EMPLOYMENT TRIBUNALS

Claimant: Mr K Roberts

Respondent: Hafal

Heard: by video **On:** 21, 22, 23, 24 (in chambers) & 25 March 2022

Before: Employment Judge S Jenkins
Mrs J Kiely
Mr B Roberts

Representation
Claimant: In person
Respondent: Ms K Reece (Employment Advisor)

JUDGMENT

1. The Claimant's claim of breach of contract is dismissed on withdrawal.

2. The Claimant's claims of: health and safety detriment, health and safety dismissal, protected disclosure detriment, protected disclosure dismissal, and harassment related to disability; all fail and are dismissed.

REASONS

Background

1. The hearing was to consider the Claimant's claims of: health and safety detriment, health and safety dismissal, protected disclosure detriment, protected disclosure dismissal, harassment related to disability by association, and breach of contract. In the event, during the course of the hearing, the Claimant confirmed that he was not in a position to advance a breach of contract claim and it was therefore withdrawn.

2. On behalf of the Claimant, we heard evidence from the Claimant himself; his wife, Jodanna Roberts; and his trade union representative, Susan Reynolds. We also considered a written statement from a former colleague, Tracey Beaton, to which we could attach limited weight, but which was, in any event, of limited relevance. On behalf of the Respondent, we heard from Alun Thomas, Chief Executive Officer; Nia Murphy, Director of People

Services; and Julia Wheatley, formerly Centre Manager.

3. We considered the documents in a bundle spanning 505 pages to which our attention was drawn, together with some additional documentation produced during the hearing. We also considered the parties' submissions.

Issues and law

4. The issues to be determined had been identified at a preliminary hearing before Employment Judge Harfield on 2 March 2021, and were as follows.

1. Health and Safety detriment and dismissal

1.1 Under section 44(1)(d) /100(1)(d) Employment Rights Act 1996 did the Claimant, in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, leave (or propose to leave) or (while the danger persisted) refuse to return to his place of work or any dangerous part of his place of work?

1.2 The Claimant says that he raised concerns about Covid safety including the lack of staggered start or finish times, use of common areas, lack of social distancing, lack of robust cleaning, PPE not being worn, public health guidance not being followed and that this meant the risk of him contracting Covid was very high, which in turn he could take home to his vulnerable family. He says that at a meeting on or around 22 May 2020 he therefore refused to return to his place of work / the dangerous parts of his place of work (he had offered to do administrative work in an office).

1.3 Was the Claimant subjected to a detriment by any act, or deliberate failure to act by his employer done on the above ground in that:

1.3.1 On 06/08/2020 Nia Murphy called the Claimant to a meeting and told him he was being dismissed and had failed his probation. The Claimant was told staff had lost faith in him. He was told he had not completed paperwork in January and that as a result they had kept a patient illegally on the unit. The Claimant says these things had not been raised with him before and that he was being accused of things without there being any investigation and that they were not the real reason.

1.4 Was the reason or principal reason for the Claimant's dismissal that ground?

2. Protected Disclosure

2.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the Claimant say or write? When? To whom? The Claimant says he made disclosures on these occasions:

PPE

2.1.1.1 21/4/2020 – in an email to various individuals regarding staff wearing PPE in all patient settings and not just for specific work. The Claimant says he was disclosing information that in his reasonable belief tended to show that the health and safety of staff and patients was being endangered;

2.1.1.2 21/4/2020 – in an email to Alun Thomas again about the wearing of PPE across all patient settings;

2.1.1.3 21/4/2020 – the Claimant spoke with Julia Wheatley and Alun Thomas. The Claimant says he again stated his concerns that staff should be wearing PPE as standard across all settings;

2.1.1.4 Either 21/4/2020 or 22/4/2020 – at a meeting on Microsoft Teams with Judith Major, Julia Wheatley, Helen Bennett and possibly Amanda Tribble. The Claimant says he said that face masks should be standard in the building to minimise risk. The Claimant says that the combined effect of these disclosures, that PPE should be worn in all circumstances and face masks warn as standard, amounted to a protected disclosure.

The Sanctuary Project

2.1.1.5 22/4/2020 & 23/4/2020 – the Claimant says he sent various emails to [RB, LM, RV, DC, JM], Julia Wheatley and that the combined effect of these amounted to a protected disclosure. The project was about offering initially during the pandemic a telephone service and the Claimant says he expressed concerns that it would be serviced by staff not sufficiently qualified or trained to deal with the potential level of patient need and risk (for example suicidal patients). The Claimant says he said that the staff may miss cues and triggers and opportunities to intervene with vulnerable patients which could endanger their wellbeing or their life. The Claimant says that the project also anticipated (when under less Covid related restrictions) the Respondent taking patients into the sanctuary. He says he expressed concerns about staff safety in dealing 1-2-1 with patients where the staff did not know their mental health history and with no full risk assessment complete. The Claimant says that he disclosed information that in his reasonable belief tended to show that the Respondent was likely to endanger the health and safety of patients and staff

2.1.2 Did he disclose information?

2.1.3 Did he believe the disclosure of information was made in the public interest?

2.1.4 Was that belief reasonable?

2.1.5 Did he believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered;

2.1.6 Was that belief reasonable?

2.2 If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the Claimant's employer.

3. Protected Disclosure Detriment (Employment Rights Act 1996 section 48)

3.1 Did the Respondent do the following things:

3.1.1 On 27/4/2020 the Claimant was sent an email saying that his services were no longer required on the sanctuary project;

3.1.2 On 27/4/2020 it was suggested that the Claimant needed clinical supervision;

3.1.3 The Claimant had been doing some work from home (his wife and son were on the shielding list). On 05/05/2020 the Claimant was told that as he had refused to help on the sanctuary project the options were limited for ongoing remote working and he was limiting his deployment options (the Claimant disputes that he refused to help with the project, he said he had just highlighted concerns);

3.1.4 The Claimant's proposals for work were all refused, which included (a) the sanctuary, (b) undertaking wellbeing clinics, (c) supervisions, and (d) coming into work and doing admin work in an office such that he ended up being on furlough when he could have worked;

3.1.5 On 05/05/2020 Nia Murphy told him that if he did not return to work and ended up on furlough his job would be at risk;

3.1.6 Whilst on furlough the Claimant was refused permission to work elsewhere on track and trace;

3.1.7 On 06/08/2020 Nia Murphy called the Claimant to a meeting and told him he was being dismissed and had failed his probation. The Claimant was told staff had lost faith in him. He was told he had not completed paperwork in January and that as a result they had kept a patient illegally on the unit. The Claimant says these things had not been raised with him before and that he was being accused of things without there being any investigation. The Claimant says these were not the real reasons.

3.2 By doing so, did it subject the Claimant to detriment?

3.3 If so, was it done on the ground that he made a protected disclosure.

4. Remedy for Detriment

4.1 What financial losses has the detrimental treatment caused the Claimant?

4.2 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

4.3 Is it just and equitable to award the Claimant other compensation?

4.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.5 Did the Respondent or the Claimant unreasonably fail to comply with it?

4.6 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

4.7 Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the Claimant's compensation? By what proportion?

4.8 Was the protected disclosure made in good faith?

4.9 If not, is it just and equitable to reduce the Claimant's compensation? By what proportion, up to 25%?

5. Protected Disclosure - Dismissal

5.1 Was the reason or principal reason for dismissal that the Claimant made a protected disclosure?

6. Remedy for Unfair Dismissal

6.1 Does the Claimant wish to be reinstated to their previous employment?

6.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

6.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

6.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

6.5 What should the terms of the re-engagement order be?

6.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

6.6.1 What financial losses has the dismissal caused the Claimant?
6.6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
6.6.3 If not, for what period of loss should the Claimant be compensated?
6.6.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for

some other reason?

6.6.5 If so, should the Claimant's compensation be reduced? By how much?

6.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.6.7 Did the Respondent or the Claimant unreasonably fail to comply with it?

6.6.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

6.6.9 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

6.6.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

6.6.11 Does the statutory cap of fifty-two weeks' pay or £86,444 apply?

6.7 What basic award is payable to the Claimant, if any?

6.8 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

7. (Associative) Disability

The Equality Act 2010 says that a person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

There is more information about this here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf

In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

7.1 Did the Claimant's wife and/or son have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

7.1.1 Did s/he have a physical or mental impairment: [Claimant's wife: chronic severe asthma and severe allergies. Claimant's son: chronic severe asthma, severe allergies and croup]?

7.1.2 Did it have a substantial adverse effect on his/ her ability to carry out day-to-day activities?

7.1.3 If not, did the individual have medical treatment, including

medication, or take other measures to treat or correct the impairment?

7.1.4 Would the impairment have had a substantial adverse effect on his/her ability to carry out day-to-day activities without the treatment or other measures?

7.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

7.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

7.1.5.2 if not, were they likely to recur?

8. (Associative) Harassment related to disability (Equality Act 2010 section 26)

8.1 Did the Respondent do the following things:

8.1.1 Ask the Claimant to move out of the family home to facilitate the Claimant returning to work;

8.1.2 Threatened the Claimant that he could lose his job if he did not move out of the family home or otherwise return to work;

8.1.3 Required the Claimant to return to an unsafe work environment that would place his family at risk

8.2 If so, was that unwanted conduct?

8.3 Did it relate to disability?

8.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

8.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

9. Remedy for discrimination

9.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

9.2 What financial losses has the discrimination caused the Claimant?

9.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.4 If not, for what period of loss should the Claimant be compensated?

9.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

9.6 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

9.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

9.8 Did the Respondent or the Claimant unreasonably fail to comply with it?

9.9 If so is it just and equitable to increase or decrease any award payable to the Claimant?

9.10 By what proportion, up to 25%?

9.11 Should interest be awarded? How much?

10. Breach of Contract

10.1 Did this claim arise or was it outstanding when the Claimant's employment ended?

10.2 Did the Respondent do the following:

10.2.1 Fail to follow his probationary policy?

10.3 Was that a breach of contract?

10.4 How much should the Claimant be awarded as damages?

5. With regard to the issue of disability, prior to the hearing the Respondent had conceded that the Claimant's wife was disabled for the purposes of section 6 of the Equality Act 2010 ("EqA"), and a judgment had been issued, coincidentally by the Judge chairing this hearing, following a hearing on 21 January 2022, that the Claimant's son also was disabled for the purposes of the EqA. Those issues, together with the issues relating to the breach of contract claim, did not therefore need to be decided.

6. With regard to the health and safety detriment claim, we noted that the asserted detriment related to the Claimant being called to a meeting and being told that he was being dismissed. Section 44(4) of the Employment Rights Act 1996 ("ERA") notes that section 44 does not apply where the detriment in question amounts to dismissal, and therefore we considered the issue solely by reference to the health and safety dismissal claim under section 100 of the ERA. We formed the same view in relation to one of the Claimant's asserted protected disclosure detriments, set out at issue 3.1.7.

7. The legislation underlying the Claimant's claims was encapsulated within the list of issues. In relation to the health and safety claims, the Claimant contended that section 44(1)(d) and section 100(1)(d) ERA applied, i.e. that in circumstances of danger, which he reasonably believed to be serious and imminent, and which he could not have been expected to avert, he refused to return to his place of work.

8. In relation to the protected disclosure claims, the Claimant contended that section 43B(1)(d) ERA applied, i.e. that he had disclosed information which tended to show that the health and safety of any individual had been, was

being, or was likely to be, endangered.

9. In relation to the dismissal claims, the Claimant did not have sufficient service to pursue an "ordinary" unfair dismissal claim pursuant to section 94 ERA, questions of the fairness and reasonableness of the dismissal decision did not therefore arise. Instead, our focus was on the reason for dismissal.

10. Sections 100 and 103A ERA both note that an employee will be regarded as having been unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal was, respectively, the health and safety concern or the protected disclosure. If, therefore, we considered that the reason or principal reason for the dismissal was the health and safety issue or the protected disclosure, then the Claimant's dismissal claims, or one of them, would succeed. If not, they would fail.

11. As the Claimant was only employed for some seven months, the burden of proof in terms of showing that an automatically unfair reason was the reason for dismissal was on him. That was confirmed in relation to health and safety dismissals by the Employment Appeal Tribunal ("EAT") in Tedeschi v Hosiden Besson Ltd (UKEAT/959/95), and in relation to protected disclosure dismissals, by the Court of Appeal in Kuzel v Roche Products Ltd [2008] ICR 799.

12. In terms of the reason for dismissal, the Court of Appeal made clear, as far back as 1974, in Abernethy v Mott, Hay and Anderson [1974] ICR 323, that the reason is the reason that operated on the employer's mind at the time of dismissal. That reason must have existed in the mind of the decision-maker who must therefore have been conscious of the disclosure or the health and safety action taken by the employee.

13. In relation to the Claimant's protected disclosure claims, the starting point of our analysis would need to be the question of whether the Claimant made any protected disclosures. If he did not then he could not be found to have been treated to his detriment, or to have been dismissed, by reference to any disclosure.

14. In that regard, the Court of Appeal, in Kilraine v London Borough of Wandsworth [2018] ICR 1850, noted that any disclosure must contain sufficient factual content so as to tend to show a relevant failure, in this case that health and safety was being, or was likely to be, endangered.

15. If we were satisfied that a protected disclosure had been made, we would then need to consider whether it had been the reason or principal reason for the dismissal, and whether any detrimental treatment of the Claimant, if it had arisen in fact, had been done on the ground that the Claimant had made it.

16. We have already noted the approach we would need to adopt in relation to the reason for dismissal. With regard to detriment, the Court of Appeal, in Fecitt and others v NHS Manchester [2012] ICR 372, noted that, in order for such a claim to succeed, we would need to be satisfied, if we considered that detrimental conduct had taken place, that it had been materially

influenced, i.e. more than trivially influenced, by the disclosure.

17. In relation to assessing whether detriment had arisen, we would need to apply the same test as arises in discrimination cases, as set out by the House of Lords in Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, which is whether a reasonable employee would take the view that they had been disadvantaged in the circumstances in which they had to work.

18. The same approach in terms of causation would need to be applied in relation to the Claimant's health and safety claim. The question would be whether the reason or principal reason for the dismissal was the fact that the Claimant, in circumstances of danger which he reasonably believed to be serious and imminent, and which he could not be expected to avert, refused to return to his place of work.

19. That would involve an objective assessment of the Claimant's specific circumstances to assess whether he had had a reasonable belief of serious and imminent danger. If we considered that he had, we would then need to consider whether that had been the reason or principal reason for the dismissal.

20. With regard to the Claimant's harassment claim, the steps we were required to take were set out in the list of issues at paragraph 8. We would first have to assess whether the matters asserted had taken place, and whether they amounted to "unwanted conduct", which the EAT, in Thomas Sanderson Blinds Ltd v English (UKEAT/0316/10), confirmed should largely be assessed subjectively, i.e. from the employee's point of view.

21. If we were satisfied that there had been unwanted conduct, we would then need to consider whether it had related to a protected characteristic, in this case the disability of the Claimant's wife and/or son, "related to" having a broad meaning, certainly wider than "because of" or "on the ground of".

22. Finally, if we were satisfied that there had been unwanted conduct which related to the disability of the Claimant's wife or child, we would need to consider whether it had had the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

23. The Claimant did not appear to contend that the Respondent had deliberately acted by reference to his wife or child's disability, and our focus, therefore, would be on the effect of the Respondent's actions.

24. In relation to violating dignity, the EAT, in Richmond Pharmacology v Dhaliwal [2009] ICR 724, noted that dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended.

25. In deciding whether the Respondent's conduct, if it took place, had the effect of violating the Claimant's dignity or of creating an intimidating etc. environment for him, section 26(4) EqA notes that three matters are to be taken into account; the Claimant’s perception, the other circumstances of

the case, and whether it was reasonable for the conduct to have had that effect, a test which therefore has both subjective and objective elements.

26. Whilst remedy matters were included in the list of issues, it was agreed at the outset of the hearing that our initial focus would be on liability, i.e. on whether or not the Claimant's claims succeeded. If they did, we would then return to remedy matters at the end of the hearing.

Findings

27. There were no significant differences between the parties on the facts relevant to the issues we had to decide, their differences principally relating to the interpretation of events. Our findings, on the balance of probability where there was any dispute, were as follows.

28. The Respondent is a registered charity which provides support to people with disabilities and their carers. It has a particular emphasis on individuals with serious mental illnesses. It is now part of a larger organisation, Adferiad Recovery.

29. The Respondent operates Gellinudd Recovery Centre, a hospital providing support to individuals recovering from mental illness, and the Claimant was employed at that Centre. The Centre can accommodate up to eighteen patients or guests, but typically has an occupancy level of around five.

30. The Claimant had worked at the Centre on an agency basis, but was then recruited as an employee and started work on 30 December 2019. He was initially to be engaged as a staff nurse but appeared ultimately to have worked as a charge nurse. It was not clear whether this happened at the start, or after a short period of working as a staff nurse, but nothing material turned on that. For the purposes of the events relevant to the issues in this case, the Claimant was working as a charge nurse at all times.

31. By approximately April 2020, the Claimant was one of four charge nurses at the Centre. They were line managed by Mrs Wheatley, the Centre Manager.

32. The Claimant was issued with a contract shortly after he commenced employment. Whilst the contract did not contain a specific clause relating to a probation period, the notice period clause did refer to notice being one week during the probationary period, which was stated to be normally six months, but which could be extended if necessary.

33. The events giving rise to the Claimant's claims arose from April 2020 onwards. We noted however that one incident arose in January and February 2020, which ultimately formed part of the Respondent's rationale for dismissing the Claimant. That involved a Deprivation of Liberty Safeguards, or “DOLS” referral, which was made by the Claimant.

34. No direct evidence was put before us about the incident, but it appeared that the Respondent considered that the Claimant had not made the referral to the correct person, and had not followed the referral up, which had then led to a patient's detention being unauthorised for a period of time.

35. No action was taken by the Respondent against the Claimant in the immediate aftermath of the incident, but it was investigated, with the outcome of that investigation, issued in August 2020, being one of the matters which played a part in the dismissal decision. The matter was also subsequently referred to the Nursing and Midwifery Council ("NMC") by the Respondent.

36. In his role, the Claimant supervised other employees, including staff nurses and peer support employees. Another issue which formed part of the Respondent's decision to dismiss the Claimant was what it considered to be his over-familiarity or over-friendliness with staff he supervised. The Claimant denied that that was the case, but we were satisfied, from the evidence of Mrs Wheatley and Ms Murphy, that concerns about that issue had existed, although no action was taken in relation to it until the Claimant's dismissal.

37. As will be well known to all, by March 2020, the Covid-19 pandemic was impacting on all. Prior to this, the Claimant had been carrying out his duties by way of physical attendance at the Centre. In mid-March however, one of the Claimant's children was showing Covid-19 symptoms. The Claimant indicated that his view was that he therefore needed to self-isolate for two weeks. Whilst it was subsequently clarified that the Claimant did not need to self-isolate in the circumstances, he was allowed to work from home.

38. Whilst his initial reason for doing so was the possible infected status of one of his children, the Claimant's rationale for not attending work subsequently became the health of his wife and one of his other children, both of whom were severely asthmatic. Letters were received by the family, noting that they were both in the clinically extremely vulnerable category and should shield for 12 weeks. The Claimant considered that that advice also applied to him as the carer for people who were shielding. Again, it was subsequently clarified that that was not a requirement, but the Claimant was allowed to continue to work from home, undertaking the administrative elements of his role, and did so until May.

39. By April 2020, discussions were taking place within the Respondent's organisation, principally by email, about how to deal with the impact of the pandemic. That included discussions about PPE, which the Claimant subsequently contended involved protected disclosures.

40. On 21 April 2020 the Claimant sent an email to the Centre's senior management, including Mrs Wheatley, which was copied to other senior managers, including the Chief Executive, Mr Thomas, which he contended was a protected disclosure. Attached to this email were various public health posters, and in the email the Claimant said "Please see attached document, correct me if I'm wrong, but from my interpretation do staff may [*sic*] need to be wearing gloves, masks and apron continually? Or on each contact with individual.".

41. Mr Thomas replied, almost immediately, thanking the Claimant and commenting that he did not think any changes were needed at present as the Respondent did not have any suspected or confirmed cases.

42. Later on 21 April 2020, the Claimant sent a further email to the same recipients, which he again contended was a protected disclosure. He noted that he had contacted Public Health Wales, and forwarded a link they had sent to him. He said. "Following conversation they have sent me link that I had previously sent, and have advised that this is the current and most up to date information which highlights the people should be wearing masks, apron and gloves in an inpatient setting with all patients, regardless of Covid-19 status.".

43. Mr Thomas replied, again almost immediately, thanking the Claimant, and pointing out that he thought that there had still been a misunderstanding. He considered that the advice was that PPE was only required when dealing with confirmed or possible Covid-19 cases, and that otherwise the use of PPE should be risk assessed. Mr Thomas then sent a further email, noting that the Respondent had plenty of masks, aprons and gloves, but that masks and gloves could be quite impersonal with the Centre's guests.

44. The Claimant then sent a further email in response, saying, "Sorry to raise discussion, I feel the same as you have mentioned Alun, it's just following discussion with different professionals in different settings they are using face masks as standard hence raising it in this arena for discussion.".

45. Mr Thomas then sent an email, again thanking the Claimant, noting that they were desperately lacking leadership from PHW and Government, and suggesting a Teams call on the following day. The Claimant replied confirming that that would be fine with him.

46. Mr Thomas then sent a direct email to the Claimant alone, noting that the guidelines were not clear, that with one individual guest mask-wearing should continue, but that for anyone else they need to think about the therapeutic relationship. He commented that he would be tempted, if they went down the route of wearing masks, to ask guests to wear them as well.

47. One of the other charge nurses circulated an email noting that the Centre was already implementing measures such as temperature checks and social distancing, and that one guest was shielding due to an underlying health condition, and commenting that wearing masks may cause problems.

48. The Claimant then replied to that email (which he did not contend was one of his protected disclosures), noting that the issue was open to interpretation. He commented that other units were adopting masks as standard practice and he outlined circumstances where social distancing could not be practised effectively. He then said, "I think that it is not unreasonable for guests to be provided with a face mask as I feel we should be doing this.". He attached a further link to updated guidance, and concluded by saying, "Obviously, my concern is ensuring that both guests and staff are kept as safe as possible during this pandemic.".

49. The Teams meeting took place on 22 April 2020, and the Claimant contended that his comments at the meeting about the need to wear face masks amounted to a protected disclosure. Following the meeting, an email was circulated noting that, for several weeks, staff had been changing into their scrubs in an outbuilding, and that temperatures were being taken

before entering the building. It noted that local risk assessments would need to be factored in when dealing with individuals, and that the situation could be reviewed weekly with anyone symptomatic not entering the building. The Respondent's health and safety consultant was asked to review the guidance received and to confirm agreement to the proposed action. The Claimant emailed Mr Thomas and thanked him for his email and the health and safety consultant circulated further guidance regarding PPE.

50. The Claimant also contended that he had made a protected disclosure in the course of a conversation with Mr Thomas and Mrs Wheatley at this time, but that was not supported by any evidence.

51. At very much the same time as the emails about PPE were being exchanged, discussions took place with the Claimant about his involvement in a new service to be operated by the Respondent; an out of hours service to deal with mental health crisis situations to be known as "Sanctuary". Whilst the service was initially intended to be a face-to-face service to which referrals could be made by organisations such as the police or local authorities, due to the pandemic it was put in place as a telephone helpline. It was not designed to provide direct assistance, but to provide a triage service giving directions as to where advice could be sought.

52. Someone was required to oversee and supervise the service, and bearing in mind that the Claimant was not carrying out his role at the Centre, and was indicating that he did not feel comfortable in returning, in the circumstances, he was approached to become involved.

53. Following some initial discussions, the Claimant agreed that he would be the point of contact for the service. A draft referral form was produced which indicated that staff without former mental health qualifications would be involved. The Claimant responded, indicating that he felt that qualified staff should be used.

54. Following that, an indication of the staff available to provide the service, drawn from a range of the Respondent's operations, and the number of shifts they were able to work, was produced. This noted that the Claimant would be available for three shifts a week, that he would be the main point of contact for staff, and that the Claimant and another registered mental nurse would be rostered for each night, the position to be reviewed as the service progressed and the team's confidence grew.

55. The Claimant sent an immediate response, saying that discussion may be needed as the proposed work would take him away from Gellinudd a lot. He then sent a more detailed email, noting that he was still happy to help, but that he thought that a few potential issues need to be considered first. He referenced that he had been undertaking a more administrative role and was additionally on-call for Gellinudd on a 24/7 basis. He commented that, as a professional, he would be held highly accountable for delegation of tasks outside of the staff's skill set and knowledge. He confirmed that he personally felt that some things should be dealt with by someone with the appropriate training and skill set, as well as holding a professional qualification in mental health. He also referred to being very conscious of his own burnout and well-being, especially as he would hold a pivotal role in

both settings.

56. In response, the manager leading the Sanctuary project clarified that the service had been commissioned to run without clinical staffing, and that its very essence was to provide a non-clinical environment of support. With regard to the Claimant's position, the manager noted his comment that he had a significant amount of responsibility within his role at Gellinudd which impacted greatly on his capacity. She noted that Gellinudd was the Claimant's priority and that that should absolutely remain the case. She confirmed therefore that it made sense for the Claimant to focus on Gellinudd, and that other arrangements would be made for the Sanctuary service. Another employee, who was working at home due to her own health concerns, took over the Claimant's planned role.

57. In addition, the manager noted the Claimant's comments around well-being and burnout, and therefore copied the exchange to another manager to pick up and to provide supervision and support.

58. As we have noted, until May the Claimant had worked exclusively from home and had not been undertaking his duties as a charge nurse. Following the Claimant's indication that he did not want to undertake the Sanctuary role, the Respondent re-examined the Claimant's position, bearing in mind that he was a highly paid member of staff with a salary of just under £48,000 per annum, and that the Respondent was paying agency staff to cover his duties at the Centre.

59. A discussion took place between the Claimant and Ms Murphy on 5 May 2020. Ms Murphy explained that the Claimant's role could not be done from home, that there was insufficient administrative work for the Claimant to do at home, and that the Respondent would not want to be paying a salary at that level to someone undertaking administrative work in any event. She indicated that the Respondent wanted the Claimant to return to his normal duties in order to retain his salary.

60. The Claimant commented that there were three other charge nurses working in the Centre, that he therefore did not need to be there, but could instead do all the charge nurse administrative work from home. Ms Murphy responded that, if that was the case, and if the role was not necessary, then that would be something that the Respondent would need to look at in the long term, but that, in the Respondent's view, the Claimant was needed as a charge nurse at Gellinudd.

61. That comment was not well received by the Claimant, and, indeed, he contended that the comment was made in the context of the Claimant being furloughed and was a threat that his role would be reviewed if he opted to be furloughed. However, we did not consider that that had been the case.

62. Ms Murphy was consistent in her evidence that the comment arose as a response to the Claimant's comment that he was not physically needed at the Centre due to the number of charge nurses working, which seemed a plausible explanation. We were also conscious that the Claimant did then opt to be furloughed, and was furloughed for some two to three months, which supported the view that the comment had not been made in the

context suggested by the Claimant.

63. The discussion between the Claimant and Ms Murphy also encompassed the possibility of the Claimant moving into separate accommodation at the same time as returning to work in order to remove any risk to his family. The Claimant was not keen to do that due to the young ages of his children, although some discussions about the option did take place. Those discussions did not get beyond the preliminary stage and we did not consider that they involved any form of request or direction that the Claimant move into separate accommodation.

64. Ultimately, the discussion boiled down to the Claimant having three options; returning to work and thus continuing to receive his full salary, be placed on unpaid leave, or be furloughed. At the time, flexible furlough was not in place, so the Claimant either had to be furloughed completely or not at all. Ms Murphy was keen to resolve the situation, but the Claimant was given time to consider his position. It was agreed that the Claimant would take some annual leave at that time.

65. The Claimant was clearly unhappy about his position, his preference being to work from home and receive his full salary. He did confirm before us however, that he accepted that his charge nurse role was primarily a hands-on role to be undertaken physically at the Centre.

66. Email exchanges then took place between the Claimant and Ms Murphy about the options, which appeared to become increasingly defensive, with the Claimant concluding an email on 19 May 2020 with the comment that there may be a breakdown in a conducive and constructive communication between them as it appeared that there was no possible resolution to his concerns. Ms Murphy therefore proposed that she and the Claimant meet by video, together with the Claimant's trade union representative from the RCN, to reach a decision.

67. The meeting took place on 22 May 2020 by video, with Ms Reynolds, the Claimant's trade union representative being present. The notes of the meeting suggested it was reasonably amicable, and both the Claimant and Ms Reynolds confirmed that the meeting was a cordial one. The Claimant’s circumstances were discussed, and Ms Murphy acknowledged the Claimant's desire to protect his family by not attending work at the Centre. She confirmed however, that there was insufficient administrative work for the Claimant, and that the Respondent, in any event, could not countenance paying a salary at that level for administrative work. The Claimant suggested he undertake supervisions of staff, but Ms Murphy pointed out that that would be difficult if he had not been able to see the staff perform their duties.

68. Ultimately, in view of the Claimant's unwillingness to return, two options remained; the Claimant would go on to unpaid leave or would be furloughed. The Claimant confirmed that he would revert with his decision by Monday, 25 May 2020. The Claimant also queried what would happen regarding his probation period, and he was told that it would need to be extended as the ability to assess him had been limited.

69. The Claimant then emailed Ms Murphy on 26 May 2020 with what appeared to be, and was taken by the Respondent to be, an agreement to go on furlough. That was then arranged from June onwards.

70. Discussion about the furloughed arrangements led to the Claimant enquiring about taking another job whilst furloughed. He was told that that would not be permitted and that the Respondent may need to call him back from furlough at short notice. He responded by saying that the furlough scheme allowed employees to take other work and that they were only not allowed to work for their employer. The Respondent responded by saying that, whilst that was correct, it was its own contractual restrictions it was concerned about. The Claimant was reminded of a clause within his contract which prohibited other work without permission.

71. Further emails were exchanged about the Claimant's proposed other work, with the Claimant being asked to provide more details so that the Respondent could be satisfied that his duties would not conflict with the Respondent. The Claimant responded in something of a piecemeal fashion, but confirmed, by 22 June 2020, that he intended to apply to the NHS Track and Trace scheme. No further communication took place about the role apart from an email from Ms Murphy, on 17 July 2020, asking for an update on the Claimant's application, noting that they would need to review the role before commencement.

72. The Claimant then remained on furlough for the months of June and July 2020. At the end of July or the beginning of August, the investigation into the DOLS issue had reached a conclusion which, as we have noted, led to a referral of the Claimant to the NMC.

73. A further issue had been brought to Mrs Wheatley's attention, arising from what was considered to be the Claimant's over-familiarity with other staff. That had taken place in April or May 2020, when the Claimant had been remotely on-call. An issue regarding a junior employee arose, which the staff nurses referred to another, i.e. not on call, charge nurse. When that was queried by Mrs Wheatley, she was informed that the staff had not felt comfortable raising the issue with the Claimant, due to their perception of his relationship with the individual concerned. That struck something of a chord with Mrs Wheatley as she herself had perceived the Claimant to be over friendly.

74. Mrs Wheatley was also concerned at the way the Claimant had conducted his discussions with Ms Murphy, feeling that he had been disrespectful to her and had disparaged Ms Murphy to her. She felt that that called into question the Claimant's judgement.

75. That led to Mrs Wheatley concluding that the Claimant's employment should not be confirmed. A meeting was arranged, with Ms Murphy rather than Mrs Wheatley as Mrs Wheatley was on leave, which ended up being brought forward due to the Claimant's unavailability at the scheduled time.

76. Prior to the meeting an email had been sent to the Claimant, noting that it was to “discuss next steps”. It did not state that it was to consider the Claimant's future, or even that it was a formal probation review meeting. Ms

Murphy did however have a conversation with Ms Reynolds about the meeting, in which they discussed the DOLS issue and that the Claimant may need to call on his RCN indemnity in relation to that. Ms Reynolds confirmed that she had not understood the discussion to mean that the Claimant's employment was to be ended, and, had she done so, she would have ensured that she was in attendance, or would have rearranged the meeting. Instead, she was content for the Claimant to attend and then report back to her.

77. Overall, we were of the view that it had not been made explicitly clear that the meeting could lead to the termination of the Claimant's employment, although Ms Reynolds was aware that a serious matter had arisen, as otherwise there would not have been a need to refer to the RCN indemnity. Ms Murphy also confirmed before us that, with the benefit of hindsight, she would have given more explicit notice to the Claimant.

78. The video meeting then took place on 6 August 2020, and the Claimant was informed that his employment was being terminated. He was afforded the right of appeal, which he exercised, but his appeal was subsequently not upheld by Mr Thomas.

Conclusions

79. Applying our findings and the legal principles to the issues we had to consider, our conclusions were as follows.

Protected disclosures

80. As we have noted, in order for something to qualify as a protected disclosure it must contain sufficient factual content so as to tend to show the required relevant failure. We noted the Claimant's contentions that emails he sent on 21 April 2020 amounted to protected disclosures, as did the conversation he had with Mrs Wheatley and Mr Thomas on 21 April 2020, and his comments in the meeting on 22 April 2020.

81. In the emails we saw nothing which we felt could be interpreted as the provision of information by the Claimant that health and safety was likely to be endangered. The Claimant passed information on about the use of PPE, and certainly expressed his view that the PPE, particularly face masks, should be worn at all times, a view with which Mr Thomas and others did not completely agree. At no stage however, did the Claimant express any view that what the Respondent proposed to do, whilst not in line with the way he viewed things, would lead to an endangerment of health and safety.

82. The emails did not, in our view, get beyond expressions of an opinion. Even in the Claimant's last substantive email on the point, which he did not actually contend was a protected disclosure, he concluded by saying only, "Obviously, my concern is ensuring that both guests and staff are kept as safe as possible during this pandemic.". He did not go on to say anything further, even that a failure to adopt his suggestions would not achieve that. Also, when the summary of the meeting on 22 April 2020, was circulated, which confirmed that the Respondent was going to continue to apply a risk-based approach to PPE, the Claimant simply thanked Mr Thomas. He gave

no indication of any concern with that approach.

83. We saw no evidence, even within the Claimant's own witness statement, of any issue being raised by the Claimant in conversation with Mrs Wheatley and Mr Thomas, and the summary of the meeting on 22 April 2020 did not indicate that the Claimant had made his views more explicitly clear. Even in the summary of this meeting in the list of issues, the Claimant simply noted that he said that facemasks should be standard to minimise risk. He did not go on to say that not wearing face masks would endanger health and safety. In our view, it was not sufficient for the Claimant to rely on any implicit understanding of what he might have meant, it was incumbent on him to provide sufficient factual content to indicate that health and safety was being endangered, and he did not do so.

84. We formed the same view in relation to what the Claimant contended were his disclosures in relation to the Sanctuary service. The list of issues record the Claimant as raising a number of issues of concern about the service, but the evidence did not support that.

85. The Claimant commented in his email that he felt that, "some things should be dealt with by someone with the appropriate training and skillset, as well as holding a professional qualification in mental health.". Again, that was a view which differed from the Respondent's, its approach being that the service was specifically commissioned as a non-clinical service.

86. Whilst the Claimant's view differed from the Respondent's, he again did not give any express indication that the Respondent's approach was wrong, or would in any way endanger health and safety. Had he said the things asserted in the list of issues he would have provided sufficient factual content to demonstrate that the disclosure had been made, but he did not. Indeed, the impression gained from the email was that the Claimant was reluctant to get involved with the service because of the demands it would make on him, and not because of any concerns about safety risks arising from the way the service was structured.

87. Our conclusion therefore was that the Claimant had not made protected disclosures, and that his claims of detriment on the ground of having a protected disclosures and unfair dismissal by reason of having a protected disclosures failed and fell to be dismissed.

88. For completeness, we went on to consider whether, had we been satisfied that the Claimant had made protected disclosures, we would have considered that he had been treated to his detriment and/or dismissed as a result.

Detriments

89. With regard to the asserted detriments, our conclusions were as follows.

    3.1.1 As a matter of fact, the Claimant was sent an email saying that his services on the Sanctuary project were no longer required. However, the reason for that was the Claimant's indication that it would impact on his work at Gellinudd, and on his workload generally. We did not

see that it was in any sense related to any disclosure.

3.1.2 Again, as a matter of fact, it was suggested that the Claimant needed supervision. However, that was general rather than clinical, and was again driven by the Claimant's indication that he was mindful of his wellbeing and possible burn out. In our view, that was a reasonable stance for the Respondent to take in the circumstances, and was again not in any sense connected to any disclosure.

3.1.3 and 3.1.4 The Claimant was, as a matter of fact, told that his options for remote working, were limited, and the discussions about alternatives were rejected such that the Claimant ended up being on furlough. However, we did not see that the Respondent's conclusion, that it was not prepared to allow the Claimant to do administrative work from home in return for a salary of £48,000, was in any way unreasonable.

Similarly, once the Claimant had indicated his reluctance to work on the Sanctuary project, when the Respondent had another employee, who would otherwise have faced furlough, able to do it, its view that that avenue was closed was not unreasonable. The other options discussed were also not appropriate.

Overall therefore, whilst the Claimant was clearly unhappy about not being able to work from home whilst maintaining his salary, we saw no detriment in the Respondent indicating that that was not feasible, in circumstances where furlough, albeit at a reduced salary, was available. Even if a detriment had arisen, we did not see that it would have arisen in retaliation to any disclosure; it simply arose in response to the Respondent's requirements and the Claimant's circumstances.

3.1.5 As a matter of fact, we did not find that Ms Murphy told the Claimant that if he did not return to work and ended up on furlough his job would be at risk.

3.1.6 Again, as a matter of fact, we did not find that the Claimant was refused permission to work elsewhere on Track and Trace. The Respondent only asked for details in order to consider whether permission would be granted.

90. Overall, therefore, even if we had concluded that disclosures had been made, we would not have considered that the Claimant had been treated to his detriment as a result of them.

Unfair dismissal

91. Turning to the question of whether, had we considered that the Claimant had made protected disclosures, we would have considered that his dismissal had been by reason of them, we did not consider that it would.

92. We noted the reasons advanced by the Respondent, particularly through Mrs Wheatley, for the decision not to retain the Claimant's employment, and considered that they were the reasons for the dismissal and that they were

compelling reasons.

93. Acutely, we did not consider that any disclosures would have motivated the decision, as the disclosures advanced were made at the end of April 2020, and yet the Respondent entered into fairly convoluted discussions with the Claimant over his position over the next month, and then placed the Claimant on furlough for two more months. We considered that, had the Respondent been motivated to retaliate against the Claimant in response to disclosures, it would have moved more swiftly, and would have reduced the amount of managerial time it spent on dealing with the Claimant.

Health and safety

94. The first aspect for us to address here was whether the Claimant had refused to return to work, in circumstances which he reasonably believed involved serious and imminent danger. In that regard, we noted that this required us to objectively examine the Claimant's subjective belief in his individual circumstances.

95. Carrying out that exercise, we were satisfied that the Claimant's belief was reasonable. The pandemic had taken hold, and cases and deaths were rising, first around the World, and then in the UK. The Claimant had two extremely clinically vulnerable individuals at home, who were required to shield, and we felt that it was reasonable for the Claimant to believe that attending work as normal would be a danger to their health. That danger was then clearly serious, and potentially imminent. Indeed, we noted that the Respondent itself did not at any stage question the Claimant's stance in wishing to remain at home to safeguard the health of his family.

96. We then moved to consider whether the reason for the Claimant's dismissal had been the fact that he had refused to return to work, and we did not think that it had. We have already noted our conclusions on the reason for dismissal in relation to the protected disclosure claim, and those conclusions apply equally here.

97. In addition, we noted that the Respondent at no stage questioned the Claimant's position that his priority was to ensure the safety of his family. Its only concern was that it was not in a position to fund the Claimant staying at home to undertake only administrative work when it was paying agency staff to carry out his duties. We did not consider that the Respondent was in any way motivated to dismiss the Claimant or to act against his interests because of his desire not to attend work. We therefore concluded that the Claimant's claim under section 100 ERA failed.

Harassment

98. We looked at the three allegations of unwanted conduct in turn.

    8.1.1 As a matter of fact, we did not consider that the Respondent asked the Claimant to move out of the family home. It was raised as an option, but when the Claimant indicated that it was not something he felt would be feasible it was not raised further. Indeed, when the Claimant himself returned to the matter, in his emails with Ms Murphy

asking for details of what it would involve, she replied, indicating that, as the Claimant had indicated that it was not something he wished to pursue, it would not be appropriate to provide any details.

8.1.2. Similarly, we did not consider, as a matter of fact, that the Respondent threatened the Claimant that he could lose his job if he did not move out of the family home or otherwise return to work.

We have dealt with the family home element above, but we also noted that the only discussion in relation to the long-term future of the Claimant's role arose in response to the Claimant's attempts to paint a picture of the work of the unit being capable of being done by the other three charge nurses. It did not, in our view, go as far as a threat that the Claimant could lose his job.

8.1.3 Again, as a matter of fact, we did not consider that the Respondent required the Claimant to return to an unsafe work environment that would place his family at risk.

As we have noted, the Respondent wished the Claimant to return to work, but did not, at any stage, put any pressure on him to return, other than to tell him that it could not continue to pay his salary if he did not. In our view, that was a reasonable position for the Respondent to take.

99. Our conclusion therefore, was that the Claimant's assertions of harassment were not made out. For completeness, even if we had, whilst we would have concluded that they would have amounted to unwanted conduct, we would not have concluded that they related to the disability of the Claimant's wife and child, other than in the most basic "but for" way.

100. Our overall conclusion therefore was that all the Claimant's claims failed and fell to be dismissed

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Employment Judge S Jenkins

Date: 26 April 2022

JUDGMENT SENT TO THE PARTIES ON 27 April 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

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