EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107652/18

Held in Glasgow on 15, 16 and 17 October 2019 with deliberations on 25 November 2019

Employment Judge: S. Walker
Tribunal Member: A. Grant
Tribunal Member: I Poad

Ms L Chandler	**Claimant** **In person**
HC-One Limited	**Respondent** **Represented by** **Mr Clayton, solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that all the complaints are dismissed.

REASONS

Introduction

1. The claimant worked as a carer for just over 3 months in a residential home called Blar Buidhe operated by the respondent in Stornoway.

2. The claim consists of the following complaints:

   (i) unfair dismissal, it being alleged that the reason for dismissal was the making of a protected disclosure (section 103A of the Employment Rights Act 1996 ("the ERA");

   (ii) being subjected to various detriments because of making a protected disclosure (section 47B of the ERA):

   (iii) unauthorised deduction from wages under section 23 of the ERA.

3. The claimant gave evidence on her own behalf. For the respondent evidence was led from Donald McIntosh, the manager of the home at the time the claimant was dismissed, Angela Percival, Turnaround Manager at the relevant time who made the decision to dismiss and Janet Kermack, Area Quality Director at the relevant time, who heard the appeal. There was a joint bundle of documents. The parties agreed to provide written submissions by 28 October 201 9 and there was a further period to provide any comments on those submissions. The panel met to deliberate on 25 November 2019.

Relevant law

4. Generally, an employee requires to have 2 years continuous service to be able to claim unfair dismissal. However, there are a number of "automatically unfair" reasons where no length of service is required.

5. One of these is set out in s103A of the ERA where the reason or principal reason is the making of a protected disclosure. It is for the claimant to prove that this is the reason or principal reason for dismissal.

6. S43B of the ERA defines a "qualifying disclosure" as "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. .....

c. .....

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

e. .....

t that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

7. It is for the claimant to prove that she has made a protected disclosure.

8. S47B of the ERA provides that a worker has the right not to be subjected to any detriment on the ground that the worker has made a protected disclosure.

9. It is for the respondent to prove that the detriment, if established, was in no sense influenced by the fact that the claimant had made a protected disclosure.

Issues

10. There were a number of preliminary hearings in this case. A list of issues to be determined at the final hearing were agreed at the preliminary hearing on 24 July 2019 as follows:

Protected disclosure

Did the claimant make a qualifying disclosure falling within s43B(1) (a); (d) or (f):

- on 25 December 201 7 to Sharon Foster or Liezl Rusk; and/or
- on 26 or 27 December 201 7 to Peter Venus and/or
- by statement emailed to Donald McIntosh on 3 January 201 8?

If so, was that qualifying disclosure a protected disclosure under section 43A?

Unfair dismissal

If the claimant made a protected disclosure (s), was the reason, or principal reason for dismissal the making of the protected disclosure(s)?

Detriment

If the claimant made a protected disclosure(s), was she subjected to any of the following detriments:

- The claimant's holiday pay entitlement was not included in the pay cycle following her dismissal. It took a lot of emailing to chase it and charges were taken off it with the full amount not being paid until May 2018.

- The claimant's wage due on 29 December 2017 was withheld and eventually issued on 12 January 2018 but the respondent did not remedy the tax reporting to HMRC despite the claimant explaining that she had lost about £400 in benefits.

- The respondent required the claimant to complete compulsory training at home in her own time and without payment although they knew she had no internet at home.

- The claimant was refused assistance to complete the handbook which detailed the probationer's journey through HC-One.

- The handbook was confiscated by Angela Kermack at the appeal meeting and when the claimant requested it back this was refused. All that was supplied was a photocopy of the claimant's learning outcomes that had not been completed.

- The respondent failed to deal with the claimant's allegations of bullying and harassment relating to Louise, the Assistant manager, made to Donald McIntosh on 11 February 2018.

- The respondent failed to take steps to discuss the risk assessment provided by the claimant to Donald McIntosh on 11 January 2018.

Were any of the detriments, so far as established, materially influenced by the making of the protected disclosure?

Wages

What wages were payable to the claimant during her notice period?

Was there an underpayment?

Remedy

If the claimant succeeds in any or all of her claims, what should be awarded by way of remedy?

Findings in fact

11. The Tribunal makes the following relevant findings in fact:

12. The claimant is an intelligent and educated woman. She has worked in a number of different occupations including in drug and alcohol outreach.

13. The respondent has a number of care homes throughout the UK. Administrative support in relation to matters such as payroll is provided from the respondent's head office in Darlington.

14. The claimant was employed by the respondent on a 6 month probationary period to work as a carer at a home in Stornoway called Blar Buidhe starting on 29 November 2017. The home provides residential care to about 38 residents who are, with a few exceptions, over 65.

15. The home had difficulties employing and retaining sufficient staff. Management routinely emailed and telephoned staff asking if they could cover additional shifts. The claimant did cover on a number of occasions.

16. The manager of Blar Buidhe when the claimant started was Peter Venus. His assistant was Louise MacDonald. Peter Venus left that position on 27 December 2017 and his replacement was Donald McIntosh. This was Mr

McIntosh's first management role having previously been a staff nurse in a hospital. He had carried out a period of shadowing in Glasgow for 2 weeks from 4 December 2017 and started at Blar Buidhe on 18 December 2017. He was supported in the initial stages of his appointment by Angela Percival, whose role was Turnaround Manager.

Probation

17. The claimant's contract stated that if she was performing to the required standard her appointment would be confirmed at the end of the probationary period. The probationary period could be extended *"if circumstances necessitate such action".*

18. There was a probationary procedure. The claimant was not provided with a copy of this procedure this although it was accessible online. The probationary procedure was to be applied to probationers rather than the respondent's normal Capability or Disciplinary procedures. The probationary procedure stated that *"In cases of serious under-performance or misconduct, the company reserves the right to terminate their employment or demote them to a lesser position before the conclusion of their 6-month probationary period."*

19. When the claimant started employment, she spent 1 or 2 days working alongside a colleague and then she was working independently. She had a number of concerns about practices in the home. In particular she was concerned that care assistants were handing out medication and also that medication was being left for residents to take themselves.

Incident on Christmas Day.

20. On 25 December 2017, the residents were gathered for lunch and the care assistants were dispensing a glass of alcohol to each. The claimant was asked by another carer to give a glass of whisky to a resident, John X. She had concerns about whether this was appropriate as she had observed him fitting on another occasion. She did not have access to the residents' records so was unable to check what medication John X was on. She asked another

care assistant if it was OK to give John X the alcohol. The other assistant said she thought so but to check with Liesl Rusk the Senior Carer. The claimant asked if "John" could have whisky and Liesl said yes. The claimant asked if Liesl was sure and she said if the claimant was that concerned to speak to Sharon Foster, the Nurse in Charge. The claimant went upstairs and asked Sharon if "John" could have alcohol and she said "yes". The claimant went back downstairs and was about to give John X the whiskey. Liesl shouted at her saying "What are you doing? He can't have alcohol". Liesl said she thought the claimant had been referring to another "John". The claimant was upset and walked away.

21. The claimant went home. When she came back in on 27 December, Peter Venus spoke to her about the incident. She told him about the incident with the alcohol and how she had been told by Liesl Rusk and Sharon Foster that it was fine but had been yelled at. Mr Venus asked her to complete an Incident Report.

22. The claimant emailed Mr McIntosh a 4 page document headed "Statement Record" on 3 January 2018. This included the claimant's account of the incident on 25 December. It also included her concerns about *"giving alcohol to residents when she had no documentation or supervisor to ask about the specific residents who may have issues or their background medications etc"*

23. She went on to describe her concern about the practice relating to medication generally. She said "*I have consistently since my start date been instructed to use mealtimes and tea times with residents as a time to administer an array of medications that have been left on their bedsides or bed-tables (sometimes at a distance where they would either be unaware or unable to each them). I have felt uncomfortable as some I cannot identify and there are some tablets that seem excessively large for example. "*

24. Mr McIntosh obtained statements from Sharon Foster and Liesl Rusk. He was concerned about the issues raised by the claimant in relation to medication. He spoke to the nurses as part of their formal supervision and reminded them that they were accountable in terms of their NMC registration for prescribed

medication. He also reminded them of the risk to residents if they didn't get their mediation on time.

25. He did not take any further action in relation to the claimant's statement about what had happened specifically on 25 December. As far as he was concerned the matter was dealt with.

Issue with December 2017 wages

26. The claimant's wages were due to be paid on 29 December 201 7. The payroll date was 22 December 2017. The claimant had provided details of her account to the administration. There was a difficulty with processing the payment to the account because it was a building society account and the required reference was not put on the payment. The claimant was advised of this and provided details of a different account. The claimant and Ann Stewart, the home's administrator, chased up the payment but the payroll department would not process her payment until the original payment was returned to them. The wages were paid eventually on 9 January 2018 but were not credited to the claimant's account until 12 January 2018. This caused the claimant significant financial difficulties and distress.

Training

27. The claimant's contract provided that she was required to complete an online e-learning induction programme. This included a number of modules to be completed sequentially by specific dates. This training was supported by some activities in a paper workbook which the claimant was provided with at the start of her employment. The online training was expected to be done in the employee's own time. No time was scheduled for it.

28. The claimant had limited internet access in her own home. The respondent was not aware that the claimant had problems with her internet access. There was a computer at the home that the claimant could have used if she had asked.

29. The claimant was concerned about the training and completing her workbook. She asked colleagues about it but no one seemed able to assist.

30. Before Ms Percival became involved, the staff had not been routinely doing the required training. This was an area of focus for Ms Percival as Turnaround Manager and she took steps to ensure that appropriate training was completed. She had arranged for posters to be put up and was reminding staff to do the training. She spoke to the claimant reminding her about her training. The claimant had seen the posters.

31. The claimant had limited access to the internet at home. She had done some of the online modules but not all that had been scheduled. She had not completed any of the workbook exercises in the workbook.

Louise MacDonald

32. The claimant considered that Louise, the assistant manager was hostile to her. She believed that she ignored her and avoided speaking to her. She thought that Louise was laughing at or about her with colleagues. The claimant had mentioned this in conversation with Mr McIntosh. Mr McIntosh did not mention this to Louise as he had a difficult relationship with her. However, he arranged for someone else to be the claimant's mentor.

Absence

33. The claimant emailed Mr McIntosh that she had been assessed as *"workplace stressed on the HSE Workplace Stress Indicator Toor* on 11 January 2018 and provided a copy of the tool to him the next day. Mr McIntosh did not do anything with that information. This was because Ms Percival had said they didn't use that particular tool and also that he didn't appreciate that any further action was required.

34. The claimant was sent home from her shift on 6 February 201 8 with diarrhoea and vomiting.

35. She was asked by Ms Percival to cover a night shift on 7 February 201 8 and agreed to do that and did work that shift.

36. On 9 February 2018 the claimant was due to work a shift but called in to say that she could not come in as she hadn't slept.

37. On Saturday 10 February 201 8, she was working a shift and felt unwell. She told Chris Brown, the nurse, she was going home. She said she would not be in for her shift the next day.

38. The claimant did not attend for her shift on Sunday 11 February but she emailed Mr McIntosh at 18.57 that day about a number of matters. She was scheduled to work on the Monday (12th) but asked if it would be possible to return to work on Tuesday so that she could complete her Touchstone training on the Monday. She said that Louise had alerted her to an appraisal requiring completion but she requested that that not be done by Louise as she felt it would not be a fair appraisal. She said she was absent on Friday as *"the adhoc night shift really impacted"* and she hadn't slept. She said she had left work early on the Saturday *"under the same conditions regarding the HSE workplace stress questionnaire* ". She said she was aware she might be approaching a trigger point for absence and asked that for 3 days to be treated as annual leave rather than sick leave.

39. Chris Brown had provided a statement to Mr McIntosh about the events of the 10 February. He said that the claimant was upset and said she felt ignored at the handover. She had said that people didn't think she knew how to do her job. The claimant had said that one of the other carers had asked her if she was OK with the list and if she was clear what she was doing? Chris said he had tried to explain that this question was probably asked for support but the claimant was upset and said it was happening every day. Later Chris said he had seen the claimant and asked if she was OK. She had said she would be going home at 14.30 (although scheduled for a long shift.) He said that when he asked why, she became upset again and said she was *"sick of the place"* and she was still upset from the morning. He told her to take a break but a short while later she had appeared in her own clothes and said she was going to go home and she could not continue. He let her go about 10am. He said

that the claimant had then informed him she would not be in for the Sunday shift and would be in on Monday to speak to the manager.

40. Mr McIntosh took some advice from HR which was to hold a probationary review meeting with the claimant to discuss the events of the weekend. He did not reply to the claimant's email.

41. The claimant came in on the Monday expecting to do training but Mr McIntosh told her he had taken advice about her conduct over the weekend and that he was going to hold a probationary review. He said that her conduct could potentially lead to termination of her probation. The claimant replied *"Id like to see you try".* The claimant said she was still unwell and that she had informed Chris Brown that she was unwell on Saturday and had left due to ongoing medical matters. Mr McIntosh did not accept this explanation because he considered she had worked a shift on 7 February after the original illness and then had given as a reason that she was *"tired'* [1] on the 9 February so he did not consider this to be continuation of the previous illness.

Dismissal procedure

42. Mr McIntosh gave the claimant a letter inviting her to a probationary review meeting on 20 February 2018. This was not a letter that followed the normal probationary procedure. It said this was to be an opportunity to discuss how she had progressed and to *"review your achievements against your job description during your probationary period".* However, the letter stated that the meeting would also discuss the events of Saturday 10th February, Sunday 11th February and Monday 12th February. Specifically:

(1) that at or around 10am on Saturday 10th February 201 8 you left your place of work informing the Nurse in Charge that you were "sick of the place"

(2) That on Sunday 11th February 2018 you failed to turn up for your shift having given no valid reason for this to the Nurse in Charge

(3) that on Monday 12th February 2018 you failed to tun up for your 0800 - 14.30 shift having emailed the home manager requesting this but having received no authority to do so".

43. The letter stated that the claimant's actions *"potentially compromised the safety and welfare of the Residents of Blar Buidhe and therefore potentially breach HC-One's Disciplinary and conduct Policy and therefore the terms of your probation."* The letter stated that the meeting would be an opportunity for the claimant to provide any mitigation for her actions and to decide next steps if the probation period is passed or extended. The letter stated that should the probation not be passed, the employment would come to an end. The claimant was invited to submit a written statement if she wished. She was told that she had a right to be accompanied.

44. The meeting was held by Angela Percival as Mr McIntosh was on pre-arranged leave. Ms Percival was aware of the claimant's email of 3 January but considered the matter was closed. It did not affect her decision in relation to the dismissal.

45. On 15 February 2018, Ms Percival emailed the claimant as she had been advised that the claimant had left shift early. The claimant had understood her shift ended at 2.30 and emailed Ms Percival a copy of her rota. This was different to the rota that Ms Percival had been given. Ms Percival did not accept the claimant's version of the rota was correct.

46. At the meeting on 20 February 2018, Ms Percival asked the claimant for an explanation for her actions over the weekend of 10-1 2 February. The claimant said she did not recall saying she was sick of the place. She said she had not slept following the night shift and had phoned to say that there was no way she could come in. With respect to the Saturday shift, she mentioned a number of things about the shift. She had been given a handover on a napkin, she had been asked by another carer if she was OK, she had been working with an agency carer who had not worked on that floor. She had been trying to brief the agency carer but the napkin was taken away from her and she was tired. She was concerned she was working without knowledge of the floor

and with a carer who didn't know the residents. When asked why she had left, the claimant said she was exhausted and was continually being asked about her capabilities which she was uncomfortable about. Ms Percival asked if she was aware this left the Home short-staffed? The claimant said this was an unfair representation. She did leave the shift but she was very tired.

47. Ms Percival asked why she had not come in for her shift on the 11th? The claimant did not give an answer. Ms Percival asked about the 12th and whether the claimant had done the training? The claimant said no. Ms Percival asked if she was aware that modules were overdue? The claimant said yes she had seen the posters but had not done the modules.

48. Ms Percival moved on to discuss the claimant's sickness and said this was an issue as the claimant had only worked for the Home for 12 weeks. The claimant then asked to leave the meeting to see if she could get someone to come and sit with her as she felt the meeting was unfair. Ms Percival agreed. The claimant returned after 10 minutes. She was alone and said she would continue.

49. Ms Percival then listed the claimant's absences and the reasons that had been given, if any. She listed 20 December, 26 December (saying that no reason given for either day) 5 February (when she had diarrhoea and vomiting - the reference to the 5 February was a mistake and should have been 6 February), 9 , 10, 11 and 12 February and 15 February.

50. There was a discussion in which the claimant said she was doing too many hours. Ms Percival asked why she was then asking for more? There was reference to the 15th February. The claimant said it was not her responsibility if the Home was short staffed.

51. Ms Percival decided to terminate the claimant's probation. Her primary reason was the level of absence within a short period and she did not consider the claimant had given an adequate explanation for her failure to follow the absence reporting procedure. She considered the claimant to be unreliable.

52. A letter was sent to the claimant from Ms Percival on 20 February 2018 confirming that her performance during the probationary period had been unsatisfactory and giving 2 weeks' notice of termination. The reasons she gave were that the claimant had not completed her training and that she had not complied with the absence reporting policy on several occasions and notably the weekend of 10 January; that this had potentially compromised the health and safety of residents as she left the home knowing that this left the home short-staffed with a staff member who was not familiar with the needs of the residents.

Notice

53. There was a confusion about whether the claimant had to work her notice. The dismissal letter said that she did not have to work it and she was dismissed with immediate effect. Ms Percival was then advised by her line manager that the claimant should work her notice and sent a second letter on the same day which stated that the claimant was required to work her notice and her contact would terminate on 6 March 2019.

Holiday pay

54. There was lengthy communication about the amount of holiday pay to which the claimant was due. It was paid in the month after termination as the termination date was after the payroll cut off dat. The amount paid was short because it was calculated on a termination date of 20 February rather than 6 March. The correct amount was ultimately paid after intervention by Mr McIntosh in May 2018.

Appeal

55. The claimant appealed her dismissal and Janet Kermack was asked by Ms Percival to conduct it . Ms Kermack had had no involvement with the claimant and she was not aware of the incident on Christmas day nor of the claimant's email of 3 January 201 8.

56. Ms Kermack had the statements of Chris Brown and Sharon Foster. She also had the dismissal letter and the claimant's absence record.

57. Ms Kermack asked the claimant about training. The claimant said she considered it was a box ticking exercise and there was then a discussion about the training, which modules were outstanding and the workbook. As far as the absence was concerned, the claimant said there should have been more investigation and she complained about the inadequate procedures.

58. Ms Kermack did not uphold the appeal.

Observations on the evidence

59. The claimant could not remember clearly what was said on some occasions. She repeated said "I think I would have said that" or "I'm virtually certain I said that" about critical matters. The Tribunal considered this evidence was unreliable and was really speculation by the claimant about what she thought she may have said or, perhaps, wished she had said. Other matters, such as what exactly was said to Sharon Foster or Peter Venus about the Christmas day incident, she was unclear exactly what was said. The Tribunal did not consider the claimant was seeking to mislead them. It was clear that the claimant had experienced serious mental health challenges at the time and was still experiencing difficulties and this made it difficult for her to clearly recollect in detail what had occurred. The Tribunal placed more emphasis on contemporaneous written documents.

60. The respondent's witnesses gave their evidence in a clear and straightforward way. There was one matter which the Tribunal had difficulty with. Ms Percival stated that the claimant had said to her that she didn't want to be in Stornoway or be back living with her Mum and that Ms Percival had said to her that she could have a good career in care and work her way up. However, she said that the claimant was dismissive of this suggestion and that as soon as she could get off the island she would. The claimant refuted absolutely that she had any discussion like this with Ms Percival (or in fact any discussion at all)

and that she had not said any of these things, nor would she. On balance, the Tribunal was not convinced that this was said. It did not appear consistent with the claimant's other evidence which was that she wanted to stay in Lewis, that she had a croft and wanted to be close to her family. However, this was not critical to the issues to be determined and did not affect the Tribunal's assessment of the rest of Ms Percival's evidence.

Claimant submissions

61. The claimant submitted that she had made a protected disclosure because she had reasonable grounds to believe that what she was describing fulfilled the criteria in ERA s43B.

62. She maintains that she was dismissed at least principally for making these disclosures. She submitted that those who executed the termination had previous knowledge of the disclosures, the timescale between the disclosures and dismissal was short and the method of dismissal appeared to be strategically non-procedural and rested on false assertions of non-compliance.

63. She considered that what had happened was very different to probationary review and the reasons given (of endangering patients) were things that she as a probationary employee had no means to remedy.

64. She suggested that the insistence on working her notice was to avoid alerting the SSSC and Care Inspectorate and cause further investigations at the home.

Respondent's submissions

65. For the respondent, Mr Clayton set out the relevant law and provided a detailed analysis of the evidence and why, the respondent says the claim should not succeed. These are not set out in full here.

66. He submitted that, insofar as the detriment claims predate 12 January 2018 they are out of time.

67. He submitted that, on the evidence, there were no protected disclosures to Liesl Rusk, Sharon Foster or Peter Venus.

68. As for the email of 3 January 2018, it is conceded that the information is capable of being a protected disclosure. The Tribunal should assess whether the claimant had the necessary belief that the disclosure was in the public interest and tended to show one of the relevant matters.

69. He submitted that the claimant had not established a prima facie case that the reason for dismissal was any protected disclosure. In any event, he submitted the respondent had provided a credible and compelling reason for the claimant's dismissal.

70. As for the alleged detriments, insofar as these have occurred, the respondent has provided a full explanation and they were no affected by any protected disclosure.

Decision

71. The Tribunal dealt with the issues in turn.

Protected disclosure

72. It first considered whether the claimant had made a protected disclosure:

- on 25 December 201 7 to Sharon Foster or Liezl Rusk; and/or
- on 26 or 27 December 201 7 to Peter Venus and/or
- by statement emailed to Donald McIntosh on 3 January 201 8?

73. The Tribunal did not consider there was a qualifying disclosure to either Sharon Foster or Liesl Rusk. From the claimant's own evidence, it appeared that her interaction with Liesl Rusk was simply asking whether a resident could have alcohol and then questioning her answer to that question. There was no disclosure of information. Similarly her evidence of her interaction with

Sharon Foster was asking whether John X could have alcohol. This was not a disclosure of information. The claimant's evidence was unclear about what may or may not have been said later that day and the Tribunal has been unable to make ant specific findings about that.

74. It was unclear exactly what the claimant said to Peter Venus about the incident when he asked her about it. Again, the Tribunal felt unable to make any specific findings about this conversation and therefore were unable to conclude that it was a protected disclosure.

75. However, the Tribunal considered the email of 3 January 2018 was a qualifying disclosure. The claimant was conveying information about practices in relation to medication and in relation to alcohol that would potentially have been dangerous for health of residents. It was suggested at the end of the respondent's case that there were no restrictions on alcohol for any residents as this was a residential home. The Tribunal did not accept that this was the case in practice as it was clear that Sharon Foster and Liesl Rusk considered John X should not have been given alcohol.

76. Further, even if that was the case, the Tribunal considered the claimant had a genuine belief that this was a practice that could endanger the health of residents and that this was a reasonable belief. As far as the administering of medication was concerned, this was clearly a reasonable belief as Mr McIntosh himself accepted in evidence that bad practices had grown up and told the Tribunal that he had taken steps to remind nursing staff of their responsibilities in relation to dispensing medication.

77. The Tribunal also accepted that while the claimant made the disclosure in an email that Peter Venus asked her to provide, her motivation, at least in part, was the interests of the residents and this amounted to a "public interest" for the purposes of the statutory definition. The Tribunal considered the claimant had a genuine and reasonable belief that she was making the disclosure in the public interest.

78. The qualifying disclosure was made to her employer and is therefore "protected".

Unfair dismissal

79. The Tribunal then considered whether the claimant had established that the email of 3 January 2018, being a protected disclosure, was the reason, or principal reason for dismissal?

80. It was evident that the claimant was having some issues with other personnel in the home partly because she was questioning methods and the Tribunal considered it was likely that she may have been considered to be difficult.

81. The Tribunal considered that it is possible that the claimant was unfit for work on 10 and 11 February due to her mental health condition or possibly the continuation of the diarrhoea and vomiting. However, this was not clearly conveyed to the nurse in charge nor was it clearly articulated to Angela Percival. Ms Percival based her decision on the evidence she had before her which included statements from Chris Brown and Sharon Foster. The claimant did not put forward any real mitigation to Angela Percival.

82. The Tribunal was satisfied that the reason for the claimant's termination was the number of absences (both leaving shift and not turning up for shift) generally and, in particular over the weekend of 10-12 February 2018 and, to a lesser extent, her failure to complete the required training.

83. The Tribunal had some sympathy with the claimant as there was evidence that the claimant was under stress and she had been asked to work a shift when she was recovering from diarrhoea and vomiting. She had agreed to do so although this was during a 48 hour "window" following that kind of illness when she should not have been asked to work.

84. It did appear that the claimant was correct in her belief that the procedures in relation to medication were not appropriate and she could have been supported better in relation to her training.

85. The claimant placed a lot of reliance on procedural failures and she had grounds to do so. It was not clear which procedure was being used when she was meeting with Ms Percival and there was reference to the disciplinary procedure where there should not have been. The claimant was not provided with the statements of her co-workers at any stage either at the probationary review meeting or at the appeal. Had the Tribunal been considering a claim of unfair dismissal under the normal principles, it would almost certainly have found the dismissal to be unfair on procedural grounds.

86. However, this is not an "ordinary" unfair dismissal claim as the claimant did not have 2 years' service. Employers have a great deal of freedom in the early stages of employment to decide whether or not to continue the employment of an employee. Such a decision does not have to be "fair" nor does there need to be an investigation of any alleged misconduct or capability in the way that would be expected for an employee with longer service. The Tribunal may draw inferences from how a dismissal is carried out but otherwise the only issue is whether the reason, or principal reason for her dismissal was the making of a protected disclosure on the 3 January 2018.

87. Where a claimant has less than 2 years' service, it is for her to prove that the reason or principal reason for dismissal was the making of a protected disclosure. The Tribunal did not consider that this disclosure played any part in the termination of her contract. They were satisfied that the main reason for termination was that Ms Percival considered she had left shifts without a proper explanation and that she had not attended for shifts without permission, on several occasions. She considered the claimant to be unreliable and this caused particular issues where the respondent was short staffed.

88. Had Ms Percival carried out more investigation it is possible she might have found that the claimant did have a reason for her absences. However, the Tribunal did not consider that the limited nature of the investigation undertaken was affected by the protected disclosure on 3 January. The claimant was on a probationary period. She had left shift and also not

attended for shift on several occasions in a short 3-month employment. The respondent was short staffed and this caused difficulties for it. She was not up to date with her training. The Tribunal did not consider it surprising that the respondent decided not to continue with her probationary period. They certainly were not satisfied that there was another reason, namely the making of a protected disclosure.

Decision on unfair dismissal claim

89. The claim of unfair dismissal is dismissed.

Detriment

90. The burden of proof is different for a claim of detriment rather than unfair dismissal. If the detriment occurred, it is for the employer to show it was in no way influenced by the making of a protected disclosure.

Holiday pay

91 . The first alleged detriment is that the claimant's holiday pay entitlement was not included in the pay cycle following her dismissal and that it took a lot of emailing to chase it and charges were taken off it with the full amount not being paid until May 2018.

92. The Tribunal was satisfied that this detriment occurred. The question was whether this was influenced by the protected disclosure.

93. The Tribunal was satisfied that this delay in payment was because of the timing in the payment run and that the difference in pay was because of a misunderstanding by Ann Stewart as to the termination date.

94. The Tribunal with their industrial experience considers it is quite common for issues to arise in connection with the calculation and payment of accrued holiday pay on termination.

95. They considered that this detriment was not influenced by the making of a protected disclosure.

Wages

96. The next alleged detriment is that the claimant's wage due on 29 December 2017 was withheld and eventually issued on 12 January 2018 but the respondent did not remedy the tax reporting to HMRC despite the claimant explaining that she had lost about £400 in benefits.

97. The Tribunal was satisfied that reason the payment was not made on time was because of an issue with the reference for the building society account. That information would have been provided to payroll before the claimant made the disclosure. The claimant clarified during the hearing that her position was that for another employee the respondent would have taken more active steps to remedy the matter and ensure she was paid promptly.

98. The Tribunal accepted that the respondent's actions were not influenced by the protected disclosure in any way. It was the payroll department who said that payment could not be made until the payment was returned. There was no suggestion that they would be aware of the protected disclosure. There was evidence of several emails and attempts by the respondent chasing up the payment. The final 3-day delay was because of the nature of the claimant's account which did not accept fast payments.

99. This delay in payment undoubtedly caused the claimant distress and financial difficulties. However the Tribunal was satisfied that the non-payment and the subsequent delay in payment was not in any way affected by the claimant's protected disclosure.

Training

100. The next alleged detriment is that the respondent required the claimant to complete compulsory training at home in her own time and without payment although they knew she had no internet at home.

101. There was no evidence that the claimant was refused access to the computer in the home and no evidence that the claimant ever told the respondent about any difficulty with internet access at home. Had she said there was a difficulty,

the Tribunal considered she would have been allowed to do it at the home. This element of the alleged detriment is not proven

102. The Tribunal was satisfied that the claimant was required to complete compulsory training in her own time and without payment. However this was standard for all employees and was in force before the protected disclosure was made. The Tribunal was satisfied that this was not influenced by the making of a protected disclosure.

Handbook

103. The claimant says that she was refused assistance to complete the handbook which detailed the probationer's journey through HC-One. If the claimant asked for help it was from co-workers and before she had made any disclosures. There was no evidence that these co-workers were aware of the protected disclosure. There was no evidence of any different treatment by the respondent to any other employee in relation to this. It was clear that there had been a certain slackness about training in the past which Ms Percival was seeking to remedy. The workbook was not discussed at all until the appeal hearing. The Tribunal did not consider this detriment had been established.

104. The claimant further alleges that the handbook was confiscated by Janet Kermack at the appeal meeting and when the claimant requested it back this was refused. All that was supplied was a photocopy of the claimant's learning outcomes that had not been completed.

105. The Tribunal was satisfied that Ms Kermack was unaware of the protected disclosure and so this could not have been her motivation in taking the handbook back.

106. In any event, the Tribunal accepted Ms Kermack's explanation that the claimant was no longer an employee, the book was the property of the respondent and there was no reason to give her back a blank book.

Bullying and harassment.

107. The claimant alleges that the respondent failed to deal with the claimant's allegations of bullying and harassment relating to Louise, the Assistant manager, made to Donald McIntosh on 11 February 2018.

108. It was unclear what allegations were made. The claimant could not specify these and Mr McIntosh said none had been made. The claimant did refer in an email on that date to having raised concerns. However, the Tribunal has accepted that the claimant did express concerns to Mr McIntosh about Louise and he had arranged for someone else to be her mentor. This was done in an informal way in conversation.

109. If there was any failure in this regard, the Tribunal were satisfied it did not have anything to do with the protected disclosure. Mr McIntosh gave evidence about the difficulty he had in his relationship with Louise and that he was an inexperienced manager. If there was a failure to deal with these allegations, the Tribunal considered that this was the explanation rather than the claimant having made a protected disclosure.

Risk assessment

110. The claimant said that the respondent failed to take steps to discuss the risk assessment provided by the claimant to Donald McIntosh on 11 January 201 8. Mr McIntosh frankly gave evidence that he was an inexperienced manager who probably should have done something with this information but didn't. Ms Percival said that HR had told her they didn't use this tool. The Tribunal was satisfied this didn't have anything to do with the protected disclosure.

Decision on detriment complaint

111. For the reasons given above, the complaint of being subjected to a detriment for making a protected disclosure is dismissed.

Wages

112. On the list of issues was a complaint about unpaid wages. The Tribunal did not hear any evidence about this matter. It may well be that the matter is resolved. However, for the avoidance of doubt, that complaint is dismissed.

Employment Judge: S Walker
Date of Judgment: 10 December 2019
Entered in register: 12 December 2019
and copied to parties