dismissal?" Subsequently, at 10:48am Miss Nortje wrote, "conflicting on how to dismiss, do I need to investigate first?"

29. The claimant subsequently telephoned the respondent's office, spoke to Miss Anna Olehnovicha, an Administrator, and left a message advising that she would not attend for her shift on 11 August as she was due to attend a meeting with Mrs Bartin. Miss Nortje communicated the content of that message to Mrs Bartin by text message centred 1804 and TB replied 1947 stating "She'll upset when I don't turn up. Can you send the letter out first thing." Those discussions are entirely consistent with Miss Nortje's account that Mrs Bartin took the lead in the decisions.

30. Miss Nortje suggested that she sought to telephone the claimant on 10 August to advise her that she had been dismissed, and that when the claimant did not answer, she left a voicemail message advising her that she had been dismissed and that she should call back to discuss the decision. We reject that evidence, we prefer the claimant's evidence that she did not receive any voicemail message; and note that the telephone call was not referred to in the contemporaneous texts that were exchanged between Miss Nortje and others on the 10th or 11th of August. We find that the only call Miss Nortje made to the claimant was on 11 August 2020, as indicated in the dismissal letter.

The events of 11 August

31. On the morning of 11 August 2020, the claimant waited at Wetherspoons to meet with Mrs Bartin. She did not attend and so at approximately 12am the claimant called Mrs Birkett. Both the claimant and Mrs Birkett allege that the other was drunk during that call; we do not need to decide the truth of that allegation as it is immaterial to the matters we have to decide. The claimant told Mrs Birkett that she would raise her concerns with the CQC as the respondent had entirely failed to listen to them or engage with them. The claimant then phoned the CQC and reported the concerns detailed at paragraph 23 above. She also reported that Mrs Bartin had failed to attend a meeting to discuss those concerns

32. The claimant received messages from her colleagues and friends at work who advised her that they had been called to a meeting, told that the claimant had been dismissed, and instructed not to have any further contact with her. At approximately 1pm, therefore, the claimant called Mrs Nortje to inform her that Mrs Bartin had failed to attend the meeting with her, that she had called Mrs Birkett and that Mrs Birkett sounded drunk. Miss Nortje told her that she had been dismissed.

33. Sometime during the morning of 11 August 2020 a dismissal letter had been drafted by the office administrator, Miss Olehnovicha, signed by Miss Nortje, who did not read the contents with any care at all, and was subsequently posted by the administrator to the claimant at approximately 4pm. Simultaneously, at 4pm, a copy of the letter was emailed to the claimant.

34. The dismissal letter stated the reason for dismissal as follows:

> *Confirmation of Dismissal*
>
> *Following the message left on your phone on 11/08/2020 and our consequent conversation, we confirmed that it has been decided that your employment with Dunmore Residential Home is to terminate immediately. Your dismissal is due to a breakdown in the relationship between you and Dunmore Residential Home.*
>
> *Given that you have less than 2 years' service, there is no obligation on Dunmore Residential Home to apply the disciplinary procedures set out in the Staff Handbook. Please note that there is no right to appeal this decision.*

The Issues

35. The issues are set out in the case management order of Employment Judge O'Rourke.

The Relevant Law

36. The concept of "protected disclosure" is defined by section 43A of the 1996 Act:

> "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H ."

37. A qualifying disclosure is in turn defined by section 43B:

> "In this Part a qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

38. The disclosure must be a disclosure of information. In practice, many whistle-blowing disclosures raise concerns, or complaints, or make allegations. This does not, however, prevent them from falling within the terms of the section. As Sales LJ observed in Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; [2019] ICR 1850 at para. 35, the question is whether the statement or disclosure in question has "a sufficient factual content and specificity such as is capable of tending

to show one of the matters listed in the subsection". He added that whether this is so "will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case" (para. 36). A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly not suffice; by contrast, one which also explains the basis for this assertion is likely to do so.

39. Whether the words cross the threshold depends on the context and the circumstances in which they are spoken and is essentially a question of fact for the Employment Tribunal which has heard evidence (see Eiger Securities LLP v Miss E Korshunova [2017] ICR 561 EAT at para 35)

40. Where a claimant argues that the information tended to show a breach of legal obligation "Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. …" see Blackbay Ventures Ltd v Gahir [2014] IRLR 416 per HHJ Serota QC at paragraph 98.

41. However, neither the EAT in Blackbay nor in Eiger Securities was referred to Babula v Waltham Forest College [2007] ICR 1045, CA and although it was referred to in Harris, Soole did not address the potential inconsistency and tension between those cases (see para 62). Blackbay was relied upon by the EAT in NASUWT v Harris (2019) UKEAT0061/19 and applied by Soole J to allegations of the commission of criminal offences.

42. The identification of the obligation "does not have to be detailed or precise but it must be more that a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. The decision of the ET as to the nature of the legal obligation the Claimant believed to have been breached is a necessary precursor to the decision as to the reasonableness of the Claimant's belief that a legal obligation has not been complied with" (see Eiger Securities LLP v Miss E Korshunova [2017] ICR 561 EAT at paras 46 to 47).

43. In Twist DX v Armes UKEAT/0030/20/JOJ (V) Linden J returned to the question of disclosures of information. He concluded that it is not necessary that a disclosure of information specifies the precise legal basis of the wrongdoing asserted.

44. The worker does not have to show that the information did in fact disclose wrongdoing of the kind enumerated in the section; it is enough that he reasonably believes that the information tends to show this to be the case. As Underhill LJ pointed out in Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979; [2017] IRLR 837 at para.8, if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable.

45. Having reviewed the law we conclude that the following propositions apply when considering whether a claimant has made a protected disclosure;

45.1. First there must be a disclosure of information. That may include allegations, complaints, and allegations, provided the combined effect has a "sufficient factual content and specificity" (Cavendish Munro Professional Risk Management Ltd v Geduld [2010] ICR per Sales LJ at para 35;

45.2. Secondly, that information must objectively tend to show, in the claimant's reasonable belief that one of the qualifying grounds exists. The Tribunal's task is to assess the information in context and against the prevailing circumstances. Those circumstances:

45.2.1. Permit a higher objective test where the individual is a professional (see Korashi v Abertawe Morgannwg University Local Health Board [2012] IRLR 4 per HHJ McMullen at para 62);

45.2.2. Permit the Tribunal to read across documents and consider statements to create an objective picture of what would reasonably have been believed to have been understood from a written or verbal statement.

45.3. Thirdly, where the qualifying ground relied upon is a breach of legal obligation:-

45.3.1. *Either* the information must identify the legal obligation, although the "identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong" Eiger Securities LLP v Korshunova [2017] ICR 561 paras 46-47;

45.3.2. *Or*, if the obligation is not identified it must be objectively "obvious" from the information disclosed (Blackbay per HHJ Serota QC at para 98);

45.4. Fourthly, it does not matter whether the claimant's belief is wrong, if objectively his/her belief that he/she has identified a breach as detailed above is reasonable (Babula per Wall LJ at para 79 and Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73 per Elias LJ at para 21.)

45.5. Finally, the articulation of the breach of legal obligation in that sense is a "necessary precursor" for a claimant to establish a *reasonable* belief that the information tends to show that there had been such breach.

S.103A

46. Section 103A provides:

> "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."

47. The principle reason for the dismissal is "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (see Abernethy v Mott, Hay and Anderson [1974] ICR 323).

48. The focus must be on the knowledge, or state of mind, of the person who actually took the decision to dismiss, as, "by S.103A, Parliament clearly intended to provide that, where the real reason for dismissal was whistleblowing, the automatic consequence should be a finding of unfair dismissal. In searching for the reason for a dismissal, courts need generally look no further than at the reasons given by the appointed decision-maker. …[however] If a person in the hierarchy of responsibility above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination." Royal Mail Group Ltd v Jhuti 2019 UKSC 55, SC.

Discussions and conclusions

Adverse inferences

49. We make the following general observations in relation to the evidence which we

heard; before turning to our conclusion: The claimant was a straightforward witness, and we found her account to be credible and honest.

50. The respondent's evidence was far less satisfactory: consistently evidence given by the respondent's witnesses to us was entirely contrary to the evidence in their statements. By way of example, Miss Nortje suggested in paragraph 4 that she had seen a Facebook post which showed that the claimant had been drinking on the night of the 9 August 2021. In evidence she said the post showed the claimant in the back of a car, it did not show her drinking and she could not say when the photograph had been taken. Similarly, at paragraph 7 she suggested that she had drafted and posted the dismissal letter. Her evidence was that the letter was drafted by an administrator, that she barely read it and did not post it herself.

51. Furthermore, the Tribunal was unimpressed by the evidence of Mrs Joy Birkett. That impression arose in part from the way she gave her evidence: despite those attending being told that the hearing was a formal court hearing and that they should conduct themselves accordingly, and despite the parties being asked on several occasions to mute their microphones, Mrs Birkett wandered around holding whatever device she was using to connect and failed to mute her microphone. Furthermore, she gave the appearance of being dismissive of the case and the Tribunal itself: when giving evidence she positioned her device by her feet, providing a view of her lower leg, hips and upwards to her face. Of greater concern was the nature of her evidence: she sought to minimize the seriousness of the CQC Whole Service Investigation into the Dunmore care home, suggesting the act of whistleblowing which caused it was limited, and repeatedly made generalized assertions without any evidential basis. She seemed to have little or no knowledge of the respondent's policies yet was willing to suggest that the respondent's actions were entirely in keeping with those polices.

52. The Tribunal was similarly unimpressed with the evidence of Mrs Tina Bartin. We found that she was deliberately misleading as to the role which she played in the decision to dismiss the claimant. She told the Tribunal that she merely affirmed a decision which Miss Nortje had made, when in reality as Mrs Norrtje was not the Registered Manager, was new in post and was being mentored by Mrs Bartin and had not seen the respondent's disciplinary policy. Miss Nortje was, as she described, almost entirely reliant on Mrs Bartin as to the process to be followed, and the decision was in reality Mrs Bartin's: Miss Nortje merely agreed with it and implemented it. That is entirely consistent with the text messages which were sent between the two women.

53. Lastly, the Tribunal was very concerned by the evidence of Miss Rabbage, who suggested that the claimant smelt of drink on every occasion that Miss Rabbage had worked with her, which was approximately 64 occasions prior to the claimant's dismissal, that she had raised a concern about that on only one occasion in June or early July and that she had done nothing about it since. That evidence was entirely inconsistent with Miss Nortje's who said that she worked on shift with the claimant and had never noticed that she smelt of drink, or that she appeared drunk. If matters occurred as Miss Rabbage suggested, she placed herself, the other staff and critically the service users at risk of harm and wholly failed in her duties to the vulnerable people in her care by abrogating her responsibility to report the events to protect them. On balance, we are not persuaded that Miss Rabbage's account was truthful or accurate, but rather found it to be deliberately exaggerated and largely false.

54. Furthermore, the respondent was entirely unable to offer any explanation as to why it did not follow its disciplinary policy at all when dismissing the claimant. It did not conduct an investigation, call the claimant to a meeting, explain the allegations to the claimant, or allow her to respond to them before taking the decision to dismiss.

Given that the General Manager and Area Manager were involved in the decision to dismiss and the process that was followed, and the Director was aware of it, that complete failure of process is of considerable concern. It reflects very poorly on the manner in which the respondent is managed from the Director level down. Whilst a complete failure to follow its own procedures is consistent with the evidence we heard which suggested that the respondent's operation at the time was best described as shambolic and haphazard; in the circumstances of this case we are prepared to draw an inference that the reason was connected to the claimants' threat to go to the CQC which was made to Mrs Bartin.

55. The evidence which suggested that the respondent's day to day systems were woefully inadequate was provided by Mrs Birkett, who suggested that General Managers were permitted to run their homes with autonomy; Miss Nortje that she received no handover and no induction upon her appointment, and that the administrative assistants had a practice of scanning documents and shredding the originals and that the orignals could not be found; and Miss Rabbage's that there was no system in place for staff to record concerns, such as a day book, and that staff were in consequence forced to write notes on scraps of paper if they bothered to raise concerns at all.

56. In addition, the reason advanced by the respondent for the claimant's dismissal was unsupported by the evidence and was inconsistent (varying between allegations that the claimant was drunk on duty, to one that she was unreliable because she failed to attend shifts or called in sick on short notice, whilst the dismissal letter referred to a breakdown in the respondent's relationship with the claimant). Neither the account of unreliability or being drunk on duty was supported by the respondent's records: the respondent produced a sickness absence record for the claimant that omitted two months (and no explanation could be provided for that) but only showed 3 days of absence in a 9-month period. There was no record of any complaint having been made or any concern raised that the claimant had appeared, let alone was drunk, on shift, and Miss Nortje denied that the claimant was drunk or that the dismissal was for that reason. In any event, the respondent's disciplinary policy is clear: a single failure to attend shift and even persistent failures could be treated as serious misconduct and not gross misconduct.

57. In consequence we were prepared to draw an inference that the reason that the respondent's witnesses were not candid and truthful in their evidence was because they wished to conceal (a) the degree to which the respondent's regulated activities were already being investigated by the CQC given the earlier Moore protected disclosure and, (b) that the respondent sought to conceal that Mrs Bartin had made the decision to dismiss, and (c) that prior to that decision being made the claimant had threatened to report the respondent to the CQC.

Protected disclosure

58. The only issue for us was whether the claimant had reported the matters detailed in the issues to the CQC on 11 August 2020: the respondent concedes that if the claimant disclosed the information alleged she reasonable believed that it tended to show a breach of legal obligation and that disclosing that information to the CQC was in the public interest.

59. We are persuaded that she did report the matters alleged to the CQC. As we have said, we found the claimant's evidence credible and we accepted that she raised those concerns because she had tried to raise them with Mrs Hartley, Miss Nortje and Mrs Bartin, but no action appeared to have been taken. The nature of the concerns are detailed and specific. The respondent argues that had such concerns been raised the CQC would have taken more significant and immediate action. We reject that argument on the grounds that in our view the CQC was already

investigating serious concerns and Dunmore was subject to a Whole Service Investigation which continued until November 2020.

The reason for dismissal

60. It is clear from the evidence that the claimant raised the protected disclosure with the CQC on 11 August 2020 but the decision to dismiss had been taken by Mrs Bartin on 10 August 2020. The protected disclosure was not therefore the reason for the dismissal; it cannot have been as a matter of logic or chronology. The evidence suggests that the reason for the dismissal may have been the claimant's threat to whistleblow to the CQC which she made during her conversation with Mrs Bartin on 10 August 2020; of course, we do not need to and do not make any finding in that respect. A threat to blow the whistle is not a protected disclosure, and further that is not the claimant's pleaded case, which is specific.

61. Accordingly, the claimant's claim must fail. It is not well founded and is dismissed.

Employment Judge Midgley
Date: 26 November 2021

Judgment & reasons sent to parties: 16 December 2021

FOR THE TRIBUNAL OFFICE