



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MORTON
Mrs N Christofi
Mr S Huggins

BETWEEN:

Ms A Eyeson

Claimant

AND

Royal Mencap Society

Respondent

ON: 11-15 November 2019 (in chambers on 14 November)

Appearances:

For the Claimant: Mr K Anti-Boasaiko (Legal consultant)

For the Respondent: Mr J Feeny (Counsel)

Judgment

It is the unanimous judgment of the tribunal that the Claimant's claims of:

1. Automatically unfair dismissal pursuant to s 100(1)(c) and s 103A Employment Rights Act 1996 ("ERA");
2. Whistleblowing detriment pursuant to s47B ERA
3. Direct sex and race discrimination pursuant to s13 Equality Act 2010 ("Equality Act");
4. Harassment related to sex and harassment of a sexual nature pursuant to s 26 Equality Act;
5. Victimisation pursuant to s27 Equality Act

fail and are dismissed.

Written reasons produced in response to a request by the Claimant

1. Judgment and reasons were given orally at the end of the hearing. These written reasons are produced in response to the Claimant's request.
2. By a claim form presented on 29 December 2017 the Claimant brought claims of automatically unfair dismissal pursuant to s 100(1)(c) and s 103A Employment Rights Act 1996 ("ERA"); whistleblowing detriment pursuant to s47B ERA; direct sex and race discrimination pursuant to s13 and 39 Equality Act 2010 ("Equality Act"); harassment related to sex and harassment of a sexual nature pursuant to s 26 and 39 Equality Act and victimisation pursuant to s27 and 39 Equality Act.
3. Her claims of ordinary unfair dismissal under s98 ERA was struck out by Judge Pritchard on 23 March 2018 on the ground that the Claimant had insufficient service to bring a claim under s98. Judge Pritchard also struck out her claim under s 104 ERA on the basis that the Claimant was unable to identify the statutory right which she alleged had been infringed and her claim had no reasonable prospect of success.
4. The Claimant also brought claims in relation to unlawful deductions from wages and holiday pay which were dismissed on withdrawal by a judgment of Judge Williams on 26 October 2018.
5. At the hearing we heard evidence from the Claimant herself and from the Respondent's witnesses Mr Ekolie, a Support Worker who worked alongside the Claimant, Mr Odongkara, their manager, Ms McCafferty, who made the decision to dismiss the Claimant and Ms Kinnear, the Respondent's head of employment law, who gave evidence about aspects of the documentation. A fifth witness, Ms Crisafi, did not give oral evidence and we accorded little weight to her statement. All the witnesses had prepared witness statements that the Tribunal read before the hearing. There was a bundle of documents comprising 419 pages. References to page numbers in this judgment are references to page numbers in that bundle.

The relevant law

6. The relevant sections of the Employment Rights Act are as follows:

47B Protected disclosures.

- (1) **A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.**

- (1A) **A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—**

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

100 Health and safety cases.

(1) 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—

.....

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

103A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

7. The relevant sections of the Equality Act are sections 13, 26, and 27 which provide as follows:

13 Direct discrimination

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

26 Harassment

1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
- (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- 27. Victimisation**
- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
- (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
8. S39 of the Equality Act makes provision for prohibited conduct in the Act to be unlawful in the context of employment.
9. It is also relevant to consider the law on the burden of proof which is set out in section 136 of the Equality Act. In summary, if there are facts from which the tribunal could decide in the absence of any other explanation that the Claimant has been discriminated against, then the tribunal must find that discrimination has occurred unless the Respondent shows the contrary. It is

generally recognised that it is unusual for there to be clear evidence of discrimination and that the tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in *Igen v Wong and others* [2005] IRLR 258 confirmed by the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246. In the latter case it was also confirmed, albeit applying the pre-Equality Act wording, that a simple difference in status (related to a protected characteristic) and a difference in treatment is not enough in itself to shift the burden of proof to the Respondent; something more is needed.

The claims and issues

10. The claims were difficult to elicit from the claim form but were eventually agreed after a case management hearing on 23 March 2018. A list of the issues arising in the case was also agreed upon after further case management and although at the commencement of the hearing there were some minor disagreements between the parties the Tribunal has decided the issues as set out in that list. The list of issues is set out in the Appendix to these reasons.
11. To summarise, it was a substantial part of the Claimant's case that from early in her employment she was subjected to unwanted sexual advances from her co-worker Mr Ekolie. The specific incidents she relied on were identified in the further and better particular she supplied (pages 104 -108 and repeated in the List of Issues). She relied on these in claiming harassment (sex based and sexual harassment) under s 26 Equality Act, and direct sex discrimination under s 13 Equality Act.
12. The Claimant also claimed that she had raised two specific matters that amounted (a) to complaints about circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety and (b) protected disclosures. The matters she relied on were Mr Ekolie having pushed her to the floor on one or more occasions and Mr Ekolie having been constantly late for work meaning that there was at such times an unsafe ratio between staff and service users.
13. It was her case that her dismissal was in effect engineered by Mr Ekolie as an act of retaliation for her having complained about his sexual advances or other issues. Further, or in the alternative she claimed that her dismissal was automatically unfair because the reason or principal reason that she was dismissed was (a) that she had made protected disclosures about the two matters described in the preceding paragraph and/or (b) that she had brought them to the Respondent's attention as circumstances that were potentially harmful to health and safety.
14. The Claimant also relied on the matters leading up to her dismissal (the allegation of theft and the pursuit of a disciplinary process against her) as whistleblowing detriments separate from the dismissal itself and a number of other matters as acts of victimisation under s 47B ERA and s27 Equality Act. She also complained that the allegation of theft, the dismissal and the

Respondent's failure to investigate her complaints about Mr Ekolie were acts of direct race discrimination.

Findings of fact

15. The Respondent is a charity providing support for people with learning disabilities, their families and other carers. The Claimant started employment with the Respondent on 17 October 2016 as a support worker at Templar Street, a home in south London in which five service users are supported by employees of the Respondent to live independently. The Claimant worked alongside Mr Ekolie and with effect from January 2017 both of them reported to a new line manager Mr Odongkara. They worked according to a shift rota, examples of which were in the bundle at pages 389-402. The Claimant gave evidence that the rotas were much more prone to last minute changes and alterations than the documents in the bundle suggested. She relied on this fact to rebut the Respondent's case that many of the alleged incidents of sexual harassment took place on days when the Claimant and Mr Ekolie were not working together. The Respondent conceded that the rotas were not a complete and accurate record of the working hours of its employees but disputed that they were inaccurate to the extent claimed by the Claimant. We return to that point later in these reasons.
16. The Claimant remained in employment until she was dismissed for gross misconduct at the end of a disciplinary hearing on 10 November 2017. The decision was confirmed in writing on 17 November 2017. The Claimant appealed against her dismissal and the appeal hearing took place on 17 January 2018. The decision not to uphold the appeal was communicated by letter dated 29 January 2018.
17. The Claimant said in her evidence to the Tribunal that the harassment had begun in or around the first week of November 2016 and continued until Mr Ekolie was transferred to another service in or around June 2017 for a period of three months. She complained of inappropriate touching, explicit words and language, suggestions by Mr Ekolie that the Claimant should engage in a sexual relationship with him, his buying her bottles of wine, his inviting her to come home with him, his sending her unwanted WhatsApp messages and his suggesting that if she did not comply with his advances or complained about them her employment would be in jeopardy. She said that this happened very frequently during shifts or during handover when he was relieving her.
18. The Claimant's evidence about the harassment was not coherent. She had produced a diary of events that the Tribunal did not think had been produced contemporaneously. We also concluded that it did not constitute a reliable record for a number of reasons, including the fact that the Claimant failed to produce the original record despite the Tribunal's specific request to do so. In addition the events recorded in the diary did not coincide in date or description with the matters set out in her further and better particulars of claim. The Claimant's evidence in cross examination did not resolve these problems. Her recollection of dates and events was extremely poor and she gave evidence that was contradictory and inconsistent when cross examined closely about

the matters listed on pages 104-108. It was also the Respondent's case that many of the incidents relied on had allegedly occurred when the Claimant and Mr Ekolie were not working together. The Tribunal was sceptical about that suggestion for two reasons: firstly because we accepted that there were times when the Claimant was on the premises but that this was not recorded on the rota and there were also times when the Claimant was relieved by Mr Ekolie so that although they were not scheduled to work together they could have met in the building. Secondly the Claimant admitted that her recollection of dates was poor and inaccurate. That being the case, the inconsistency between the rotas and the Claimant's further and better particulars did not have the significance for which the Respondent contended. However given the inconsistencies in the Claimant's evidence the Tribunal considered very carefully whether the sexual harassment had happened at all.

19. The Tribunal's starting point was that an allegation of sexual harassment is unlikely to be entirely fabricated. Despite the unreliability of the Claimant's evidence to the Tribunal itself, we had regard to the contemporaneous documents and in particular to the notes of the Claimant's investigation meeting. At pages 196-197 there was an account of her relationship with Mr Ekolie and her response to it that the Tribunal found to be credible and on a balance of probabilities a true account of her working relationship with Mr Ekolie and the manner in which Mr Odongkara had managed it. In this account the Claimant said a number of relevant things. When the investigating officer asked the Claimant if she liked working at Templar Street she said that to some extent she did but that "Everyone is out for themselves. The other one is ...unfortunately,,I don't know how to describe it... as if he is an admirer...one of my colleagues...His name is Benson Ekolie.
20. This account is consistent with the evidence Mr Odongkara gave to the Tribunal that he had wanted to resolve the issues between the Claimant and Mr Ekolie through mediation. It is also consistent with the Claimant's evidence that Mr Odongkara did not deal with her complaints effectively. Mr Odongkara was adamant that the Claimant had not complained at any stage of sexual harassment by Mr Ekolie and Mr Ekolie was adamant that he was not the perpetrator of such conduct. The Tribunal considers that the most likely course of events was that once Mr Odongkara became the manager the Claimant did disclose her concerns, but that Mr Odongkara did not respond as the Claimant had hoped, but instead told the Claimant to focus on the service users and not to complain to him so much. The Claimant explained to the investigation officer that the reason she did not then raise a formal grievance was that

"He first started with the odd "I will take you out", and after work he would step out with me. For me it was safety and we would finish at 10pm. In the initial stages I did not take it seriously, but when I did tell him I have no interest, things then turned very nasty.

He started doing things like a detective. When I cook ... he has a strong personality, a very strong personality. He started playing detective with me. When I cook he would wrap up the food and say it was uncooked. The strange part is he would wrap it up and say it was uncooked but he looks after one particular ... he looks after [name] he is his key worker. So it was not

something he would be involved in. ... I came with a lot of enthusiasm but now I have no confidence as he does not allow me to do medication. Any time I make a decision about a service user even [name] who I have been asked to key work. If I make a decision, he steps in and stops it. So in other words it is like I was not capable. And this only started when I put him off with his advances. When was this?

Answer: This was I think in the first three months. I kept telling him, he would make comments and I would say no I am not interested. To the extent I told the manager about it. Benson is more the manager than the manager so the first manager I could not tell him. But suddenly we got a new manager, Geoffrey, and I was able to tell Geoffrey.

Geoffrey called me and Benson to a meeting, he spoke to us and I told him. Geoffrey started in January and it was probably in March when we had the meeting. He asked us what was going on. I told him about intimidation and disrespecting Benson and he spoke to us to try and resolve and work through it. But it did not stop.

When I had the opportunity to do medication he comes and double-checks everything I do. He runs me down in front of the people I support. My decisions he overrules.

Question: Have you spoken to Geoffrey since this to say it was continuing?

Answer: Yes, he was new and I do not think he thinks it is that serious. He does not see it from the angle in which I am seeing it.

Question: Have you ever done a formal complaint or grievance?

Answer: No, as Benson is an elderly man and I have always looked at him as ... he is in his early 60s ... I cannot say I see him as my father but as a senior figure ... he has children and if I take this out of ... I think where it might lead and I take it into consideration and I just get on with it.

I have spoken to Geoffrey but I felt I was being a child reporting and reporting so I just get on with it."

21. The Tribunal finds as a fact that on a balance of probabilities the Claimant was subject to sexual harassment by Mr Ekolie in the period beginning in November 2016. However the Claimant was unable to prove to our satisfaction that any of the specific incidents she relied on occurred in the way or at the times she described. To illustrate this we note that as regards the diary of incidents kept by the Claimant, the first eight matters listed in the further particulars were not mentioned at all in the diary and of the remaining five incidents, the description in the diary did not correspond with the details supplied on the further particulars. This state of affairs was in our view consistent with the Claimant having decided early in 2017 that she did not wish to make a formal complaint (and not therefore having made a record of incidents at the time), but then deciding at the time of the disciplinary proceedings and her dismissal that she wished to make the case that her dismissal was linked to her having complained to Mr Odongkara early in 2017 about Mr Ekolie's treatment of her. It is also consistent with her having mentioned the harassment at her dismissal hearing and her having referred to the harassment in her appeal against her dismissal – she did so because she wished to assert that her dismissal had resulted from Mr Ekolie's anger towards her. By that stage there was a great deal at stake for her and it is credible that she would have revived her accusations at that point. The picture is complicated by the fact that the Claimant's complaints about Mr Ekolie were not limited to complaints of sexual harassment within the purview of the Equality Act – she also complained of micromanagement and hectoring.

- Given the lack of credible particulars of harassment, combined with the fact that other things were a concern to the Claimant, the Tribunal was unable to conclude that any of the specific matters alleged by the Claimant actually occurred.
22. There was one specific incident on 28 February 2017 that caused the Tribunal considerable difficulty but was the incident that led to a meeting taking place between the Claimant, Mr Ekolie and Mr Odongkara with a view to resolving the difficulties. The first problem was that the Claimant was not on the rota to work that day. However all three witnesses were agreed that she had been present at Templar Street. The explanation Mr Ekolie gave was that the Claimant had been present to provide her services voluntarily to help the co-worker of one of the residents, whose birthday it was. The Claimant's evidence about 28 February was very incoherent, but she accepted that she had been present. Mr Odongkara said that 28 February had been a TOIL day for the Claimant, but he too accepted that she had been present at Templar Street so we accepted that that was the case regardless of what the rota said.
23. The Claimant and Mr Ekolie gave radically different accounts to the Tribunal of what occurred. The Claimant said that Mr Ekolie had become angry because she was decorating the kitchen rather than the living room for the party. Her account of what happened next was very confused. First she said that he pushed her and she fell. She then said that he stormed at her, she blacked out and fell. Then she said that he pushed her, she missed her step and fell. Finally she said that she had dizzy spell rather than having blacked out and that she was holding a kitchen knife. She said that 'everyone' knew that he pushed her to the floor while she was holding a knife. However she then suggested that he had pushed her more than once, even though she refers to only one incident in her witness statement. She suggested that the second incident had been when she was chopping vegetables and using the wrong chopping board. There is no reference to any of these matters in the diary and no details in the Claimant's witness statement – merely a general reference without a date at paragraphs 30 and 31. We decided that the inconsistency of the Claimant's recollection made it inherently unreliable.
24. Mr Ekolie describes the incident in paragraph 5 of his witness statement and his evidence in cross examination was consistent with that statement. He describes the Claimant as having reacted to his telling her that normally they decorated the lounge rather than the kitchen by wailing noisily, pulling her skirt up above her head, pulling her underpants down round her ankles and dropping to the floor, still wailing. He had then tried to remove himself from the situation by going into the lounge and she had followed him and dropped to the floor again, crying. When cross examined about why the Claimant might have behaved in that way Mr Ekolie said that he had thought that she might have a depression or other mental issue. He said that it was very strange and he had never seen anything like it before. There had been a service user present at the time.
25. The Claimant complained to Mr Odongkara about Mr Ekolie that same day. He then summoned a meeting with a view to trying to mediate between them

and enable them to resolve their differences. However at that meeting, which took place on 7 March, Mr Ekolie complained about the Claimant, and described her behaviour on 28 February. Mr Odonkara was concerned about this and wondered whether it would be necessary to begin a formal procedure. He adjourned the meeting to consult HR and his area operations manager and it was confirmed to him that he could continue with an informal process provided this was documented. The meeting reconvened on 14 March. At page 156-157 was an account of Mr Ekolie's concerns and at pages 158-9 those of the Claimant. At page 160 was a list of action points in relation to their future working relationship. All three documents were signed by all three participants on 30 March. In Mr Ekolie's account he states "On 28/2/17 in front of myself and service user [initials], Alberta stripped herself naked". The Claimant's account stated "When I was dressing table for [service user] birthday in the kitchen, Benson came and said that I should also do the living room, he then told me off and gave me a warning to what I was doing. I was very angry with him and I turned my bump towards Benson with some gesture as I was unhappy with his treatment towards me."

26. Having weighed the Claimant's account of this incident against that of Mr Ekolie the Tribunal considers that Mr Ekolie's account is more likely to be true, particularly given the Claimant's admission in the notes of the meeting that she turned what she describes as her "bump" towards him and "made some gesture". In cross examination furthermore she admitted to saying to him that he could "kiss her arse". In light of this conclusion we do not accept the Claimant's claim that she was pushed to the floor by Mr Ekolie and find as a fact that she was not. There is no other evidence that supports this assertion. The evidence suggests that the statement is untrue and the Claimant either fell to the floor or threw herself down.
27. As regards the allegations of sexual harassment it was the Claimant's case that she had raised the issue with Mr Odongkara but that he had failed to respond effectively. Mr Odongkara's evidence was that she did not raise it and that he would have taken action if she had. We considered the possibility that she did mention her concerns on 28 February but there is no contemporaneous or later record of her having done so, including her own diary of incidents. We are therefore unable to make a finding that the Claimant did raise her concerns about the sexual harassment with Mr Odongkara either on 28 February or 7 March. There is no reference to the sexual harassment in the notes of the meeting of 14 March, which included some otherwise very specific details of Mr Ekolie's conduct. In cross examination the Claimant had said that she had felt inhibited from discussing it in the presence of Mr Ekolie, who was opposite her "huffing and puffing". It seems to the Tribunal however that if the Claimant had wanted Mr Odongkara to take formal action she could have approached him afterwards for guidance on raising a formal grievance. She described her relationship with him positively. We note also that the agreement at page 60 explicitly left open the possibility of formal action if matters did not improve. That would also have been a means by which the Claimant could have raised her concerns, if doing so at the meeting had been too difficult. The Claimant's later evidence to the investigation officer, as noted above, was that she had taken a decision not to pursue formal action

- against Mr Ekolie at the time to spare him the potential repercussions. The Tribunal therefore finds that it was open to the Claimant in March 2017 to raise a formal grievance about Mr Ekolie's sexual harassment towards her but she voluntarily chose not to do so. She has not shown when and how she raised her concerns informally, if she did so at all.
28. The Tribunal also considered whether in complaining to Mr Odongkara about various aspects of Mr Ekolie's conduct the Claimant had made a disclosure relating to health and safety and/or a protected disclosure. The Claimant relies on two matters – her concerns about Mr Ekolie's timekeeping and her allegations that he pushed her to the ground. The Tribunal has already found as a fact that Mr Ekolie did not push the Claimant as she alleged and thus she cannot have made a protected disclosure or a health and safety disclosure in relation to that incident (or one that she reasonably believed to be true).
29. We find however that the Claimant did complain about Mr Ekolie having been late for work. That is clear from the notes at page 158. There is no evidence that at the time she specifically related his lateness to the health and safety of herself or the residents. Her evidence to the Tribunal was that this should have been obvious to her manager and she did not need to state it specifically. The Tribunal was prepared to accept that if the Claimant had been left alone with the service users for long periods when Mr Ekolie should have been on duty, there was a potential risk to the health and safety of service users and that the Claimant reasonably held a belief that that was the case and that given the nature of the Respondent and its work there was a public interest in her making this known to her manager. That being the case we accept that she did disclose information to Mr Odongkara from which it was obvious that when Mr Ekolie was late for work the ratio of support workers to service users was not being observed and that she therefore made a protected disclosure in relation to Mr Ekolie's lateness.
30. As regards the Claimant's claim that she raised his lateness as a health and safety matter directly with Mr Odongkara when it was not reasonably practicable for her to raise it with a health and safety representative or health and safety committee, the tribunal was hampered by a lack of evidence or submissions by the Claimant on this point. In order to meet this test the Claimant must establish either that there was no health and safety representative or safety committee or that it was not reasonably practicable for her to raise the matter by those means. The Claimant failed to prove facts that persuaded the Tribunal that this was the case. Her evidence simply failed to address the issue at all.
31. Following the meeting on 14 March it was the Claimant's case that matters did not improve, but in fact became worse. She told the Tribunal that she wished she had not complained about Mr Ekolie. She listed a number of further examples of unwanted conduct, including sexual harassment, in her diary, but that Tribunal was not satisfied that the dates and details in that document were accurate or that it was a credible account of the Claimant's complaints. The last entry in the diary was 26 March in any event. Furthermore in her appeal meeting on 17 January 2018 the Claimant contradicted this evidence

- by suggesting that matters had in fact improved after the meeting (page 337). When she was asked at that meeting whether there had been further incidents she said no. There was therefore a period between March 26 and a date in or around June 2017 in which the Claimant has not shown that there were any further grounds for her to complain about Mr Ekoli's behaviour. Mr Ekolie was then sent to work at a different service for a period of approximately three months from June to August 2017.
32. Mr Ekolie returned to work at Templar Street on 22 August 2017. Shortly after that, on 30 August he raised concerns with Mr Odongkara about three matters concerning the finances of a service user in which he suggested that the Claimant might have been implicated: the apparent disappearance of £10 of the service user's money; the apparent disappearance of some perfume and other items that had been bought with a service user's money and the apparent use by the Claimant of the service user's Oyster card for personal journeys. It is the Claimant's case that in raising these concerns Mr Odongkara was motivated, at least in part, by the fact that she had carried out certain protected acts by disclosing to her manager the matters listed in paragraph 24 (i) to (viii) of the list of issues.
33. The Tribunal finds that of the listed protected acts the Claimant has failed to establish on the facts that she disclosed the matters listed in paragraphs 24(i) to 24 (v). Although the Tribunal was prepared to accept that she may have made a complaint of sexual harassment to Mr Odongkara at some point between January and March 2017, the Claimant has not proved facts that show that she made these specific complaints. We have also found on the facts that the matters referred to in paragraphs 24(vi) and (vii) did not occur and the Claimant did not complain about them. We have found that she did complain that Mr Ekolie was regularly late for work and we have accepted that in doing so she made a protected disclosure and was therefore protected from detriment or dismissal by reason of having made that disclosure.
34. The Claimant complained about being subjected to five specific detriments by Mr Ekolie for reasons that were influenced by her having done the protected acts referred to. We have found only one protected act on the facts of the case, the protected disclosure about his lateness. We also find that only one of the five detriments survives scrutiny. Detriments (i) to (iii) were matters that the Claimant described as having occurred prior to her raising her concerns with Mr Odongkara. They cannot therefore have been influenced by those complaints. We have found that detriment (iv), Mr Ekolie having been physically aggressive and pushed her to the floor, did not happen. The remaining detriment is her allegation that her complaints led Mr Ekolie to play a part in her dismissal. The relevant test is whether her protected disclosure had a material influence on his actions - a lower threshold than her complaint of automatically unfair dismissal, to which we return.
35. Mr Ekolie's explanation for his having raised his concerns about financial impropriety on the Claimant's part and escalated them over the head of Mr Odongkara to area operations manager Katherine Gilham was that Mr Odongkara was too slow to deal with these matters and he was concerned

that there might be further problems if prompt action were not taken. He said that he was obliged to raise any matter that could constitute any form of abuse of a service user, including financial abuse, under the Respondent's safeguarding policy. The Tribunal could see that it was possible on the facts of this case that Mr Ekolie could have been motivated by anger that the Claimant had complained about his timekeeping. There was evidence that he had arrived a comfortable arrangement at Templar Street that suited his circumstances and that he would have not welcomed disruption to those arrangements. But the Claimant was obliged to establish a prima facie case from which the Tribunal could conclude that her protected disclosure had formed at least part of the reason for his deciding to act as he did. There was no objective evidence that her complaints had been on his mind when he drew the issues about the service user's finances to the attention first of Mr Odongkara and then Ms Gilham. That was the Claimant's interpretation of events, but without some evidence to support that interpretation such as evidence that the practices of which she was accused were tolerated in other members of staff, this is no more than supposition. There was some evidence before the Tribunal that there had been another incident involving the loss of £10 of a service user's money, but we had no evidence about how that was dealt with by the Respondent save for the brief account given by Mr Odongkara at page 206. The detailed explanation the Claimant gave to the investigation officer during her disciplinary investigation interview (page 201) does not amount to evidence that this is what motivated Mr Ekolie. In fact that account suggests that there was another explanation for his actions and that Mr Ekolie's suspicions may have been aroused by the Claimant herself telling him that during his absence £10 had been unaccounted for from another service user's tin. It is that disclosure that appears, from the Claimant's own account at page 201 to have prompted the chain of events that led to him reporting the financial discrepancies.

36. The Claimant was then involved in a disciplinary process that led to her dismissal. She claimed also that this process was itself a whistleblowing detriment and that the sole or principal reason for the decision to dismiss her in which it culminated, was her protected disclosure. A different test of causation applies to detriment and dismissal.
37. The Claimant did disclose her concerns about Mr Ekolie during her disciplinary interview with the investigation officer. She gave the investigation officer the background to their dispute and explained that she thought that this was what had motivated Mr Ekolie to report the missing £10 from the tin containing the service user's money. The investigation officer did not interview Mr Ekolie, in order, he said, to protect the integrity of the investigation. He was therefore alive to the possibility that Mr Benson might not be an independent witness. Whether or not that was the correct judgment to make in this situation is not a matter for this Tribunal in this case and as the investigating officer was not called to give evidence we were unable to probe the issue. Instead he independently reviewed the relevant paperwork and formed the view that as the Personal Money Record and petty cash receipt were in the Claimant's handwriting it was reasonable to assume that she was responsible for the missing £10 and that contrary to her account, Mr Ekolie had not written

“shopping” in the PMR – it was the Claimant herself who had done that. The investigation officer being alive to the possibility that Mr Ekolie might have been motivated by malice towards the Claimant was a very different matter from he himself being motivated by the Claimant’s dispute with Mr Ekolie to produce the investigation report that recommended disciplinary action. We find that there was no such motivation. The investigation officer’s focus was on establishing whether or not there was evidence that the Claimant had misused a service user’s money. We therefore find that there was no evidence of a causal link between the Claimant’s disclosure about Mr Ekolie’s timekeeping and decision by the Respondent, acting through the investigation officer, to initiate disciplinary proceedings.

38. We also find from the disciplinary hearing notes and outcome letter, that the focus of Ms McCafferty was clearly on the allegations of financial abuse. She was uninterested in the Claimant’s history with Mr Ekolie and unresponsive when the Claimant brought up the allegations of sexual harassment, merely repeating that the Claimant could have raised a grievance about them. There is no evidence from those notes that Ms McCafferty herself was influenced by the disclosures the Claimant had made about Mr Ekolie’s timekeeping. It was clear from the outcome letter that the principal reason for the Claimant’s dismissal was the Respondent’s conclusion that she had dishonestly dealt with money belonging to a service user and had used the service user’s Oyster card for her own benefit.
39. The Claimant also complained that she was directly discriminated against because of race. She did not prove facts that establish a prima facie case that her race played any part in any of the decisions taken by her managers.

Conclusions

40. Taking the matters set out in the list of issues in turn, our conclusions are as follows.
41. The Claimant was not automatically unfairly dismissed under s100 ERA. She did not prove facts to show that she had raised a health and safety concern in the circumstances envisaged by that section, that is when it was not reasonably practicable for her to have raised concerns with the Respondent’s health and safety committee because she did not know the protocols for doing so. She therefore could not show that that her having raised a health and safety concern in those circumstances was the sole or principal reason for her dismissal. Her claim under s100 ERA therefore fails and is dismissed.
42. The Claimant made a protected disclosure concerning the ratio of support workers to service users when she complained about Mr Ekolie’s lateness. Her belief was reasonable and she reasonably believed that the disclosure was made in the public interest given the nature of the Respondent’s charitable objects. The protected disclosure was not however the sole or principal reason for the Claimant’s dismissal. Her claim of automatic unfair dismissal under s103A ERA therefore fails and is dismissed. Our conclusion that the Claimant made a protected disclosure is not incompatible with our

- conclusion that she did not fall within the regime in s100 ERA because the two regimes operate differently and involve different statutory tests.
43. The Respondent alleged that the Claimant had misappropriated money belonging to a service user and subjected her to a disciplinary process for that reason. It was no part of the reason for the Respondent having done either of those things that the Claimant had made the protected disclosure. The Respondent acted solely because it regarded the Claimant's actions as financial abuse of a service user that constituted gross misconduct on the part of the Claimant. The Claimant's claim of whistleblowing detriment by the Respondent under s47B ERA therefore fails and is dismissed.
 44. The Claimant has not proved on a balance of probabilities any facts that show that she was subjected to the sex based/sexual harassment as alleged in the particulars of her claim. Her claims under sections 13 and 26 Equality Act which are based on the same allegations, therefore fail and are dismissed.
 45. The Claimant has not proved facts that show that the Respondent treated her less favourably than it would have treated a white woman by making an allegation of theft against her and subsequently dismissing her. The Claimant did not shift the burden of proof to the Respondent as she failed to put forward any facts from which the Tribunal could have concluded that direct race discrimination had occurred.
 46. In relation to the victimisation claim, the protected acts the Claimant alleges that she did, as set out in paragraph 24 of the list of issues, included both protected acts under the Equality Act and a protected disclosure under the ERA we conclude that the Claimant has proved only that she made the protected disclosure of complaining about Mr Ekolie's working hours. As regards the detriments set out in paragraphs 28 (i) to (v) of the list of issues, the Claimant could not show that there was any causal link between the matters referred to in paragraphs 28(i), (ii) and (iii) because these predated her complaints about Mr Ekolie's timekeeping. We have found that the matter referred to in paragraph 28(iv) did not occur as alleged. As regard matter (v), that he had played a part in her dismissal, she has not shown that it was any part of Mr Ekolie's motivation in reporting her conduct and thus playing a part in her dismissal that she had made the protected disclosure of complaining about his timekeeping and its effect on staffing ratios. Her claim of whistleblowing detriment by Mr Ekolie therefore fails and is dismissed.
 47. As the Claimant's claims have not succeeded it is not necessary for us to consider whether she brought her claims in time.

Employment Judge Morton
Date: 10 December 2019

Judgment sent to the parties
11 February 2022

Appendix

List of issues

Automatically unfair dismissal

1. Health and safety dismissal

- a. Did the Claimant complain to Mr Odongkara that:
 - i. the ratio of support workers to service users was not being observed and that this was harmful to the health and safety of service users?
 - ii. Mr Ekolie was physically aggressive in the kitchen and pushed her on to the kitchen floor?
 - iii. Mr Ekolie pushed her when she stood close to the kitchen cooker.
- b. If so:
 - i. did the Claimant bring to the Respondent's attention by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety?
 - ii. was it not reasonably practicable for the Claimant to have raised the matter with the Respondent's health and safety committee because she did not know the protocols for doing so?
- c. Was the sole or principal reason for the Claimant's dismissal that she brought the health and safety issues to the Respondent's attention?

2. Whistleblowing dismissal

- a. Did the Claimant make a disclosure of information to Mr Odongkara that the ratio of support workers to service users was not being observed?
- b. If so:
 - i. did she believe that the information tended to show that the health or safety of any individual has been, is being or is likely to be endangered?
 - ii. was such a belief reasonable?
 - iii. did she believe that the disclosure was made in the public interest?
 - iv. was such a belief reasonable?

It is accepted that, if made, the disclosure was to her employer pursuant to Section 43C ERA.

- c. Was the sole or principal reason for the Claimant's dismissal that she had made the protected disclosure?

3. Whistleblowing detriment

- a. Was the Claimant subjected to a detriment by the Respondent by:
 - i. making an allegation of theft against her?
 - ii. following a disciplinary process following this allegation?
- b. Was this an act or failure to act on the part of the Respondent?
- c. If so what was the reason for the Respondent's act or failure to act?
- d. Was the Claimant subjected to the detriments on the grounds of the protected disclosure identified above?

4. Harassment related to sex/of a sexual nature

- a. Did the following acts occur:
 - i. 8/12/2016 10.30pm - Mr Ekolie placed his hands around C's waist and said 'Accept this from me, go home, relax, drink this and think of me and if you behave well you will receive better things';
 - ii. 12/12/16 10.30pm - Mr Ekolie said to C 'If you are a good girl, I will ensure you pass your probation and work with Mencap';
 - iii. 16/12/16 10.30pm - Mr Ekolie purchased a bottle of wine from the local Tesco for C and said 'Come with me to my home and relax';
 - iv. 12/1/17 3.30pm - Mr Ekolie stated you have large breasts, the ones I like';
 - v. 14/1/17 - Mr Ekolie smacked C's buttocks and said 'One man should not enjoy this alone';
 - vi. 20/1/17 - Mr Ekolie whispered in C's ear 'I can do it better than your so called husband';
 - vii. 28/1/17 8pm - Mr Ekolie touched C's breasts and stated 'Come and visit me at home, I am divorced, there is no woman in my life and house, the children won't bite you';
 - viii. 5/2/17 9pm - Mr Ekolie stated 'I love your large breasts' and leaned towards C. C pushed him away and Mr Ekolie stated 'This is breast is good for...' he did not finish his statement and laughed it off;
 - ix. 13/2/17 3.45pm - Mr Ekolie went close to C, placed his hands around her waist and whispered into her ears 'come home with me after work and I will show you what you have been missing';
 - x. 19/2/17 - Mr Ekolie smacked C's buttock and smirked;
 - xi. 25/2/17 9.30pm - Mr Ekolie stroked his penis and said 'This is for you';
 - xii. 27/2/17 8pm - Mr Ekolie said to C '[] and give me a chance if you want to work here or I would like to take you out after work';
 - xiii. 2/3/17 8pm - Mr Ekolie threatened to get C dismissed by stating 'if you tell Geoffrey about this again you would be out of this place'.
- b. If so, was it unwanted conduct?
- c. Was it related to her sex and/or of a sexual nature?
- d. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

5. Direct discrimination because of sex

- a. Did the following acts occur [the Claimant relied in the incidents set out at paragraph 4(a)]?
- b. If so would a man in materially the same circumstances have been treated differently?
- c. Are there facts in which the Tribunal can conclude, absent any other explanation that the discrimination occurred?
- d. If so, what is the Respondent's explanation for the treatment?

6. Direct discrimination because of race

- a. Was the Claimant treated less favourably as follows:

- i. making an allegation or theft against her and subsequently dismissing her;
 - ii. failing to investigate her complaints about Mr Ekolie.
- b. If so, would a person of non-black race in materially the same circumstances have been treated differently?
- c. Are there facts from which the Tribunal can conclude absent any other explanation that the discrimination occurred?
- d. If so what is the Respondent's explanation for the treatment?

7. Victimisation

- a. Did the Claimant say to Mr Odongkara the following:
 - i. that Mr Ekolie followed her after work, brought her drinks at the local Tesco, would say 'Think of me' and 'If you behave well you will receive better things'?
 - ii. that Mr Ekolie shouted at her and called her names and ensured that whatever she asked clients to do they disobeyed?
 - iii. that Mr Ekolie would slap her buttocks whenever she walked past him and that she felt offended by this?
 - iv. that Mr Ekolie always made remarks about the size of her breasts?
 - v. that Mr Ekolie said I can do it better than your so called husband'?
 - vi. Mr Ekolie was physically aggressive in the kitchen and pushed her on to the kitchen floor?
 - vii. that Mr Ekolie pushed her when she stood close to the kitchen cooker?
 - viii. that Mr Ekolie was always late to work by three to four hours whenever she worked with him, leaving her alone with vulnerable clients, putting her health and safety at risk?
- b. When did these conversations take place?
- c. Did these conversations constitute a protected act or acts?
- d. Were the allegations false and made in bad faith?
- e. Did Mr Ekolie subject the Claimant to the following treatment:
 - i. did all he could to criticise the Claimant and report her (for example saying that her cooking was poor and that she might poison service users)?
 - ii. ensure that others showed the Claimant their respect;
 - iii. overruled the Claimant's decisions in front of service users?
 - iv. being physically aggressive towards the Claimant and pushing her to the floor?
 - v. playing a part in her dismissal?
- f. Did any of the alleged treatments constitute one or more detriments?
- g. Was the Claimant subjected to one or more detriments because she had done one or more protected acts?

8. Jurisdiction

- a. Did any of the complaints occur within three months of presentation of the ET1 taking into account the provisions of Acas early conciliation?
- b. If not, can time be extended on any of the basis in Section 123(1) Equality Act?