EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Gale**

Respondent: **Northern Life Care Limited t/a UBU**

Heard at: **Leeds** **on: 16-18 August 2022**

Before: **Employment Judge Maidment**
Members: **Mr M Brewer**
Ms VM Griggs

Representation
Claimant: **In person**
Respondent: **Mr E Nuttman, Solicitor**

JUDGMENT having been sent to the parties dated 18 August 2022 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The claimant complains of unfair dismissal, both ordinary and automatic. The respondent's case is that the claimant was dismissed for a reason related to capability i.e. long-term ill-health. The claimant maintains that the reason or, if more than one, principal reason for her dismissal was her making of a qualified protected disclosure in a written grievance of 20 May 2020 in which she says that she raised safety issues in relation to the coronavirus pandemic in the context of the respondent's business as a care provider to disabled adults.

2. The tribunal had thought from its perusal of a list of issues previously provided by the claimant's former legal advisers, that the claimant may have been in addition complaining of whistleblowing detriments. However, on

consideration after hearing from the parties, there was no whistleblowing complaint within the claimant's grounds of complaint and none had been identified at a preliminary hearing for case management conducted by Employment Judge Smith on 27 July 2021. The claimant's solicitors had produced further and better particulars on 3 August) after that preliminary hearing), which had included detriment complaints. On 25 August the respondent had objected to such claims being raised, referring to the issue having been addressed at the preliminary hearing and that there was no pleaded whistleblowing detriment case. On 31 August the claimant's solicitors provided more information regarding the legal obligation they were relying upon in the whistleblowing dismissal claim. On 3 September 2021 Employment Judge Lancaster accepted the new further and better particulars as limiting the extent of the claimant's complaint. The final hearing in this claim had in fact commenced on 10 and 11 January 2022 prior to the Employment Judge sitting (with members) in that case recusing herself and thus necessitating the re-arrangement of this final hearing. No whistleblowing detriment complaint had been identified at that hearing and the claimant had not sought to advance any. The tribunal concluded that there was, therefore, no extant whistleblowing detriment complaint open to it to consider. The claimant was told of her ability to seek to introduce such complaints, if she wished, by way of an application to amend her claim. After an adjournment, the claimant confirmed that she was not making any application to amend her complaints to include ones of whistleblowing detriment.

3. The claimant had pleaded complaints of disability discrimination based upon her being a disabled person by reason of her suffering from osteoarthritis. The respondent had accepted disability status, albeit the issue of knowledge was in dispute, certainly in terms of the period prior to an occupational health report in November 2020.

4. The tribunal went through the apparent disability discrimination complaints with the claimant. Firstly, it was raised in a reasonable adjustments complaint that the claimant was relying on a requirement that she return to work on a full-time basis and secondly that there was a practice of moving employees' place of work where they were allegedly in dispute with management. On discussion, it was clear that the claimant did not actually believe that such practices applied or were applied to her. She did not understand why those complaints were being made. There was then a discussion regarding separate pleaded complaints of discrimination arising from disability. Firstly, there was said to be unfavourable treatment in a requirement of the claimant to change her role to a more physical one and secondly in her dismissal. Again, the claimant said that those were not claims she was advancing. Certainly, the tribunal noted from her witness statement that no positive case appeared to be being advanced and reliance on her osteoarthritis as the reason for dismissal was absent. The appearance was of the claimant's solicitors having formulated such claims as being more what the claimant might have asserted in theory rather than

in practice. The claimant confirmed that all her claims of disability discrimination were withdrawn, the tribunal ensuring that she understood the effect of that decision and how it limited the scope of her claim, albeit not necessarily to her prejudice if she was not in fact seeking to advance a positive claim under these causes of action in any event. The claimant also expressed her understanding that the tribunal would issue a judgment dismissing claims of disability discrimination on her withdrawal of them.

Evidence

5. Having taken time to identify the issues with the parties, the tribunal then privately read into the witness statements exchanged between the parties and relevant documents contained within an agreed bundle of documents. The tribunal firstly heard evidence from the claimant. On behalf of the respondent, the tribunal then heard from Mr Robin Cornock, regional development manager, Linda Bilsborrow, chief operating officer, Lesley Rattigan, compliance quality lead and Gillian Bundy, employment welfare manager. Finally, the respondent submitted a signed written statement of Dorothy Jarvis-Lee, chief executive, on the basis that only significantly reduced weight could be given to such statement in circumstances where Ms Jarvis-Lee would not be present before the tribunal to be cross examined on her evidence.

6. Having considered all relevant evidence, the tribunal made the findings of fact set out below.

Facts

7. The respondent provides personal care and support to vulnerable people living independently in the community, known by it as “people we serve”. The claimant worked as an assistant service manager at a site known as Peel Mill in Leeds comprised of a number of local authority owned flats accommodating people we serve. As well as providing care and support to people we serve, the claimant had some managerial responsibilities, including ensuring that staff had undertaken necessary training modules.

8. The claimant’s contract of employment included a provision allowing her to be moved to work at alternative sites on a temporary or permanent basis. The claimant accepted in cross-examination that staff were frequently moved around different sites. She had, however, been at Peel Mill for over 9 years.

9. By early 2020, the respondent was engaging with the appropriate precautionary steps to take in the light of the emerging coronavirus pandemic. At a team meeting on 22 February infection control training was introduced, as well as an emergency storage of cleaning products and food. Staff were to undertake new online training courses and to inform the claimant by 23 February that these had been completed. Staff were told to read the health and safety pandemic risk plans and coronavirus risk plan.

10. On 2 March there was a communication to staff, marked as urgent, to take every precaution and make themselves aware of the guidance accessible online. A message on 3 March advised staff to ensure that they were washing their hands to a good standard, following good hygiene procedures and using PPE. A message was sent on 4 March regarding the use of hand sanitisers.

11. The claimant messaged staff chasing them up regarding the need to sign to say that they had read the procedures on 4 March. On 14 March she messaged that unfortunately most of the people we serve did not really understand the implications of the virus. She said that everyone was now prepared with supplies of toiletries and food should there be a need to isolate. The claimant sent a message on 16 March regarding one of the people we serve needing to self-isolate and the precautions to be taken by staff who needed still to support him. The individual was said not to have coronavirus, but that the precautions were necessary. Anticipating the commencement of lockdown on 26 March, the claimant messaged on 24 March saying that staff were not to go out when supporting the people we serve unless necessary. On that day personal support was withdrawn from one of the people we serve who had not followed the rules. The claimant told the tribunal that it was difficult to ensure that individuals did not mix and at Peel Mill there was a narrow corridor off which their flats were situated.

12. By this stage service managers such as Mr Pierre, to whom the claimant reported, were removed (as a covid precaution) from day-to-day presence at the sites, such that the claimant, when on shift, would be the most senior person there.

13. On 28 March, the claimant asked everyone to check that their E-knowledge was up-to-date and that they had done modules on infection control and working safely within the last 2 months. On 30 March a lengthy guidance note was issued by Mr Pierre. This included a section on what PPE was to be worn and hand hygiene. He messaged on 1 April to say that he was updating the people we serve with a pandemic support plan.

14. The claimant made a posting of her own on 29 March that they now had hand sanitisers and wipes, that the people we serve were aware of the importance of the cleaning rota and everyone was reminded of the importance of hand washing.

15. The claimant sent a message to staff regarding enhanced cleaning on 1 April. A further message on 5 April referred to 4 people we serve shielding and what staff were to wear when supporting them.

16. The next team meeting took place on 8 April which the claimant attended remotely. It was noted that the police had been on site to emphasise to people we support the need to stay at home and avoid mixing. This was at the instigation of the claimant. Mr Pierre had also given that instruction. The claimant told the tribunal that, in reality, there was mixing between the people we support. New policies regarding the use of PPE and distancing were discussed. People we support were to order anything they needed online rather than to go into shops. There was discussion of wearing gloves and aprons in the individual flats and of the daily cleaning regime. This was to be undertaken 3 times a day. Temperatures were to be taken of staff arriving on site. Staff were told to read policies, the new support plans and to use PPE correctly. The claimant agreed in evidence that, certainly on paper, a lot of steps to avoid the risk of infection were in place.

17. On 10 April, Mr Pierre messaged regarding plans to deliver training regarding coronavirus control and precautions.

18. By 9 May, he notified staff that the Covid file had 18 policies and procedures in place to read and sign for. On 23 May, Mr Pierre advised staff that a new Covid E-knowledge module was available.

19. The claimant was taken in evidence to a CQC assessment in July of the respondent's Covid response, which was rated as good. However, she said that that did not reflect what had been happening in February/March and a lot of the steps taken had been after she had been absent, as will be described, from work. She agreed, however, that she had not said to her managers anything else which they ought to have been doing. Nor did she report to anyone that she felt that the working environment was unsafe.

20. The claimant felt unwell at work on 15 April. She thought she had a cold. She did not have a cough. Whilst she felt tired and had no sense of taste and smell, they had not been recognised as symptoms of Covid at that point in time. The claimant attempted to see if anyone was available at any other site to cover for her if she went home. She told the tribunal that there was no option in terms of agency staffing as no one was available who was qualified to carry out the essential more office-based tasks, involving medications, administration of money, working the sleeping shifts and dealing with messages to and from people we serve. She said that Mr Pierre told her that she could go home if she could find someone else to cover her shift. The claimant messaged him at 3:42pm saying that there was no one to cover, so that she would stay saying: "I'm feeling okay, don't worry." Again, the claimant did not think she had Covid.

21. The claimant felt unwell overnight on her sleeping shift and went home the next day. The respondent arranged for her to take a Covid test. The first was inconclusive, but a second one indicated a positive test for the

coronavirus. The claimant appreciated from that point that she needed to self-isolate. As will be described, she did not return to work thereafter.

22. The claimant self-certified her absence from work from 22 April. Her husband also contracted Covid and as a result sadly passed away on 2 May 2020. The claimant remained absent from work and provided a fit note citing bereavement. The claimant, in cross-examination, accepted that she blamed the respondent because of her catching Covid at work and passing it on. She had Covid, she said, before her husband. When put to her that none of the people we serve at Peel Mill caught Covid at this time, she said that she did not know - a few were ill and no tests were carried out at that time. When put that none of the other staff members had Covid, she said that one employee had been off before her and her daughter had been unwell. Subsequently, her colleague had had a blood test which showed that at some point in time she had had Covid.

23. It is noted that the claimant and her husband lived with their daughter and son-in-law and their children. Her daughter and son-in-law worked at Sainsburys. Her daughter tested positive for Covid the same day as the claimant and her son-in-law a few days later. The claimant believed that she had passed the coronavirus to her husband because she had closer contact with him than others within the household.

24. The respondent's chief executive officer, Dorothy Jarvis-Lee, wrote to the claimant on 5 May expressing her sadness at the claimant's loss and extending her deepest sympathies. She included the words of a poem which she hoped might provide the claimant with some comfort. The claimant received no further contact from the respondent until 9 May.

25. On 20 May the claimant submitted a grievance to the regional manager, Mr Cornock. She said this was due to the respondent being negligent in keeping employees, people we serve and visitors safe from Covid. She referred to extra demands and overtime expectations upon her. She said that there had been no guidance on how to keep safe. In cross-examination, the claimant conceded that in fact there had been a lot of guidance. The grievance continued that people we support were allowed to continue with their normal daily routines, including visiting households outside their homes. She referred to a lack of capacity on their part to understand the concept of social distancing. Nevertheless, she maintained that no information had been provided to them. The claimant told the tribunal that there were 8 inside flats and the people we serve went into each other's flats and came together to exercise. The people we serve didn't listen to the advice given, she said.

26. The claimant said that she had been given no solution on 15 April as to how her shift could be covered.

27. The claimant referred to lack of PPE equipment initially and lack of guidelines regarding people we support. She said that there should have been clear guidance, training and the presence of service managers. She said that she had been left in an extremely vulnerable position and a product of this caused her to contract Covid which went amongst her family causing the death of her husband. This had caused her significant work-related stress.

28. The claimant was initially on extended bereavement leave. On 27 May the claimant thanked the respondent for what they had done and expressed gratitude towards Ms Jarvis-Lee.

29. The evidence is that the claimant's grievance was considered at the highest level within the respondent and that Mr Cornock was asked to undertake an investigation. He interviewed Mr Pierre on 26 May. He recounted telling the claimant about her being on a period of compassionate leave by telephone. The claimant accepted that this conversation took place on 9 May, but said that there had been no contact since 2 May which she found to be hurtful.

30. The assistant regional manager, Laura Parkinson was interviewed on 26 May and then the care enablers, Pauline Anderson and Kelly Mortlock. Another enabler, Danielle Budby was interviewed on 27 May.

31. On 27 May Gill Bundy, employee welfare manager, expressing her condolences and acknowledging the claimant's grievance. She referred to the claimant having spoken with the chief operating officer, Linda Bilsborrow and Ms Jarvis-Lee the previous day, who had confirmed that a full investigation would be carried out. She said that due to the personal nature of her letter, Ms Lesley Rattigan, compliance quality lead, and Ms Jarvis-Lee would have oversight of the process. She confirmed that the claimant would be placed on furlough from 17 April so that she could receive backdated pay which would be topped up to full pay from that date.

32. The claimant attended a grievance meeting chaired by Ms Bilsborrow, with Mr Cornock present, by Teams on 1 June. There was a discussion about the claimant's knowledge of guidelines issued and precautions taken at the Peel Mill site. Ms Bilsborrow said that sometimes staff asked not to be contacted after a bereavement and she apologised if the lack of contact in the claimant's case had been misconstrued. Towards the end of a lengthy meeting, the claimant was asked what she hoped to achieve from the grievance. She said that she felt that she had been cheated out of her husband and would like to be compensated in some way.

33. Mr Cornock then completed a detailed report noting the outcomes to the claimant's various points of grievance. A complaint regarding a lack of

contact was partially upheld. Complaints regarding a lack of safety measures and guidance were not however upheld. It was found that the claimant should not have come into work on 15 April if she was unwell as this could have put other staff and the people we serve at risk. Mr Pierre did not provide support to help cover the shift knowing that the claimant was ill. The claimant had later told him that she was fine. A complaint that there had been a lack of supervision was upheld as planned support sessions had not been carried out with all staff by Mr Pierre.

34. The report was not provided to the claimant, but a further meeting was held with her on 3 June where Ms Bilsborrow and Mr Cornock went through the notes of the previous meeting.

35. Ms Bilsborrow then issued a detailed written outcome letter to the claimant on 5 June. The apology regarding a lack of contact by staff was repeated. It was said that none of the people we serve at Peel Mill had displayed any Covid symptoms. In addition, only 2 members of staff had displayed symptoms, and both returned a negative test. It was said that the claimant should have been aware that staff were asked not to attend if they displayed any symptoms. The various guidance and support plans were then listed. It was said that it was evident that the claimant had received and read the various guidance. It was accepted that personal one-to-one supervision was not provided by management in the early stages of the pandemic. The events of 15 April were recounted, with the respondent expressing surprise and disappointment to learn that the claimant completed her shift when displaying symptoms, whereas it had been clear that anyone displaying flu symptoms should not attend work. The evidence said, however, that she did not require her shift to be covered as she was feeling well. Had this not be the case, it would have been expected that her manager would have ensured her shift was covered.

36. Ms Bilsborrow told the tribunal that, at the point of her grievance outcome, she expected the claimant to return to Peel Mill. She was not aware that the claimant was moving house. She had no concerns regarding the claimant returning to work although she did wonder if she might have problems with Mr Pierre. She was not aware of any concerns expressed by colleagues of the claimant until after the grievance process.

37. The claimant raised a written appeal against the grievance decision on 8 June. This was acknowledged the following day and the claimant was invited by letter of 10 June to an appeal meeting to take place, again by Teams, on 16 June.

38. On 10 June the claimant was told that her furlough leave on full pay would be extended from 16 June to 7 July.

39. The claimant's appeal was conducted by Lesley Rattigan and it is clear that a full discussion of the grievances took place. The claimant was asked what she would like to happen to resolve matters for her. She said that she felt she should be compensated in some way and said she was financially struggling. The claimant said that she could stay at Peel Mill and referred to having spoken to Ms Jarvis-Lee.

40. It appears that during that conversation between the claimant and Ms Jarvis-Lee, there was mention by the claimant of her relocating from her home in Leeds to a location significantly further from Peel Mill in Green Hammerton, North Yorkshire. Again, Ms Bilsborrow had not been aware of the claimant's plans when she reached the initial grievance outcome. In cross-examination, the claimant confirmed that she decided to relocate to North Yorkshire. Her grandchildren lived there and she helped with an element of childcare and transporting them to and from school.

41. Ms Rattigan issued her appeal outcome on 17 June 2020. The claimant's appeal was rejected. Ms Rattigan noted that the claimant wished to return to Peel Mill and that in a further conversation with Ms Jarvis-Lee she had made Ms Jarvis-Lee aware that she was moving to a location nearer to her grandchildren's school. She continued that there was "a possibility" that the respondent could accommodate the claimant at a site known as Halfpenny Court in Knaresborough. However, this was a limited time offer as it affected other assistant service managers as well, so that the respondent required the claimant's prompt decision with regard to a move to this location.

42. The evidence is that the travel time from claimant's new home location to Peel Mill was 48 minutes in contrast to a travel to work time of 21 minutes if she was relocated to Halfpenny Court.

43. The claimant responded by email of 18 June saying that, before she made her decision about a move, could the reasons for her move from Peel Mill be confirmed. She mentioned having worked there for the past 9 years without any issues and with complements regarding the service she provided. Ms Rattigan responded on 18 June saying that she understood that the claimant was moving house and, if this was the case, a move to a closer site could be possible. She said this would assist with less travel time and expense. She continued that "in addition, given the decision of the grievance I ask you to reflect on whether you believe you have adequate support there [at Peel Mill], given your criticism of your manager. If yes, then perhaps you will see that some sort of criticism was in anger and consider whether there is anything you want to say to your manager to assist in moving on. If no, then how do you see you working moving under the manager moving forwards?" The claimant did not reply. She said to the tribunal that she was still speaking to Mr Pierre so that there was no animosity between them. It has been put, on behalf of the respondent, that

one of the reasons Mr Pierre subsequently left the respondent was his upset at the claimant's suggestion that he had caused the claimant and her husband to get Covid, but the tribunal has no evidence of Mr Pierre's reason for leaving.

44. Ms Rattigan wrote to the claimant again on 23 June. She said it was entirely right for the claimant to raise a grievance. She said, however, that, whether she realised it or not, her grievance did contain criticism of Mr Pierre and "it has understandably impacted on your working relationship. It is not appropriate for us to arrange for you to speak at the current time." Notwithstanding that, given the claimant's relocation, the respondent "believes that it would be beneficial to move you to a nearer vacancy. This is a decision taken above Service Manager level. From a Health and Safety perspective, reduced travel time would be beneficial to your health and minimise risk to people we serve caused by fatigue; and from an operational perspective it would fill a vacancy for ubu." Ms Rattigan explained that they had recruited interim cover for the claimant at Peel Mill during her furlough, but Halfpenny Court would be too far for that individual to travel to, so it was a logical change to make best use of staffing resources. Ms Rattigan said: "in the circumstances, I now confirm that we will transfer your place of work to Halfpenny Court on your return." The claimant was told that she would benefit from an increased level of pay.

45. The claimant was told that, as an alternative, she could move to work at a site in Elland Road, quite close to the Peel Mill site.

46. Ms Rattigan told the tribunal that she took a different view from Ms Bilsborrow about the future working relationship between the claimant and Mr Pierre. She said that she saw a move to Halfpenny Court as presenting the claimant with a fresh start because of her grievance. She said that had the claimant not been moving her home address, she would have been moved to Halfpenny Court anyway. There was a vacancy there, which needed to be filled.

47. A care enabler, Kelly Carter had been working as the assistant service manager at Peel Mill on an interim basis since the claimant's absence from work. She was appointed to the position permanently. The claimant believes this occurred in June. The tribunal has seen no evidence of the exact date of her appointment, but concludes that such appointment is likely to have been confirmed at or shortly after the time of this correspondence. The tribunal accepts that there was a vacancy for an assistant service manager at Halfpenny Court. Furthermore, it accepts that the respondent had experienced difficulty in recruiting to that position and that the respondent saw the claimant's relocation as resolving that issue.

48. The claimant emailed Ms Rattigan on 23 June saying that she was disappointed that she was still requested to move from Peel Mill, asking whether she would have been moved if she had not raised a concern. She said that she would have thought that her replacement was temporary until her own return to work.

49. Ms Rattigan telephoned the claimant to discuss the matter during which it was made clear that the claimant had not yet moved to Green Hammerton. Ms Rattigan followed this up with an email saying that the decision to move her was not because she had raised a concern, but, due to the pandemic, they had to look at who was in the right positions, in the right areas to continue to deliver quality support. The tribunal accepts that the respondent was anticipating restrictions on moves between different local authorities by staff members and that staff in the future might have to be located to work in the same administrative area as where they lived. However, these were very early days and it was only subsequently that a detailed mapping exercise was conducted by the respondent in anticipation later in the year of the introduction of different tiers of restriction by geographical area.

50. Ms Rattigan said that they had a vacancy which needed to be filled at Halfpenny Court. The claimant had disclosed that she was moving home, Ms Rattigan repeating the health and safety benefit to the claimant of being closer to work and that, from an operational perspective, it would fill a vacancy for the respondent. She said that the claimant's contract enabled the respondent to transfer her and it made operational sense. In recognition that the claimant had not yet moved house, her furlough on full pay was extended to 31 July. The claimant confirmed in cross-examination that she moved house on 27/28 July.

51. The claimant's evidence was that shortly after the grievance hearings she received a telephone call from an unknown number, but recognised that it was Ms Jarvis-Lee from her "strong" voice. The claimant said that Ms Jarvis-Lee asked if the claimant had read the grievance outcome, but then said: "well you are getting nothing from UBU". She said that she received a further call from Ms Jarvis-Lee, who said: "you have accused your manager of killing your husband" and ended the call. In a written witness statement, Ms Jarvis-Lee is vehement in her denial that she said such things. The claimant did not refer to the alleged comments subsequently and they are not part of her grounds of complaint in these proceedings.

52. On balance, the tribunal considered the claimant's assertion that such calls took place to be convincing in circumstances where she has generally presented as a straightforward witness willing to concede points which were not in her favour in cross-examination. The tribunal makes no finding that the alleged comments were made in isolation. There was more discussion between Ms Jarvis-Lee and the claimant than such bare comments and

inevitably therefore a context which has not been explained to the tribunal by the claimant. The tribunal's findings are therefore limited to an acceptance that the claimant certainly was entitled to take away from these conversations that there would be no offer of financial compensation and that the respondent's perspective was that it was believed that the claimant was suggesting that Mr Pierre bore some responsibility for what had happened to her husband. Indeed, the claimant's grievance did imply some such responsibility.

53. The tribunal accepts that the respondent became aware that there was discussion between employees about what the claimant had been saying. The tribunal has seen a note of a discussion between Mr Cornock and Pauline Anderson which he had initiated about "gossip that seems to be circulating". She said that she felt that the claimant was very angry referring then to her being moved from Peel Mill and her not wanting to leave that site. Ms Anderson said that she felt like she was being pulled into the situation around the claimant's grievance. She said that the claimant had said that she had caught Covid from the respondent, but some in the staff team thought it was from Sainsburys.

54. Ms Rattigan wrote to the claimant on 10 July saying that there had been complaints from staff at Peel Mill, who believed that she had contacted them in an inappropriate manner. Concerns included having told them that she had contracted coronavirus from Sainsburys but blamed the respondent for her husband's death, that the respondent had taken her job away because she had raised her complaint and that Kelly had taken her job away. Ms Rattigan appreciated that the claimant might disagree with these accounts. If she had not made the comments, then no action was necessary. If she had, she was asked not to make them again. She was asked not to contact anyone at Peel Mill whilst they were at work or to contact anyone who was not a personal friend. The easiest way of ensuring the distinction was kept was not talk about work with anyone based at Peel Mill, given that she no longer worked there. She said that the respondent was entitled to move staff and she had been moved for operational reasons. She said that if they believed that Mr Pierre had been deliberately undermined, it would not be appropriate to allow the claimant to return to Peel Mill, specifically because such conduct could not be rewarded. She was told that Kelly was the deputy in place and it was not appropriate for her to be undermined. She was warned if there were further reports, this could be considered for disciplinary action. The claimant was asked to concentrate her efforts on the new service (i.e.Halfpenny Court).

55. The claimant emailed Ms Rattigan on 11 July saying that she was upset and stressed by the content of her letter "but want to move forward and begin my new role at Halfpenny Court." She asked that Kelly be asked to not keep calling and texting her as she was doing most days. She said that she respected everyone she worked with and the people we support were "my

utmost importance". The claimant in cross-examination said that she said that she would go to Halfpenny Court, though felt pressurised to do so, and wanted to go back to Peel Mill.

56. On 29 July, the claimant's regional manager for the area in which Halfpenny Court was located, Ms Jefferson, arranged the claimant's back to work risk assessment. She noted a conversation she had with the claimant when the claimant had said that she felt that the new contract issued to her was unreasonable in that it referred to a 9 month probation period. Ms Jefferson said that she had explained that this was a pro forma and that everyone who had a new contract when they moved had this in their contract. The probation was reviewed at weekly/monthly intervals and signed off based on performance. She also noted that the claimant did not feel ready to return to work and was very stressed with too much going on in her life at that moment to focus on her work. She did not feel ready to return and did not want to move in the first place. She was going to see her GP on the Friday.

57. A return to work plan was put together for the claimant in respect of an anticipated return to work date of 3 August.

58. The claimant was, however, signed off by her GP as unfit to work from 31 July to 27 August due to work-related stress. The claimant accepts that by this time she had engaged the services of a lawyer. Clearly there were ongoing discussions with the respondent conducted on a "without prejudice" basis.

59. Ms Rattigan wrote to the claimant on 31 July following up on the claimant's discussion with Ms Jefferson. She said that the probationary period was simply a standard company template and not a reflection on her. All new appointments were subject to it. In the claimant's case, however, she was still under the same contract and had simply transferred services. She had already shown that she could fulfil her current role, although she would undertake an induction period.

60. The claimant emailed Ms Jefferson 3 August informing her that she been put on sick leave. She said that she thought things might have been different if the 9 month probationary period not been put in her contract but that "u have completely shattered my confidence."

61. Ms Rattigan acknowledged receipt of the claimant's fit note. She reiterated that the claimant had already successfully completed her probation.

62. Ms Bundy emailed the claimant on 17 August seeking to arrange a meeting to support her during her period of sickness and discuss her options regarding a return to work. She then held a meeting by Teams with the

claimant on 25 August. The claimant referred to her wishing for a phased return and said that there were days when she now could not work as she had to provide some additional childcare without her husband to assist. Ms Bundy told her that she could make a flexible working request. The claimant said that her doctor had not suggested any timescale for a return to work. She said that she was a bit apprehensive at going to a new location, whereas if it had been at Peel Mill she would not hesitate. She said that her ideal was to go back to Peel Mill, but she knew that would not happen. Ms Bundy set out some options regarding working patterns in her new role. The claimant said that she thought she could return on the basis of one or more of those suggestions and said that there were no further steps that she had identified which would assist.

63. The claimant then submitted a further 3 week fit note from 26 August. She emailed Ms Rattigan on 27 August asking to speak with her regarding the earlier letter saying that she should not contact anyone at Peel Mill and asking if this restriction could be removed.

64. Ms Bundy wrote to the claimant 28 August. She said that she believed the prohibition needed to remain in place to stop any further concerns arising. She sought to reassure the claimant that they had not told any staff not to contact the claimant and that they were free to do so. Ms Bundy noted that the fit note referred to work-related stress. She wanted to address this with the claimant because the grievance process had been concluded, the claimant had received a final decision in respect of her work location, she had now moved house and she had not been able to work at the new location. Ms Bundy said that she believed it important to look forwards, but needed the claimant to buy into that process, asking if the claimant did actually want to return to work at the respondent and if there was anything they could do to assist her in working at Halfpenny Court. Ms Bundy also asked for the claimant's permission to get a report from her GP.

65. The claimant was further signed off as unfit due to grief reaction and work-related stress from 14 September to 5 October.

66. Ms Bundy wrote to the claimant on 24 September seeking a further Teams meeting on 1 October. At that meeting, the claimant said she had been told by her doctor to avoid stressful environments. She said that her main stress was losing her husband, but that she did not feel supported. She believed that a grievance had been swept away. Her ideal was to return to Peel Mill and she couldn't believe that anyone who put in a grievance got moved. Being told that she had spoken to staff inappropriately, stressed her more. She said that she needed answers before she could take up her position again. When asked what the respondent could do to assist her to return, she said she could be put back at Peel Mill.

67. The tribunal has seen that, from July 2020, the respondent had started and continued to relocate a number of its employees to work in their residential local authority areas to avoid travel between the different tiers which were eventually introduced nationally in October.

68. The claimant's GP sent a report to the respondent dated 2 October. It was said that her sickness related to her husband's death and the stress related to work and imposed changes at work. He suggested seeking advice from an occupational health specialist.

69. Ms Bundy wrote to the claimant summarising their recent meeting. She said that it had been explained that unfortunately the respondent could not keep the claimant's position open indefinitely. She referred to the claimant raising concerns about lifting requirements at Halfpenny Court, saying that the majority of people there were fully mobile and very few used a wheelchair. Only one used a hoist.

70. The claimant submitted a further fit note covering the month of November. She attended a remote occupational health appointment on 4 November, following which a report was produced. The occupational health advisor noted that the claimant had said that there were aspects of her grievance investigation that she did not understand and felt that there were unanswered questions. Her bereavement, it was said, had been a contributory factor to her stress, but this was not now the main issue preventing her return to work. If the claimant's workplace concerns were resolved, she would be fit to return with possible adjustments. The work issues were said not to be medical or health related. Consideration of independent mediation was suggested as a possible way forward

71. The respondent received a letter from the claimant's GP on 25 November regarding a diagnosis of osteoarthritis affecting primarily the claimant's hands. She was given a further fit note from 30 November to 28 December.

72. The claimant met further with Ms Bundy on 1 December. The claimant reiterated that she would like answers as to why she had been moved and could not speak to people. Ms Bundy's position was that all of that had been concluded. The claimant was unable to say if there was any prospect of her returning in the foreseeable future, for example, in the next month. The claimant was told that a phased return could be arranged and that there were risk assessments in place so that she could support people we serve within her physical abilities. There was discussion regarding her osteoarthritis. The claimant, when asked further if she could return to work after the fit note had expired, said that she needed the probation to be taken off her contract of employment. The claimant was told that it was no longer applicable. Ms Bundy said she would check if another contract could be sent to the claimant. Again, the claimant said she was not able to give any

timescale regarding a return to work. Ms Bundy said she felt that the respondent had already answered all of the claimant's questions.

73. Ms Bundy then wrote to the claimant on 3 December. She assured her that the probation clause did not apply. She reiterated the reason for her being moved as set out in Ms Rattigan's letter of 23 June. She said that there was a new factor being the restriction on travelling between tiers under current government guidance. She said that they had spent time as a business restricting the travel of staff between tiers. Her change of home address meant she was in a different tier to Peel Mill, so that would have necessitated a move in any event. She said that she genuinely believed that the move could be a good fresh start for the claimant. The respondent was confident that the claimant's physical conditions could be accommodated. There was, however, no internal mechanism for the claimant to be given any further or different answers. It was now time for the claimant to decide what she actually wanted to do. The role could not be kept open indefinitely. A further meeting was then arranged for 9 December, with the claimant advised that her job unfortunately was at risk and one outcome of the meeting was the termination of her employment on the grounds of ill-health.

74. That meeting took place on 9 December by Teams. The claimant said that she had an appointment with her GP on 28 December. Ms Bundy said that she would not make a decision until after that appointment. On 29 December the claimant obtained a further fit note for a period of 42 days.

75. She met again with Ms Bundy by Teams on 30 December. The claimant was told that a possible outcome was the termination of her employment. Ms Bundy noted that the claimant had been absent for a total of 223 days. The claimant said that her doctor did not feel she was ready to return. She said she was not ill as such, but it was "a mental illness". She was still holding inside her that she did not have answers from the respondent. She said that she had asked for a mediator and the respondent had not provided one. She said that she kept asking why the respondent would put someone in her role without discussing it with her. The claimant was asked if she could give an indication of a return to work date. She said that, if she had the answers and she was put back at Peel Mill, she could respond, but recognised that the respondent was not going to do that.

76. Ms Bundy wrote to the claimant by letter of 4 January informing her that her employment was terminated from that day. She recorded that the issue causing the absence was work-related stress, but the internal grievance process had been exhausted. There was no internal mechanism for the claimant to be given any further answers. Even if she were dissatisfied with the answers given, it was necessary for her to decide whether to move on. She was unsure whether the claimant even wished to stay at the respondent. An external mediator was not part of the respondent's

processes and was not appropriate for a care provider considering the operational resources available. Also, a mediation was not an investigation and would not be able to provide different answers to her concerns. By 8 February (when the current fit note ended), the claimant would have been absent for 287 days. Ms Bundy did not believe the claimant would be likely to return even then. She did not believe that any alternative role would assist. Her (unchallenged) evidence to the tribunal was that there were no other assistant manager vacancies.

77. Before the tribunal, Ms Bundy said that she did not terminate the claimant's employment because she had raised her grievance. The reason was as explained to the claimant in the dismissal letter. They had met on a number of occasions and explored how the claimant could return to work. She been given reassurances regarding the people we serve at Halfpenny Court and a phased return was to be in place. The claimant was dismissed because there was no reasonable timescale on a return to work. The claimant had been away a considerable time. There was now another 42 day fit note in place. The claimant said previously that she would put things behind her and return to work, but there was no indication that she had. Occupational health said that there was no particular health reason preventing a return to work, yet the claimant had a further fit note with no timescale for a return to work. Her position had been kept open for a considerable period and it was felt that the claimant had been given every opportunity to return.

78. The claimant did not appeal the decision to terminate her employment. She told the tribunal that she did not think that the decision would be changed.

Applicable law

79. Section 43A of the Employment Rights Act 1996 provides that a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of the Sections 43C to 43H. Section 43B of the Employment Rights Act 1996 provides as follows:-

> *"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more of the following:-*
>
> *(a) 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 and safety of any individual has been, is being or is likely to be endangered,…."*

80. It is clear that a disclosure must actually convey facts and those facts must tend to show one of the prescribed matters. The making of a bare allegation or the expression of opinion or state of mind is insufficient.

81. As regards the public interest requirement, the Tribunal refers to the case of **Chesterton Global Limited v Nurmohamed [2017] IRLR 837** where Underhill LJ cited following factors as a useful tool in determining whether it might be reasonable to regard a disclosure as being in the public interest as well as in the personal interest of the worker:

    a. "*the numbers in the group whose interests the disclosure served…..;*
    b. *The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*
    c. *the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*
    d. *the identity of the alleged wrongdoing –… "The larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest…"*

82. 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."

83. This requires a test of causation to be satisfied. This section only renders the employer's action unlawful where that action was done because the employee had made a protected disclosure. Establishing the reason for dismissal, requires the tribunal to determine the decision making process in the mind of the dismissing officer which in turn requires the tribunal to consider the employer's conscious and unconscious reason for acting as it did.

84. The issue of the burden of proof in whistleblowing cases was considered in the case of **Maund v Penwith District Council 1984 ICR 143**. There it was said that the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that he or she is advancing. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer who

must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal.

85. The respondent puts forward that the claimant was in fact dismissed for a reason relating to capability – a potentially fair reason for dismissal. Section 98(4) of the Employment Rights Act provides:

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

86. Classically in cases of long-term ill health a Tribunal will consider whether reasonable medical evidence was obtained, the degree of consultation with the employee and the possibility of alternative employment or changes to the employee's role. The tribunal refers to the case of **East Lindsey Disrtrict Council v Daubney [1977] IRLR 181**. The Tribunal must not substitute its own view as to what decision it would have reached in particular circumstances. The Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached. In long-term ill health cases it is essential to consider whether the employer can be expected to wait longer for the employee to return – see **Spencer v Paragon Wallpapers Ltd 1977 ICR 301**. In **McAdie v Royal Bank of Scotland [2007] EWCA Civ 806** the Court of Appeal confirmed that an employer could fairly dismiss an employee for ill health capability even if the employee's illness was attributable to the conduct of the employer. The key issue is whether the employer acted reasonably in dismissing at the time of dismissal.

87. A dismissal may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 in capability cases of poor performance (not applicable here), but the basic principles of fairness are still relevant in long-term ill health capability cases.

88. Applying the relevant legal principles to the facts as found, the tribunal reaches the conclusions set out below.

Conclusions

89. The claimant's sole complaint in these proceedings is of unfair dismissal. Firstly, she maintains that her dismissal was automatically unfair in that the reason or principal reason for dismissal was her being a whistleblower.

90. The tribunal accepts that her grievance constituted a protected qualifying disclosure. The claimant did raise some matters within that grievance which were factually inaccurate, including in terms of a lack of policies and guidance. She did however provide information to the respondent about the people we serve struggling to conform with the guidance which she clearly believed amounted to a health and safety risk in the spread of coronavirus through a lack of social distancing. She further raised with the respondent that the service management team working from home impacted health and safety as there was little direct supervision of her and the care enablers and she had an increased workload. She raised the concern that she said she had been unwell and yet was told that she was responsible for sourcing alternative cover. The claimant did reasonably believe that this information tended to show a breach of health and safety.

91. The tribunal is also clear that the claimant did reasonably believe that the disclosure was in the public interest. The claimant may well have been upset and angry, may not have previously suggested any safety measures which ought to have been taken and may well have subsequently raised compensation as a potential resolution to her grievances. She may have had more than a public interest motivation. However, she was in her grievance concerned about health and safety issues affecting herself and importantly others including indeed members of the public – there is a reference in her grievance to visitors to the site. She reasonably believed that her disclosure was in the public interest.

92. Was then this disclosure the reason or, if more than one, the principal reason for the termination of her employment? The tribunal concludes that it was not. The tribunal accepts Ms Bundy's evidence that she terminated the claimant's employment on the basis that the claimant was unfit to return to work and unlikely to be fit in the foreseeable future. That related to the claimant working in the role at Halfpenny Court. From Ms Bundy's perspective that was the claimant's role. The respondent had imposed, in accordance with its contractual right, the move of the claimant from Peel Mill, but the claimant had indeed also expressly accepted that. The claimant may have been seeking to revisit that decision and may have been raising that she might still now return to Peel Mill, but Ms Bundy was concerned in her mind solely with the claimant's fitness to perform the Halfpenny Court role. She had not been involved in the claimant's grievance and was certainly not directly affected by it.

93. The tribunal has heard a lot of evidence regarding the respondent's decision to remove the claimant from Peel Mill. Whilst this was a decision owned by Ms Rattigan, the tribunal believes on balance that the decision was made after a senior management team discussion and not by Ms Rattigan on her own. The decision to impose the move was said to have been a decision above service manager level. It was abrupt, without consultation with the claimant and insensitively handled, in indecent haste in the context of the claimant's sudden and distressing bereavement.

94. The claimant was told that she should not speak to Mr Pierre. The tribunal has no evidence that Mr Pierre was affected by the claimant's grievance in the way now suggested. His feelings do not emerge from his interview with Mr Cornock and the claimant's evidence is that they were still speaking on a friendly basis. The claimant certainly did not understand that she was suggesting a lack of trust and confidence in Mr Pierre. Whilst her grievance, in part, was suggestive of some criticism of Mr Pierre as a manager, there is nothing problematical in its tone and it was certainly not directly accusatory of him. The respondent's view of the claimant working at Peel Mill after her grievance is regarded by the tribunal as, at the very least, a material influence on the decision to relocate her.

95. The only other reason for the relocation which stands up to scrutiny is a desire to fill the vacancy at Halfpenny Court – albeit, if that was the imperative, why was it only considered after the claimant had raised her grievance. Ms Rattigan's evidence before the tribunal was of a move to Halfpenny Court enabling a fresh start because of the grievance in circumstances where she said she would have moved the claimant to that location even if the claimant had remained living in Leeds thus creating a longer commute for the claimant.

96. The move was not raised with the overriding purpose of ensuring a shorter travel time for the claimant and protecting her own health and safety. The respondent, as an alternative, was suggesting that the claimant worked at Elland Road, a similar distance from Green Hammerton as Peel Mill. It was more important to the respondent, for the claimant not to be working at Peel Mill, than to be working at Halfpenny Court. There was a vacancy at Elland Road which could have been filled by Kelly, who was covering for the claimant at Peel Mill on an interim basis, thus enabling the claimant's return to the location she had work from for the last 9 years.

97. The move predated the respondent's awareness of conversations amongst staff regarding contact they had received from the claimant. It also predated anything more than a speculative consideration that, at some point in the future, there would be a need to give consideration to staff working in their own localities to manage risk and to comply with government guidelines.

98. The reasons put forward by the respondent at the time for the move to Halfpenny Court were self-serving.

99. In the context then of the ordinary unfair dismissal claim, the tribunal must against this background (and all the other circumstances of the claimant's absence) determine whether it was reasonable for Ms Bundy to terminate the claimant's employment on the grounds of her ill-health absence.

100. Whilst the aforementioned events were relevant background to the claimant's ill-health, Ms Bundy had nevertheless to deal with the situation as it was in early 2021. Whatever the cause of the claimant's absence, she reasonably considered that the claimant's employment ought to be terminated in circumstances where there was no longer any medical reason for unfitness, but at the same time no prospect of a return to work.

101. That decision was taken after a fair process of consultation with the claimant where her views regarding a return to work were sought. Assurances were given to her regarding the nature of the new role and adjustments which would be made to it relating to her osteoarthritis. It was clear that a phased return to work would be allowed.

102. Medical evidence was sought both from the claimant's own GP and from occupational health. Ms Bundy had reasonable regard to that. It did not, she reasonably considered, provide any indication of a resolution of the claimant's inability to return to work.

103. There was no available alternative employment which could have provided a solution. The claimant had suggested that she might need to reduce hours and was told she could make a flexible working request. She did not do so and, again, a change in working arrangements would not reasonably have provided a solution.

104. Ms Bundy did not consider that a mediation process was appropriate or likely to be helpful in the circumstances. The tribunal notes that this was not a case where the claimant had a relationship breakdown with someone she was being asked to resume working with and where mediation might reasonably have provided a solution. The claimant was not seeking a mediation which would change her working environment. She was in essence seeking to have some form of redress for the move from Peel Mill and to have her questions answered. Ms Bundy reasonably considered that a mediation would not, however, be a further form of investigation and that that was what the claimant was in essence seeking. She reasonably concluded that the claimant had raised questions regarding the reasons behind her move and that those questions had been answered. Whilst the tribunal has just recounted that those answers were not straightforward, the

respondent did not act outside a range of reasonable responses in rejecting a mediation process.

105. Ms Bundy's ultimate conclusion was that matters had moved on from the claimant's grievance and from the decision thereafter that her work location be moved to Halfpenny Court. The claimant had been absent from work for 223 days with no prospect of her returning.

106. Ms Bundy's conclusion was not unreasonable and her decision to terminate the claimant's employment as at 4 January 2021 was, in all the circumstances, within a band of reasonable responses.

107. The claimant's complaints of unfair dismissal must fail and are dismissed.

Employment Judge Maidment

Date: 12 September 2022

FOR THE TRIBUNAL OFFICE