EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107643/2021 (V)

Held on 23 and 24 February and 31 March 2022

Employment Judge J M Hendry
Members N M Richardson
D Massie

Mr Ikemefuna G M Onyia	**Claimant** **In Person**
Maryfield West Care Home	**Respondent** **Represented by** **Mr J Arnold,** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that:

1. **The claim for constructive unfair dismissal not being well founded is dismissed;**
2. **The claim for automatically unfair dismissal under Section 103A of the Employment Rights Act 1996 not being well founded is dismissed;**
3. **The claim for detriment under Section 47B of the Employment Rights Act 1996 not being well founded is dismissed; and**
4. **The claim for arrears of wages not being well founded is dismissed.**

REASONS

1. The claimant in his ET1 contended that he had been unfairly (constructively) dismissed by the respondent and that he had also suffered detriments as a consequence of making two protected disclosures to them by e-mail dated 7 August 2020.

2. The respondent company denied that they had committed a material breach of contract entitling the claimant to resign and argued that if there was a dismissal it was a fair one. They denied the claimant had suffered any detriment as a consequence of his alleged whistleblowing and argued that in any event the information disclosed in the email did not qualify as protected disclosures. The respondent also suggested that the detriment arising from the protected disclosures were made out of time as having been notified on 18 December 2020, an ACAS certificate issued on 20 January 2021 and proceedings ultimately raised on 14 February 2021.

Issues

3. The Tribunal had the benefit of a detailed list of issues prepared by parties. The Tribunal will not rehearse the list of issues here but make reference to issues when dealing with the substance of the case.

Evidence

4. The Tribunal heard evidence from the claimant on his own behalf and from a Mr Mike Culley, the respondent's former Care Home Manager. Witness statements were prepared, lodged and spoken to by both witnesses. The Tribunal also had the benefit of an agreed chronology of events which it has reflected in the findings of fact.

Claimant's Application

5. On the 16 February 2022 the claimant asked the Tribunal to make an order requiring the respondent's solicitors to provide photographs of the third floor hallway of the Nursing Home. The area was referred to by the claimant in his claim. The respondent's solicitors had declined a voluntary request on the grounds that they were not relevant. The hearing was due to start on the 23 February. On receipt of the application the Tribunal wrote explaining that the claimant could give evidence about the area. The Judge indicated that he was also doubtful about the relevance of the photographs and that if the layout was as asserted it would be unlikely to be gainsaid. He invited the claimant to raise the matter at the outset of the hearing.

6. The claimant duly raised the matter at the start of the hearing. There was a discussion and it appeared that the respondent's did not dispute that the area was glazed. The application was refused. In the event there was no contentious issue raised about the layout or configuration of the area.

Findings of fact

The Tribunal found the following facts either established or agreed:

7. The claimant is 57 years of age. He has gained considerable experience over many years working in hospitals and health care generally. He studied for and obtained a Law Degree and a Master's Degree. To support himself he worked as a care assistant with the respondent.

8. The claimant was not a permanent member of staff at the Maryfield West Care Home. He was on a "bank" of staff. Nevertheless, he worked regularly with the respondent at their care home in Aberdeen.

9. The claimant was provided with a contract of employment around 26 October 2018 (JBp.101). The contract makes it clear that the claimant was employed

on a zero hours basis. He had no fixed hours or guarantee of work. The claimant was free to work elsewhere.

10. The contract of employment provided for a disciplinary procedure which was not contractual.

11. The staff rota was made up as far in advance as was possible. If all permanent staff were working there was no need for assistance from bank staff such as the claimant. The rota was made up anywhere from two weeks to six weeks in advance. The claimant would either be asked to fill any gaps in the rota or he would contact the respondent's staff and ascertain where any gaps existed and offer his services to fill them. The claimant obtained regular work from the respondent covering staff absences such as annual leave and sickness.

12. An outbreak of Covid occurred in the home in late October 2020. It continued until January 2021. During this period no zero hour employees were offered any work. The respondent relied on its full-time staff. The outbreak was a serious one which led to the deaths of a large percentage of the respondent's residents and occupied the Manager Mr Culley's time.

Shift availability during July 2020

13. Due to the pandemic in early to mid-2020 most of the permanent staff deferred their annual leave because of restrictions on travel. The consequence of this was that the permanent staff began accruing leave. In June and July 2020 there were few shifts available for the zero hour employees such as the claimant as no leave was being taken. The claimant 's payslips reflected this (in June 2020 he earned £229.29 (JBp.136) and in July 2020 he earned £229.30 (JBp.37).

14. The claimant found it difficult to support himself on the hours being offered during these periods. He raised the issue of not having many shifts to work

with the Care Home Manager, Mr Culley in early July 2020. The claimant wanted to know if there was any Government support available to him. Mr Culley indicated that he would look into it on his behalf which he did at a later point (JBp.106).

Alleged protected disclosures

15. The Maryfield West Care Home is an old Victorian building that has been modified internally to allow it to operate as a care home. There is a top or third floor. The hallway/landing there is enclosed in glass panelling. Residents' rooms lead off the landing. They have windows.

16. On one occasion in 2020 when the claimant was at work he was covering the top floor and found the landing area stuffy and airless. He was wearing a mask. He was concerned about what he saw as a lack of oxygen and ventilation.

17. The claimant had also become concerned at the use of ''walkie talkies'' issued to staff in the home to keep in contact between floors. He noted that when someone made contact with him the ''walkie talkie'' would spring to life without warning and loudly broadcast the voice of the person contacting him. The claimant believed that their use might upset residents many of whom have dementia. The machines had volume controls.

18. On 7 August 2020 the claimant sent an e-mail (JBp.107). The e-mail was sent to "maryfieldwest.Administrative@Brighterkind.com". He wrote raising these concerns:

"*The top floor is relevant to the issues of health and safety concerns. This is because of its unique physical structure as designed, I believe to achieve the same concerns, albeit for a different purpose. It is noted that the only place anyone can stay without intruding on the privacy of the residents is in the hallway. The hallway as you know is an enclosure, boxed with sheets of glasses. It has no windows and thus no ventilation. The situation is*

aggravated by the necessity to prevent the spread of Coronavirus – compulsory wearing of a mask.
On the 1st August 2020 as stated earlier I stayed on the top floor and experienced a severe headache. I felt ruffled. It was intensely warm. There was an inadequate circulation of fresh air…… Based on these concerns so stated I urge you to consider the facts and opinions expressed here by me."

19. The claimant also wrote about the use of ''Walkie Talkies'' at nights:

"*I was on a nightshift recently and one of the female Care Assistants asked Mihail to explain why he appears to be the only nurse interested and directing the night staff to use the walkie talkie at nights. The concern here is focused on the wellbeing of the residents who may be affected one way or the other by the radio suddenly coming into life.*"

20. The administrator at the time Ms Kelly Summer worked at the reception. Mr Culley the Manager worked from a small office next to the reception area. Mr Culley often had his door open and could hear what was happening in the reception area.

21. Mr Culley was passed the email but did not act on it.

22. The claimant was offered work in August and September as reflected by his payslips in August (£1,262.57) and September (£1,069.95). The reason for this was that permanent staff were being encouraged to use their deferred annual leave and accordingly Mr Culley was able to offer zero hours employees such as the claimant more work when staff took leave.

Incident nightshift 13/14 September

23. The claimant was rota'd to work nightshift on 13/14 September. His duties began at 8pm and he was due to finish at 8am. In the course of the shift he was required to supervise residents on the top (third) floor. As part of his duties he had to make hourly visual observations of residents. The respondent later discovered that the occupant of room 6 on the top floor had died at some point during the night of the 14 September. This was not discovered until the day shift arrived about 8am on the 14 September and began their duties.

24. The frequency of observations is determined by the nurse in charge of the care home at any particular time. The claimant was working on the third floor alone from midnight. Part of a care assistant's duties when carrying out observations is to complete a chart headed "Visual Observations and Use of Bedrail Check Chart" which gives details of the patient, the room, the date and the frequency of the observations. It states that it is to be used "in instances where increased visual observations are required for clinical/psychological or safety reasons''.

25. Mr Culley was concerned around the circumstances in which the resident had been found some time after he had died. He obtained a copy of the relevant chart that was in use (JB110-111). It was double-sided. The last entry on the first page (13 September 2020) was at 21:46 hours and it was noted – "*left – sleeping.*" It was initialled HA/IK. Mr Culley understood that the HA was the Claimant 's colleague "Harrison" another care assistant with whom he was working that evening.

26. The second page covered the 14 September. There was only one entry "*00"* which was initialled IK. Mr Culley took that to be the claimant. There were no other observations recorded. The resident was due to be checked every hour and the check recorded. The minimum observation period was four hourly if no shorter period was specified. Mr Culley took the circumstances seriously. He was required to report the death of the patient to the patient's relatives, the Regulator and to the Police.

Meeting 16 September 2020

27. Mr Culley arranged to meet the claimant on 16 September 2020 to discuss the events of 13/14 September. Notes were taken of the meeting prepared by Ms Kerry Summers (JBp.112-116). The notes were not verbatim but were an accurate reflection of the discussion.

28. Mr Culley wanted to understand why no one had picked up that the resident had died during the nightshift. He was concerned that the resident had not been checked hourly by the claimant who was responsible for this and no records made. The claimant said that he had started a new observation chart at midnight because he could not find the resident's observation chart in room 6. His position was that a colleague ''Harrison'' had told him that the observations had been discontinued. He accepted that he had not checked this with the nurse in charge nor did he query why they had been discontinued. It would have been unusual to discontinue the observations unless there had been a change in circumstances. In any event the minimum observations of 4 hours had not been complied with either. Mr Culley was not satisfied with the claimant 's explanation. He indicated that he wanted to investigate the matter further and that meantime he was taking the claimant off the rota. The notes record (JBp.115):

"*Once I am satisfied with what is happening either you'll be allowed back or we will terminate your contract. I'll be following up some of these matters with the other people you've spoken about.*"

The claimant responded:

"*I'm not worried about the other people, if I'm being told to leave then what's the point.*" At the close of the meeting the claimant was recorded as saying: "*Before I go as I may not have the opportunity, I want to say I'm very grateful for the opportunity you gave me. I wasn't wanting it to be this way…..*"

29. Mr Culley was concerned that there might be enquiries as to the circumstances around the death of the resident and that the care home could be criticised for the failure to make observations and properly record them. The claimant had admitted that he had not checked room 6 after midnight which Mr Culley found hard to understand given that the claimant was on the top floor and it was a matter of a few paces to enter each room.

30. Other more matters were discussed which was the claimant not wearing the correct PPE on shift (JBp.114), wearing his uniform outside the home (JBp.114) and issues with his relationship with other staff members (JBp.115).

Events subsequent to the 16 September meeting

31. On 25 September 2020 Mr Culley contacted the claimant by telephone in relation to the Care Worker Fund and whether he might be eligible for financial relief (JBp.117). He indicated that he would assist him with any application.

32. On 9 November 2020 the claimant wrote to Mr Culley and asked for an update on his investigation (JBp.118). Mr Culley had been on annual leave during October 2020 and had been self-isolating at home for a period. The home was also in the early stages of a serious COVID-19 outbreak. That outbreak was treated as an emergency and the energy of staff put into containment measures. Mr Culley found the period mentally and emotionally draining.

33. On 16 November 2020 the claimant wrote to Mr Culley (JBp.119). He wrote:

"*Please note, and for the avoidance of doubts, I intend to explore all my rights under the laws including employment law, contract or both if you fail to respond within 3 days of receipt of this letter, or by close of business on Thursday 19 November 2020.*"

34. Mr Culley responded on 16 November (JBp.120):

"*Thank you for your letter and also the request for follow up information. I have been isolating due to COVID and I have just returned back to the home today. This has led to a delay in corresponding to you and I apologise if this has caused you any inconvenience. I'll be in touch to set up a teams meeting to convey my findings shortly.*

Kind Regards
Mike Culley."

Meeting 20 November 2020

35. A virtual meeting was held with the claimant on 20 November 2020 with Ms Summers taking notes (JBp.124-126). The notes were not verbatim but correctly reflected the discussion. Mr Culley apologised for not getting back to the claimant earlier. He explained that his attention was elsewhere during late October because of the COVID outbreak. He explained that out of 25 residents 11 had passed away. He had been busy as care home manager counselling key staff members and having regular contact with relatives. While he made it clear to the claimant that the investigation was at an informal stage he offered the claimant a choice as to how to deal with the matter namely whether he wanted a formal investigation or if the matter could be dealt with informally.

36. Mr Culley's initial view was that he did not think the claimant had fulfilled his role that night whilst on shift in relation to observations. Mr Culley wanted the claimant to learn from the incident and move on. (He made no reference to his e-mail on 7 August nor was it raised by the claimant).

37. Mr Culley authorised payment of wages for the Claimant 's attendance at the two meetings on 16 and 20 November.

38. On 14 December 2020 the claimant sent an e-mail to Mr Culley asking whether or not there was going to be a more formal process or whether he was going to "*close the book*" (JBp.130). Mr Culley replied the same day that he was not pursuing the matter any further. The claimant raised a grievance dated 17 December 2020. It was received by the respondent on 18 December 2020 about fifteen minutes before the claimant resigned by e-mail. Neither the grievance nor the resignation made any reference to the concerns raised in the 7 August 2020 e-mail.

39. Following his resignation the claimant did not apply for other work but received benefits. He also applied for and obtained a fully funded place at Aberdeen University starting in Autumn 2021 (JBp.189).

40. The claimant wrote:

"*Mike Culley, I write to raise a formal grievance on the following grounds:*

1. ***Failure or refusal to communicate outcome of 16 September 2020 investigation into events of 14 September 2020.***

   I refer to the statement verifying your clear intention to investigate the incident of the above date and quote 'I am not looking at inference, I am looking at facts, and I need to investigate this matter. I have to be clear with you, that, until I know what happened here, I am taking you off the rota. Once I am satisfied with what is happening, either you will be allowed back or we will terminate your contract.

2. ***Unpaid Salaries – October, November, December 2020***

   Failed or refused to pay my salaries whilst being placed on suspension.

3. ***Conscious Favouritism –*** *Given the events of 14 September 2020, I was singled out, taken off the rota and suspended without pay. There was three of us working on that fateful nightshift, but no one besides me was suspended – Mihail who was in charge of the shift was not taken off the rota nor was he suspended despite handing over to the morning staff that the former occupant of room 6 was alive when, as a matter of fact, he was dead.*

   As you may be aware, it is a general accepted practice when conducting internal investigations, to place persons directly involved in the matter on paid leave or on suspension. The nurse Mihail was not taken off the rota nor suspended. He was not threatened with fitness to practice referral/hearing by the NMC, but I was so threatened with an SSC referral.

4. ***Disrespect for due process***

   Thank you for reading the context of this letter."

41. The claimant 's resignation which followed shortly thereafter stated:

"*It has become practically impossible to continue working for Maryfield West Care Home given your conduct in the past few weeks.*

Because of your behaviour, the employment relationship has broken down irretrievably, and I am forced to resign, effective immediately."

Witnesses

42. We found Mr Culley to be generally a credible and reliable witness in relation to these events. He gave evidence clearly and in a straightforward manner. Our one concern related to the receipt by him of the claimant's email. On balance we accepted that he probably received it but had forgotten about it because of his busy duties and the Covid emergency from October onwards. We concluded that the matter made no difference to our overall assessment of his evidence nor for the reasons we give later any impact on our decision.

43. The claimant's evidence was in part difficult to accept. He had a genuine grievance in that his work was very important to him and following the meeting with Mr Culley he was no longer rota'd to work. We had difficulty accepting his evidence as being credible in relation to a number of matters particularly around the events of the 13/14 September. The main problem for us was that there was no satisfactory explanation given for the lack of observations or use of the form started that evening and partially completed.

Submissions

44. The claimant asked us to look at the facts and the way events had developed. He started with the shift on the 16 September. The respondent's he said had no corroboration of any misconduct and had not agreed the terms of minutes with him. Mr Culley was not interested in finding out the truth. He was an evasive witness. He had for example denied the claimant was suspended. He should not be believed when he denies knowing about the email. Statements should have ben taken and he should have been entitled to see them and call witnesses. Where are the statements or notes of the

conversations with the witnesses? The company did not even follow the process set down in the disciplinary policy. He had insisted on a formal process and this was not done.

45. In the claimant's view the facts speak for themselves. Mr Culley acted on the email and denied the claimant work. Mr Culley denied receiving the email but no evidence was obtained from Ms Summers who would have been likely to have known if he had seen it. None of the other witnesses who had been on duty on the night in question had been called.

46. In response, Counsel first of all reminded the Tribunal about the time bar issue. Day A was he said the 18 December 2020. Day B was 20 January 2021. Proceedings were issued on 14 February 2021. Any act or omission occurring before 19 September 2020 was therefore *prima facie* outside of the primary time-limit. His position was that there was on the evidence no continuing act that could be identified.

47. In addition, the claimant's evidence, he suggested, lacked credibility in a number of places starting with his inability to provide a coherent explanation about the observations charts, maintain his position that his observation at midnight on 14 September had been written on a fresh chart, rather than the back of the chart of 13 September 2020, despite agreeing the contemporaneous notes of the meeting of 16 September 2020 were accurate. These notes record that the observations chart for 14 September were on the back of the observations chart for 13 September 2020. Counsel gave other examples including observing that he became evasive when asked by both Counsel and the Employment Judge about why he did not check on the resident in Room 6 informally, if it was easy to do. He was unable to explain why he did not chase up the concerns he had raised in his e-mail of 7 August 2020 at any point thereafter if he had thought that they were important, and was unable to explain to the Employment Judge why he did not mention the protected disclosure in his grievance or resignation letter.

48. Turning to the claim for constructive dismissal the claimant's position was that he had resigned because of the conduct of Mr Culley which made it impossible for him to work with him. His pleaded case was that it was the failure to pay the claimant and/or failure to comply with the 'standard best practices in employment disciplinary procedures' that caused his to resign.

49. Counsel noted that the contract was a 'zero hours' contract and the claimant had no entitlement to be paid when not working and accordingly there could be no breach of an express term. There was no breach of trust and confidence as Mr Culley was acting with reasonable and proper cause at all times including suspending him. If the claimant resigned because he was not getting paid, then that was simply a resignation and nothing more. Counsel then addressed the allegedly flawed investigation and the upshot of that which was that no action was taken leading the claimant's dissatisfaction that no formal process had been instituted.

50. If the claimant was dismissed, then Counsel submitted that he was dismissed for the statutorily-fair reason of conduct. In particular, the decision- maker, Mr. Culley, had a genuine belief in the claimant's misconduct. The dismissal was he said fair in terms of s.98(4). Counsel then dealt with the issue of Protected Disclosure firstly referring the Tribunal to the statutory basis and then to the facts relied on. It was not accepted that claimant had disclosed information to Mike Culley. Even if he had received the email in question:

- The claimant failed to address in his witness statement why his belief that his headache was being caused by a stuffy hallway was in the public interest. The burden was upon him to do so, and the disclosure must therefore fail on this basis alone.

- Even if the claimant had a belief that the disclosure of information

was made in the public interest, such a belief is not reasonable.

- It was clear that there was ventilation in the hallway, he would have passed out or suffocated. He exaggerated his evidence asserting in his witness statement he was "*deprived of oxygen*" and there were "*risks of threat to life*". The (alleged) lack of ventilation was a private interest matter between employee and employer. No one else had complained.

51. The claimant, he submitted, had failed to address in his witness statement his belief that disclosing information about the use of walkie-talkies was in the public interest. The burden was upon him to do so, and the second Disclosure must fail on this basis alone. His belief was in any event not reasonable. He accepted that there was a volume control. He was unable to demonstrate any wrongdoing. It was interesting to note that he never raised the matter again. His belief was not reasonable. There was no valid Protected Disclosures. The claimant then failed to mention his alleged protected disclosures at the meetings on the 16 September, 20 November or in his grievance or resignation.

52. It was, he said, denied that the claimant's alleged protected disclosures were responsible for the treatment of the claimant by the respondent. The principal reason for the treatment of the claimant from 16 September 2020 onwards was the claimant's admitted failures on the night of 13/14 September 2020. This was supported by a contemporaneous audit trail, the actions of the respondent thereafter and the testimony of Mr. Culley. Even if dismissed then his own actions contributed 100% to that dismissal. Finally, there was no legal or factual basis set out for the claim for unlawful deductions.

Discussion and Decision

53. The claimant has claims both for ‘‘ordinary’’ unfair dismissal and for automatically unfair dismissal under Section 103A of the ERA. We will set out the legal framework for both starting with the latter claim and then turn to more general observations the evidence.

54. A “qualifying disclosure” (sometimes called a ‘‘whistleblowing disclosure’’) is defined by section 43B Employment Rights Act 1996 (“ERA 1996”), which provides:

“***43B.***
Disclosures qualifying for protection. (1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following— (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, … (d) that the health or safety of any individual has been, is being or is likely to be endangered, … or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.”

55. There must be a disclosure of information. It may be made as a part of making an allegation (***Kilraine v London Borough of Wandsworth [2018] ICR 1850)*** A worker making the disclosure must have a reasonable belief that the information must tend to show one of the matters set out at paras. 43B(1) (a) to (f) ERA 1996. The disclosure must be made, in the reasonable belief of the worker at the time, in the public interest.

56. A qualifying disclosure becomes a protected disclosure because of whom it is made to. Section 43C ERA 1996 is in these terms:

“43C.— Disclosure to employer or other responsible person. (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure — (a) to his employer, or (b) where the

worker reasonably believes that the relevant failure relates solely or mainly to— (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person."

Section 43H relates to exceptionally serious failures.

''Disclosure of exceptionally serious failure.

(1) A qualifying disclosure is made in accordance with this section if—

(a). . . . . .

(b) the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made''

57. Employees such as the claimant are protected against being subject to detriment done on the ground that they made protected disclosures by section 47B ERA 1996:

"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. … ''

57. Employees are protected against being dismissed for making protected disclosures by section 103A ERA 1996:

"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."

Constructive dismissal

58. The starting point is section 95(1)(c) Employment Rights Act 1996. That section provides that there is a dismissal when:

> ***"The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."***

59. At the point of resignation there must have been a fundamental or repudiatory breach of contract on the part of the employer. The employee must not have affirmed the contract thereafter, and the breach must have materially influenced the decision to resign.

60. All employment contracts contain certain well-established implied terms. In many cases, the employee relies on the so-called implied duty of trust and confidence. In the well-known formulation (***Woods v WM Car Services Peterborough Limited (1981) ICR 666 and Malik v BCCI SA (in liquidation) (1997) ICR 606***), this is the term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If there is a breach, then that will necessarily be a fundamental breach ***(Morrow v Safeway Stores plc [2002] IRLR 9***).

61. The question of the reason or principal reason for dismissal in such a claim was addressed in ***Eiger Securities LLP V Korshunova 2017 IRLR 115***. The test is not the same as for detriment, or in discrimination law, but to apply the statutory language and ascertain the reason or principal reason for the dismissal.

General Observations on the Evidence

62. The starting point for the Tribunal was a consideration of the overall circumstances leading up to the claimant's resignation and whether the email contained protected disclosures and if so, what it's impact was.

63. It seems as if the claimant enjoyed a reasonable working relationship with the respondent's staff and in particular the Manager Mr Culley. We could detect no antipathy towards the claimant. He regularly worked for the respondent and had done so for some time. There was no history of difficulties or antagonism as far as we could ascertain. It was noteworthy that the email did not stop the claimant being given quite a lot of work in August and September.

64. The email that was sent does appear to have been sent to and received by the Administrator Ms Summers. She did not give evidence. However, we found that it is likely that the email would have been passed to Mr Culley. We could see no reason why she would not have done this. Mr Culley worked closely with his one Administrator/Receptionist Ms Summers. They worked within a few feet of each other, and the email was marked for his attention. His position was that he did not recollect its receipt. We do not disbelieve him. We suspect that given the busy nature of his job and the numerous problems that later occurred during the pandemic it was likely that it was forgotten about. The claimant did not 'chase it up' which we think suggests that the matters raised were not as serious at the time as the claimant later made out.

65. The Tribunal also struggled somewhat with whether the email did contain enough information to amount to protected disclosures and whether there was a true public interest in the claimant raising these matters. The issue around the use of the ''walkie talkies'' in particular appears to be a matter of opinion not disclosure of facts or an incident. Of the two matters raised the alleged lack of ventilation comes closest to a protected disclosure. In the event whether they amounted to protected disclosures or not the evidence

was clear to us the email played no part in later events. Coming at the matter in reverse as it were even accepting that they were protected disclosures we were firmly of the view that no demonstrable detriment had arisen. As noted earlier it was significant that Mr. Onyia was given considerable work to do in August and September covering leave after the email was sent and likely to have been read. The later removal from the rota was fully explained by the incident on shift and there is no hint that the email played any later part in the way in which matters developed.

66. We were able to reach these conclusions for a number of reasons particularly the way in which Mr Culley treated the claimant. Harbouring some ill will towards him does not sit with him trying to find financial support for him or giving him work in August and early September. He might, if he had been minded to do so have pursued the disciplinary matter more vigorously to a conclusion which could have resulted in dismissal or disciplinary sanctions.

67. The main grievance the claimant had was that he was given no work following his removal from the rota on 16 September. The respondent had no contractual obligation to provide him with work. We also heard evidence which we accepted that once Covid struck the onus was to use the core full time staff.

68. We also found the claimant's position in relation to the incident on shift somewhat difficult to accept. There was a strong basis for Mr Culley discounting or disbelieving the claimant's explanation. It was a reasonable view to hold. It reflected the Tribunal's own conclusions and its scepticism of the claimant's position. We would note that even if the employer had accepted that the claimant had been told that the observations had been discontinued he should have checked especially given that there was no change in circumstances to justify their removal. At the least the minimum 4 hourly observation should have been carried out. Common sense would have suggested that looking in on the patient, who had apparently been so recently been taken off hourly observations, would have been prudent and easily

done. We concluded that Mr. Culley had a genuine and reasonable basis for forming the view that it looked as if the claimant was at fault. In some ways we were surprised that he did not pursue the matter given its clear importance but we accept that more significant events overtook him.

69. We agree that the claimant had a grievance in that he was not being rota'd to work and seems to have expected a more formal process during which he hoped to clear his name. He was effectively left in limbo for a period. But the claimant was probably not aware of the Covid outbreak, and the later difficulties being faced by the nursing home from October onwards or at least not fully aware of them. Mr Culley does apologise to him for delay. He is not simply ignored.. Mr Culley still seems to envisage a fuller investigation in his email dated 16 November (JBp120) and a Teams meeting took place on the 20 November. By that point the steam seems to have gone out of the matter and he explains that he had carried out an informal investigation. He was prepared to deal with the matter informally as being a case where the claimant should 'take the learning'.

Disposal

70. Returning to the various claims we need to address in relation to unfair constructive dismissal there was in our view no breach of an express term demonstrated nor in the circumstances any breach of the implied term. We found the guidance in the case of **Buckland v Bournemouth University of Higher Education** (2010) IRLR 445 to be helpful. We looked at whether the Malik test applied (implied term of trust and confidence) and then whether the principles in **Western Excavation (ECC) Ltd v Sharp** (1978) IRLR 27 applied. We had difficulty finding the effective cause for the termination or if there was some final straw. The burden of proof in this case generally was on the claimant.

72. In constructive dismissal cases involving whistleblowing we accepted Counsel's submission that the focus should be on the employer's reasons for

their actions rather than on the employee's response (**Salisbury NHS Foundation Trust v Wyeth** UKEAT/0061/15).

73. We reminded ourselves of the factual background. Cases turn on their own facts and the background events was significant in any delay. Shortly after the incident in September there was a serious outbreak of Covid that ultimately led to a significant number of deaths. It was not brought under control for some months. It is against this background that the claimant complained about the adequacy of the investigation carried out by Mr Culley. The Manager accepted that it was briefly investigated by him. He had spoken to others on shift about the night in question and had met the claimant and spoken to him. He had rejected the claimant's explanation as not being credible. We regret that we also find the explanation problematical for the same reasons as Mr Culley. We alo don't accept the claimant's expectations on what is required for an investigation at least at that early stage. The test is what is reasonable in the circumstances and as a preliminary investigation there was nothing untoward about it. It was open to the employer to drop the disciplinary action and the claimant had no contractual right to insist on a fuller investigation.

74. It was apparent to the Tribunal that the claimant resigned because he had not been rota'd to work since September and his dissatisfaction with the lack of what he regarded as should amount to 'proper process'. He was told on the 14 December that the investigation was not proceeding prompting his grievance which related, as he saw it, to a failure to pay him in the interim and a failure to fully investigate.

75. Had we had found that the claimant had been dismissed, which we do not, then the dismissal would have been a potentially fair one on the grounds of Mr Culley's reasonable belief that the claimant had been guilty of misconduct. The employers had carried out a reasonable investigation namely two interviews with the claimant and discussions with other staff members and had a reasonable belief that the claimant had committed misconduct.

76. The claimant was on a zero hours contract and could not insist on work being provided. There was no breach of an express term of his contract either in this regard or in respect to the non-contractual disciplinary policy. We accept that in other circumstances there could possibly have been a breach of the implied term by unduly delaying dealing with a disciplinary or grievance matter but that is not what we found here. There were reasons why the respondent's Manager had not more speedily addressed the events in September and had eventually offered to deal with the matter informally. Significantly as we have seen these events were wholly unrelated to the alleged protected disclosures.

77. We have discussed the alleged protected disclosures above. The burden was on the claimant to prove he had made protected disclosures and that any dismissal was in some way related to them. We found that there was no factual basis to suggest that any detriment arose from the email he had sent in relation to subsequent events namely the provision of work or any delays in dealing with the disciplinary matter. For completeness any detriment occurring before the 19 September 2020 would in any event be time barred even if we had found that there was anything in this period which could be considered to be a detriment arising from the alleged disclosures.

78. Finally, the claimant sought payment of wages for the months he was suspended. He was unable to show us the contractual basis for any such a claim (although it could have formed part of any claim for compensation if he had been successful) and that aspect of the claim is also dismissed.

Employment Judge James Hendry

Date of Judgement: 6th April 2022

Date sent to Parties: 6th April 2022