



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4112291/2021

Final Hearing Held in

Edinburgh on 11 and 12 July 2022

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Employment Judge Jones

Tribunal Member Mr T Jones

Tribunal Member Mr T Lithgow

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Miss L Millar

Claimant
In person

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Hierarchy Business Solutions Ltd

Respondent
Represented by:
Mr T Muirhead
Tribunal Advocate

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JUDGMENT

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1. It is **the unanimous** judgment of the Tribunal that the claimant was **automatically unfairly dismissed** by the respondent for having made a protected disclosure. The respondent is ordered to pay to the claimant a compensatory award of £5562. The prescribed element is £5562. The prescribed period is 26 August 2021 to 26 November 2021.

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REASONS

Introduction

1. The claimant lodged a claim of automatically unfair dismissal on the ground of having made a protected disclosure. The respondent denied the claim and argued that the claimant was dismissed for gross misconduct related to breaches of GDPR and the respondent's policies.
2. The protected disclosure was said to be that the claimant informed her line manager that a director of the respondent had behaved in a way to a person in their care which was either a breach of a legal obligation or that the young person's health and safety had been or was likely to be damaged.
3. A joint bundle of documents was produced at the final hearing. The claimant represented herself and gave evidence on her own behalf. The respondent led evidence from Ms Savina Fleming who is their registered manager and Mr Fannuei Wallah who is the respondent's managing director.
4. The Tribunal noted that the claimant indicated that she was dyslexic when she was giving evidence and appeared to have some difficulty reading documents. She did not however ask for any reasonable adjustments as a result.

Findings in fact

5. Having heard the evidence and considered the documents to which reference was made together with submissions of the parties, the Tribunal made the following findings in fact.
6. The claimant was employed by the respondent from 5 October 2020 until her summary dismissal on 26 August 2021. She was employed as a Senior Support Worker.
7. The respondent had recently commenced operations at premises in Livingston when the claimant was recruited. The respondent provides social

care services to vulnerable young people. At the time of the claimant's employment, services were provided to one young person (referred to as 'B').

8. The respondent has two directors who are married to each other.

5 9. The claimant generally worked 12 hour shifts 3 days a week and a further half day. 24 hour care was provided in relation to B and the claimant worked day shifts. The claimant was the only senior care worker responsible for B. B was a vulnerable young adult who had complex needs and had a history of self-harm.

10 10. The claimant formed a good relationship with B who lived in the accommodation. Initially the respondent used one of the rooms in the property as their office until they established a separate office facility.

11. The claimant was issued with a contract of employment and the respondent had an Employee Handbook which was available to staff. The handbook included a disciplinary policy, IT policy and Data Protection policy.

15 12. The claimant was paid £10.30 per hour and worked between 163 and 213 hours per month.

13. An incident occurred on 6 August 2021 involving Mrs Wallah, who is one of the respondent's directors and B. During that incident Mrs Wallah behaved inappropriately towards B and in particular encouraged B to hit her.

20 14. The claimant was on annual leave on 6 August but it had been arranged for her to attend work to interview a potential new service user together with Mrs Wallah.

25 15. The claimant had a phone call prior to her attending work on 6 August advising her that there had been an incident involving B and asking for her to go to work to assist. Mrs Wallah informed the claimant that an altercation had taken place. Steps were taken to ensure B was safe and no further action was taken in relation to the matter at the time.

16. When the claimant returned to work from annual leave on 10 August she was given further information about the incident between Mrs Wallah and B by other members of staff which caused her concern. The claimant contacted Ms Fleming who was her line manager, told her what she had understood had happened, that she was concerned about this and asked what was going to happen.

17. Ms Fleming was already aware that there had been an altercation and said that it would be dealt with

18. Around 10 or 11 August, another member of staff informed the claimant that she understood that the claimant would be investigating the allegation. The claimant had never conducted an investigation before and no member of management advised the claimant that she should conduct an investigation or gave her any support in how such an investigation should be carried out.

19. The member of staff who had been on duty when the altercation occurred (T), resigned from her employment shortly after the incident at least in part because of her concern about what had occurred and the conduct of Mrs Wallah.

20. There was no discussion with the claimant as to any investigation which would be carried out. The claimant asked Ms Fleming on a number of occasions what was happening with the investigation.

21. T sent a statement by email outlining what occurred on 6 August to Mrs Fleming and the claimant on 22 August.

22. On 24 August the claimant was asked to attend a meeting. The claimant understood that the purpose of the meeting was to discuss the investigation which was to occur in relation to Mrs Wallah's conduct.

23. At that meeting Mr Wallah and Ms Fleming were present. The claimant was told that she was being suspended. The claimant was informed that allegations had been made that she had breached confidentiality by discussing confidential management issues with staff. No specific details of any allegations were given to the claimant. She was not told who had made

the allegations. The claimant was immediately removed from all Whatsapp work groups and her work email address was disabled. She was advised that she was not permitted to contact anyone from work.

5 24. After this meeting Mr Wallah looked through the claimant's work email account.

25 The claimant was then required to attend a disciplinary hearing on 26 August. She did not receive a letter from the respondent requesting her attendance. She discovered that a hearing was due to take place on the morning of 26 August when an email was sent asking if the claimant would attend the hearing later that day. No details of any allegations which were to be discussed at that hearing were provided to the claimant in advance of the hearing.

II 26. The claimant attended the hearing. Mr Wallah and Ms Fleming were also in attendance. Mr Wallah recorded the meeting but did not tell either the claimant or Ms Fleming that he was recording the meeting. He did not ask either individual for permission to record the meeting. No note was taken at the meeting.

20 27. Minutes of the meeting were subsequently prepared by Ms Fleming around a week before the commencement of the tribunal hearing after she was given a copy of the recording by Mr Wallah.

28. The claimant attended the meeting alone. She had not been informed that she could be accompanied at the meeting, although she was told at the meeting that a witness could be present.

25 29. The claimant was provided with a copy of emails from her work email address in relation to a prisoner in Canada. These emails had been sent to the prisoner's lawyer and the Court dealing with his case. The claimant was also provided with an email sent from her work account to a personal account which contained the statement provided by the prisoner. She read the emails and apologised for that. The claimant said it had been mistakes on her part and that the personal email address was used by her.

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30. **Ms Fleming** was aware **that the claimant had used this personal email address for work purposes in the past and Ms Fleming had sent an email to this address regarding work matters previously. Ms Fleming did not make any reference to this during the hearing.**

5 31. **The personal email address was in the name of the father of the claimant's children and was used by her. The respondent knew of the name as the individual had carried out work at the premises in the past**

32. **The claimant was advised that this was gross misconduct and that she was being dismissed.**

0 33. **Ms Fleming and Mr Wallah had decided to dismiss the claimant in advance of the hearing if she admitted sending the emails. They did not adjourn the hearing to consider the claimant's explanations and apology.**

34. **The claimant's dismissal was confirmed to her in writing. The claimant was not informed of any right to appeal against the decision.**

5 35. **An investigation was carried out in relation to the conduct of Mrs Wallah. Mrs Wallah denied she had encouraged B to hit her.**

*0 36. **The respondent reported the claimant to the Scottish Social Services Council, which is the regulatory body for the respondent around May 2022 in relation to a number of allegations, regarding the sending of the email with a statement attached to a personal email address.**

37. **The respondent has not reported the incident concerning Mrs Wallah and B to the Scottish Social Services Council**

W 38. **The claimant has not worked since her dismissal. She has recently had an operation for which a hospital stay was required. The claimant has caring responsibilities for her disabled parents.**

Observations on the evidence

39. The Tribunal found the claimant to be an honest witness who made concessions regularly in her evidence (for instance in admitting that she should not have sent the emails sent, that she expected some form of action might be necessary such as training and that she had refused a job offer).
5 Although the claimant's evidence was at times difficult to follow, the Tribunal was of the view that she gave her evidence in an open and honest manner and where there was any conflict in her evidence with that of the respondent's witnesses, the Tribunal preferred the evidence of the claimant.

10 40. The Tribunal found Ms Fleming to be generally an honest witness. The Tribunal found Mr Wallah to be a wholly unsatisfactory witness. Regrettably the Tribunal did not find him to be truthful in his evidence. Mr Wallah changed his evidence on a number of occasions during the short period in which he gave evidence. For instance, he said that he recorded the disciplinary hearing so that minutes could be produced shortly after and that these were produced
15 three days after. When he was informed that minutes had only been produced for use at the Tribunal, he then changed his position and said that the recording had been provided three days ago to Ms Fleming to allow her to prepare the minutes. He said that he had had nothing to do with appointing
20 someone to deal with any disciplinary action against his wife, and then when advised this was not consistent with Ms Fleming's evidence he altered his evidence again. He said he carried out investigations in relation to potential staff concerns and then said that in fact he had been approached by a member of staff. His evidence was entirely confusing and contradictory. The
25 Tribunal formed the view that he gave evidence he thought would be supportive of his position rather than tell the truth.

41. **The** respondent did not follow any of its own procedures in relation how it deal with the claimant. Both Ms Fleming and Mr Wallah were aware of the disciplinary policy which was detailed, but decided not to follow it. While Ms
30 Fleming sought to blame the lack of HR support, the Tribunal did not find this convincing. The Tribunal were of the view that the respondent had no intention

of following its own procedures, despite criticising the claimant for failing to follow its procedure.

42. The Tribunal was astonished that no reference had ever been made to the Scottish Social Services Council in relation to the allegation against Mrs Wallah, yet the respondent reported the claimant after her employment had terminated for various matters including sending an email with a statement to a personal email address.

43. The respondent produced what was said to be a letter giving Mrs Wallah a first written warning for her conduct in relation to B. While the Tribunal had concerns as to whether that letter was genuine as it was not on headed notepaper and had various spelling mistakes in it, it seemed very surprising to the Tribunal that a director of a company would be issued with a first written warning for conduct which she had denied but had found to have been established.

Relevant law

44. Section 103A of the Employment Rights Act provides that

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.

Submissions

45. In the present case the respondent, while disputing some of what was said by the claimant to the respondent, conceded in submissions that, in accordance with the Tribunal's view, the claimant had made a protected disclosure.

46. The respondent reminded the Tribunal that this was not an ordinary unfair dismissal claim and therefore while it was accepted that the respondent could have handled the claimant's dismissal better, the issue was whether the claimant had been dismissed for having made a protected disclosure. The

responder sm ll busim tl e events ed during l pandemic
which was a relevant factor.

47. It was highlic - l that the cla dmitted s n .-mails and hac agreed
to the respondent's IT policy. The claimant had candidly admitted she couldn't
5 guarantee that her children' c uld not access her email ac
48. The Tribunal was invited to accept the respondent's witnesses' evidence that
the reason for the claimant's dismissal was the breach of cr e alit It
was said that if the respondent was concerned about the issue of the director's
conduct, other staff who gave statements would have been dismissed too.
10 Further, why would the respondent have given the claimant the investigation
to carry out?
49. It was said that the respondent had sent a letter inviting the claimant to a
disciplinary hearing, albeit it seemed to be accepted that the claimant had not
received this. The claimant was given an oppe■ . to explain herself and
15 was dismissed for gross misconduct.
50. In terms of remedy it was said that 'the claimant had failed to mitigate her
losses by turning down a job and failing to apply for other roles. Even if it was
found that the claimant had been unfairly dismissed any award should be
reduced by reason of her admitted conduct.
51. The claimant's position was that she was going to be sacked when she was
suspended. She said that Ms Fleming knew she wouldn't back down from
ensuring that the allegations against Mrs Wallah were dealt with, ier or
not she was a director of the company. While she ad ted sending the emails
referred to. she said she did not at any stage try to hide this and admitted it
5 straight away. She said she had thought she should have been given training
on IT as she was poor at IT.
52. The claimant said that the fac ■ the respondent locked her out of all
Whatsapp groups and her emails as soon as she was suspended
demonstrated that the respondent had made up its mind to dismiss her

53. She questioned the credibility of the respondent's witnesses in relation to a **number of** matters.

54. In terms of stress the claimant said that she could no longer be in social care because of how she'd been treated. She said that her mental health has been very bad since her dismissal and was just out of hospital two weeks ago. She said pursuing this case on her own has taken up **a tot of her time and** caused her significant **stress**.

Discussion and decision

55. The Tribunal was satisfied that the claimant had made a protected disclosure. She informed her line manager about the conduct of Mrs Wallah towards B **which in the** view of the tribunal amounted to information **that B's health and safety had** been or was likely **to** be damaged as a result of Mrs Wallah's actions. This amounted to a protected disclosure in terms of section 43B(1)(d). The information could also amount to a breach of a legal duty given the nature of the respondent's responsibilities for B, but given the respondent did not dispute that the claimant had made a protected disclosure it was not necessary to further analyse the nature of the protected disclosure.

56. The question for the tribunal was therefore whether the claimant had **been** dismissed because she made this disclosure. The Tribunal had little hesitation in coming to this view for the following reasons.

57. The claimant was suspended at a moment she had understood was to discuss the investigation into Mrs Wallah's conduct. The claimant had asked Ms Fleming on a number of occasions what was happening in relation to an **investigation**.

58. The respondent conceded it had not followed its own disciplinary procedure in relation to the claimant. It did not suspend the claimant in line with the procedure, did not write to her telling her why she had been suspended, did not conduct an investigatory hearing, did not produce an investigation report as required in its procedure, did not tell the claimant the nature of the allegations against her in advance of the disciplinary hearing, did not take

minutes of any of the meetings, covertly recorded the hearing, did not consider a lesser sanction than dismissal (despite that being provided for in their policy). The Tribunal concluded that the whole process against the claimant was a sham and that the respondent had decided to dismiss the claimant from 24 August after she had continued to ask about what was happening in relation to the investigation into Mrs Wallah. Further, the respondent had decided to dismiss the claimant in advance of holding the disciplinary hearing as she admitted to sending the emails, without being willing to consider any mitigation.

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10 59. Ms Fleming had previously sent at least one email to the claimant at the personal email address to which she had sent the statement of T. The tribunal formed the view that Ms Fleming deliberately remained silent about this matter during the disciplinary hearing. The respondent refused to look at the claimant's phone when she offered to show the respondent that the personal email address was on her phone at the disciplinary hearing.

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60. While another member of staff provided a statement in relation to the incident of 6 August remained in employment, this member of staff is more junior to the claimant and there was no suggestion that he had taken any action other than provide a statement

20 61. The respondent has still not reported what appeared to the tribunal to be a serious incident concerning Mrs Wallah and a service user to the Scottish Social Services Council, despite reporting the claimant after the termination of her employment, for amongst other issues, the sending of the emails to which - to " 'sd.

25 62. The tribunal was sceptical that any disciplinary action had been taken against Mrs Wallah as was suggested by the respondent or the identity of the person who was said to have reached the decision. In particular the tribunal found it difficult to reconcile a first written warning being an appropriate sanction where a director of a company was found to have invited a service user to hit her, but continued to deny the allegation.

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- 5 63. Even if such disciplinary action has been taken, the tribunal took into account that such action was not taken until almost 4 months after the incident, whereas the claimant was dismissed within 2 days of having been suspended for different reasons than were said to have been the cause of her suspension.
64. The individual who had been present at the incident and had raised her concerns initially had resigned as a result of her concerns. Ms Fleming candidly conceded that this was why she resigned although she then went on to say that the individual had also been looking for another challenge.
- 10 65. The tribunal accepted that the claimant was passionate about ensuring the wellbeing of B and that she had formed a good relationship with her. The tribunal concluded that the respondent was concerned that if the claimant remained in employment they would be obliged to report Mrs Wallah to the Scottish Social Care Council. The tribunal noted that Ms Fleming in evidence
15 said that she now accepted that she should report Mrs Wallah. However, Mr Wallah gave no indication in his evidence that he thought such a report was necessary.
- 20 66. The tribunal did not accept the respondent genuinely thought that the claimant sending emails to a lawyer and Canadian court regarding a prisoner was a serious breach of their policies. They did not try to determine whether the claimant had been at work when the emails were sent, despite the claimant indicating during the disciplinary hearing that there would be timesheets which would demonstrate this. The emails and letters did not suggest that the claimant was writing in an official capacity. The tribunal accepts that the
25 claimant ought not to have sent the emails from a work address and that such conduct may have warranted disciplinary action. However it came to the view that the respondent had 'gone fishing for something in the claimant's emails which could justify her dismissal.
- 30 67. indeed the respondent appeared confused about its reasons for dismissal of the claimant in its evidence. On the one hand, it appeared to be suggesting that the issues raised when the claimant was suspended were not the cause

of her dismissal, while the letter of dismissal itself makes reference to 'previous allegations made regarding breaches of confidentiality' being a consideration. The tribunal included that these were not genuine reasons for the claimant's dismissal and that the real reason was that she had made a protected disclosure and would not let the matter rest until action was taken to protect B.

Remedy

68. The tribunal went on to consider the question of remedy. The claimant candidly admitted that she had turned down a job offer. The tribunal accepted her evidence that the way in which she had been treated by the respondent meant that she no longer wanted to work in social care. However the tribunal also accepted the respondent's position that the claimant had failed to mitigate her losses. In particular, she failed to look for work in other sectors. While the tribunal accepted that the claimant had been unwell, both in terms of a hospital stay and her mental health, the tribunal found that compensation should be limited on the basis of that failure.

69. On the basis that claimant earned £10.30 per hour and worked on average 180 hours a month, being £1,854 per month, the tribunal was of the view that it was just and equitable to make an award of three months' pay to the claimant in respect of a compensatory award. The tribunal concluded that a period of three months properly reflected the period after which the claimant could have obtained alternative employment, given her health issues and the employment situation more generally. The tribunal was of the view that her failure to obtain alternative work thereafter demonstrated a failure to mitigate her losses.

70. The tribunal rejected the respondent's submission that there should be any reduction in compensation on the basis of the claimant's conduct. Although the claimant's conduct was blameworthy, it was not the sort of conduct which would otherwise have led to her dismissal and indeed the tribunal were of the view that the respondent looked for conduct which it could

use to justify the claimant's dismissal when the dismissal was clearly for other reasons, being that she had made a protected disclosure. Therefore a
, compensatory award of £5,562 is just and equitable in all the circumstances.
The claimant was in receipt of universal credit over this period and therefore
5 the compensatory award is subject to recoupment.

Employment Judge: A Jones
Date of Judgment: 15 July 2022
Entered in register: 15 July 2022
and copied to parties

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