



EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant
MS B SABU**

AND

**Respondent
ELIZABETH FINN HOMES LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 21ST / 22ND / 23RD MARCH 2022

**EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)**

**MEMBERS: MS S MAIDMENT
 MS V BLAKE**

APPEARANCES:-

**FOR THE CLAIMANT:-
INTERPRETER**

**IN PERSON
MR J ABRAHAM**

FOR THE RESPONDENT:- MR T WOOD (COUNSEL)

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim that she suffered detriment because of making a public interest disclosure contrary to s47B Employment Rights Act 1996 is not well founded and is dismissed.
2. The claimant's claim that she was automatically unfairly dismissed pursuant to s103A Employment Right Act is not well founded and is dismissed.

The Judgment set out above has already been promulgated and is repeated for completeness sake. The claimant has requested written reasons for the decision which are set out below.

Reasons

1. By a unanimous Judgment dated 23rd March 2022 the Tribunal dismissed the claimant's claims having given oral reasons at the hearing. The claimant has now sought written reasons for the decision.
2. By this claim the claimant brings a claim of public interest disclosure (whistleblowing) detriment, and automatic unfair dismissal pursuant to s103A Employment Rights Act 1996.
3. The respondent operates nine care homes, including The Lodge Care Home at which the claimant was employed. She began as an agency worker on 10th February 2020, and became an employed Care Assistant on 23rd March 2020. She was dismissed on 5th May 2020. The respondent contends that she was dismissed because of unsatisfactory performance and conduct in her probationary period, the claimant that the true reason was that she had made public interest disclosures.
4. The events which specifically concern these claims began on 14th April 2020. The claimant was working on the night shift and was asked to assist with a resident who occupied room 10. She states that she observed incorrect handling procedures being used by the other carer, in that she was trying to lift the resident from under the armpits which was an unacceptable form of moving and handling.
5. There is no dispute that the claimant had a conversation on 15th April 2020 with the Clinical Care Manager Nicola Grace. There is a dispute as to the form of conversation, the claimant asserting that it was on the telephone, and Ms Grace that it was face to face in her office. As this conversation is the basis of the assertion of the first protected disclosure identifying as precisely as possible what was said is clearly important. The claimant does not set out any specific account in her witness statement but Ms Grace sets out a detailed account of what was said.
6. She states in summary that the claimant informed her that the resident had asked her to pull her up to a standing position which the claimant had refused to do as it was not a proper manual handling technique. The claimant suggested that the resident needed to be hoisted and that her care plan was not working effectively. Finally she stated that the respondent's staff had not been trained and were not using the correct manual handling techniques.
7. One of the disputes of fact is that the claimant contends that she did not tell Ms Grace that the resident needed a hoist and that the care plan was flawed. This is significant, she asserts, in that the subsequent assessment was carried out on the wrong basis. What was flawed was not the care plan itself but the manual handling techniques of the carers. This is a dispute in respect of which the claimant has not been entirely consistent. In her ET1 she describes this incident "*they were lifting in through her armpit, rather than encouragement or use stand aid or hoist.*"; and in

her subsequent further and better particulars she states that *“When I asked about the assessment they told me that the family and resident refused to use the hoist or stand. That was not acceptable..”* In the circumstances the contention that the claimant told Ms Grace that the resident needed a hoist is consistent with her own pleaded case and not her evidence. On the balance of probabilities we accept Ms Grace’s evidence and that her account of the meeting is accurate.

8. Following the meeting Ms Grace informed the General Manager Ms Skinner of the claimant’s concerns and she arranged for an assessment of the resident’s care plan. This took place on 17th April 2020 and concluded that the existing care plan was adequate and that no changes were needed.
9. One of the complaints of detriment is that between then and her dismissal she was prevented from working with the resident in room 10. However the “Progress Notes” of the resident show the claimant herself making entries indicating that she had in fact been attending the resident regularly after the 14th April 2020.
10. On 4th May the claimant attended a pre-arranged probationary meeting with Ms Grace, whose evidence is that it was arranged verbally about a week earlier. Prior to the meeting Ms Skinner had received a complaint from a resident’s daughter about the claimant; and subsequently received complaints from three other residents. Those complaints all had the same underlying themes, making complaints about the claimant’s attitude, asserting that she was abrupt rude and unkind, and one alleged that she had “almost slapped her hand away.” Ms Skinner informed Ms Grace of these complaints and asked Ms Grace to raise them with the claimant in the probationary meeting.
11. On the same morning the claimant alleges that she was called to room 4 to assist lifting a resident which the claimant refused to do as it was against the law to lift the resident. She alleges that she attempted to raise this in the meeting but that Ms Grace refused to listen to her.
12. The contents of the meeting on 4th May are in dispute. The claimant stated bluntly that Ms Grace’s account was untrue, and that the allegations about her behaviour are false. In summary Ms Grace’s account is that she told the claimant that there was a perception amongst her colleagues that she was difficult to give instruction to during the working day, and that they felt she could be rude. She raised the complaints from residents at which the claimant became very defensive. Ms Grace expressed the view that the claimant needed to be more self-aware as to how she came across to others. She alleges that the claimant became very angry and began shouting at her. Following further discussion the claimant became very upset and stated that she no longer wanted the probationary review to be conducted by Ms Grace but wanted Ms Skinner to conduct it. Ms Grace states that the claimant became aggressive and that she genuinely feared that the claimant might hit her. She asked the claimant to leave at which point the claimant called her a “horrible English White girl” and subsequently left.

13. She states that she immediately informed Ms Skinner of what had occurred and she was advised to make a written note of it which she did. The claimant also contacted Ms Skinner and a meeting was arranged. Ms Skinner's evidence is that it took place the next day 5th May 2020, the claimant states that it took place at 1.00pm on the 4th May 2020.
14. Ms Skinner's evidence is that the claimant objected to the presence of Ms Grace, whom she had asked to attend the meeting. She states that the claimant was angry and agitated and alleged that both she and Ms Grace were terrible managers. She stated that she no longer wished to work for the respondent. Ms Skinner states that there was no reasoning with the claimant and that she talked over both her and Ms Grace and did not appear to be listening to anything they said. The claimant re-stated that she did not wish to work for the respondent anymore and left the meeting.
15. Ms Skinner took advice from HR and she was advised, that as the claimant had not explicitly resigned to dismiss her immediately which she did, and as was confirmed by a letter of 5th May 2020.

Conclusions

Factual Conclusions

16. We have concluded that where there is a dispute of fact we prefer the respondent's evidence to that of the claimant. As set out at paragraph 9 above the contemporaneous documentary evidence from the claimant herself is completely at variance with the claimant's account of having been excluded from dealing with the resident of room 10, which is the basis of both detriment allegations and therefore of considerable significance. This fundamentally calls into question the accuracy and reliability of her evidence. Moreover, having heard from both Ms Grace and Ms Skinner we are entirely satisfied that they have given truthful and reliable evidence as to the events with which we are concerned.

Public Interest Disclosure

17. The first question is whether there was a qualifying disclosure within the meaning of S.43B ERA. This requires a) a disclosure of information that b) in the reasonable belief of the worker making it is c) in the public interest and d) tends to show that one or more of the six relevant failures has occurred or is likely to occur. The relevant failure relied on in relation to each disclosure in this case is that the health or safety of an individual has been, is being or is likely to be endangered (s43B (1)(e) ERA 1996).

First Disclosure

18. The first disclosure was allegedly made by the claimant to Ms Grace on 15th April 2020. The respondent submits that in order to assess this the tribunal will need to make a finding as to what specifically the claimant said to Ms Grace, However the claimant's witness statement contains no account of what she said and she has not given any evidence as to this. As a result the claim must fall at the first hurdle.
19. Alternatively it submits that even if the claimant can rely on the narrative account in the Further and Better Particulars of refusing to lift and move the resident, of encouraging her to try to stand up with a frame; of her colleagues refusing to assist and lifting her by her armpits which was not the correct procedure; that there is only one allegation capable of constituting a disclosure of information disclosing a risk to the health and safety of the resident which was that of using incorrect manual handling techniques.
20. However, the evidence of Ms Grace is that the allegations put to her by the claimant were that the resident had asked the claimant to lift her which the claimant had refused to do so; that the care plan wasn't working effectively and that the resident needed a hoist; and that the staff had not been trained correctly. Moreover the entry in the Progress Notes, which is the only written record, simply records the claimant's refusal to lift the resident at the residents request, which corresponds precisely with Ms Grace's account of the matters disclosed by the claimant. The evidence the tribunal has comes only from Ms Grace, and on the evidence the only matter capable of constituting a disclosure of information tending to show a risk to the health and safety of the resident being lifted by her armpits on 14th April 2020. was not made to her. It follows that there is in fact no evidence that the disclosure relied on had ever been made, and the respondent submits that any allegation of detriment based on this disclosure is therefore, bound to fail.
21. The respondent also submits that even if the tribunal is able to identify the disclosure of information that the claimant had made; and conclude that it falls within s43(B)(1(e)); there is no evidence that the claimant reasonably believed that it was in the public interest. Firstly, and as set out above the entry in the Progress Notes simply records the claimant's refusal to lift the resident at the residents request; and there is no other written record, such as an incident report, that would indicate that the resident's safety was ever at risk.
22. As set out above we accept Ms Grace's account of the meeting; and given also that there is no other written account which sets out the specific allegation that is said to be the disclosure we accept the basic proposition that there is no evidence before us which would allow us to conclude that the specific disclosure relied on was ever made.

Disclosure 2

23. The second disclosure relied on relates to 4th May 2020. This allegation is that the claimant was called to assist in lifting a resident which she refused to do.
24. There are two central difficulties in relation to this disclosure. The first is that it discloses that the residents health and safety was not at risk, in fact the opposite, in that the claimant had refused to do something which would have placed her at risk. Secondly the claimant's evidence is that Ms Grace would not let her speak about this. It follows that on the claimant's own evidence this was not in fact disclosed.
25. It follows that we have not been able to identify a protected disclosure made by the claimant., and that the claimant's claims are bound to fail for that reason alone. However we bear in mind that English is not the claimant's first language and that identifying with precision exactly what was said is a difficult task and have gone on to consider the position in relation to the other aspects of the claims in any event, and in case we are wrong as to those conclusions.

Detriment

26. The first alleged detriment is that the claimant was excluded from assisting the resident in room 10 after the first disclosure. This is dealt with at paragraph 9 above. It is directly contradicted by the documentary evidence and we do not accept that it is factually correct. It follows that even had we accepted that the first disclosure was a protected disclosure that his allegation would have been dismissed on the facts in any event.
27. The second is related to the first in that the claimant "*Only learnt of this through other members of staff. None of the managers or Nurse In Charge told me and they simply showed hand gestures when allocating times.*" It follows equally from our findings above that if no such decision had ever been made as the documentary evidence demonstrates, that this allegation is also not well founded on the facts. As set out above we accept the evidence of the respondent that between 15th April and 4th May no decision had in fact been made that the claimant should not attend the resident in room 10 so that this allegation would also fail factually.

Dismissal

28. The central issue in relation to dismissal is the causal link between any disclosure and the dismissal. The respondent's evidence is that even if the claimant's concerns as expressed on 15th April 2020 did amount to a protected disclosure they were acted on in that an assessment of the care plan was undertaken within 48 hours. Self-evidently this was taken seriously and there was no consequence for the claimant having raised it. Moreover there is a wealth of evidence showing the reason for the dismissal. The

respondent had received four complaints from residents, all in very similar terms, and one of which bordered on physical abuse. The claimant's behaviour as disclosed by Ms Grace to Ms Skinner and as observed by Ms Skinner herself was unprofessional and unacceptable; and the claimant had herself stated that she no longer wished to be employed by the respondent. Having taken advice as to those matters the respondent dismissed her. If that evidence is accepted, which we do, the reason or principal reason for dismissal was her conduct, not any disclosure; and it follows that even had we accepted that there had been a protected disclosure that this claim would have been dismissed in any event.

29. It follows that all the claimant's claims must be dismissed.

EMPLOYMENT JUDGE Cadney
Dated: 6th May 2022

**Judgment Reasons sent to the
parties on:
27 May 2022 By Mr J McCormick**