THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Mrs C Gunn
Respondent: Medipro Clinical Services Ltd

Heard at: Teesside Justice Centre **On:** 1 and 2 September 2022

Before: Employment Judge Morris
Members: Mr S Carter
Mrs D Winter

Representation:

Claimant: Miss A Cheetham, counsel
Respondent: Mr B Hendley, consultant

REASONS

The hearing, representation and evidence

1. The claimant was represented by Miss A Cheetham of counsel who called the claimant to give evidence.

2. The respondent was represented by Mr B Hendley, consultant, who called the following employees of the respondent or an associated company to give evidence on its behalf: Ms S Harkness, Quality Assurance Lead employed by Medipro Training Ltd; Ms N Maslowska, Head of Commercial employed by Medipro Ltd; Mr P Ashfield, HR Lead employed by the respondent.

3. The evidence in chief of or on behalf of the parties was given by way of written witness statements. The Tribunal also had before it a bundle of agreed documents comprising some 380 pages. The numbers shown in parenthesis below are the page numbers (or the first page number of a large document) in the document bundle.

The claimant's complaints

4. The claimant's complaints were considered at length at a preliminary hearing held on 19 April 2022 (44). They are set out in detail at paragraphs 33 to 35 of the case summary arising from that hearing and, that being a matter of record, they do not need to be repeated here. In essence, they are as follows:

4.1 A complaint under Section 23 of the Employment Rights Act 1996 ("the Act") that, contrary to section 13 of the Act, the respondent had made an unauthorised deduction of £713.13 from the wages that were due to her.

4.2 A complaint under Section 48 of the Act that she had been subjected to detriment in contravention of section 47B of the Act.

5. The respondent's response was as follows:

5.1 It accepted that the deduction had been made but contended that it was authorised by a training agreement entered into with the claimant and/or by relevant provisions in her contract of employment.

5.2 It denied that any of the claimant's alleged disclosures were qualifying disclosures.

The issues

6. The issues to be determined at this hearing can be drawn from those paragraphs 33 to 35 of the case summary referred to above. In that context, the claimant had produced a list of issues (42), which Mr Hendley agreed.

7. In essence, those issues are as follows:

Protected disclosure

7.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Act? The claimant relies upon the following disclosures:

7.1.1 When she spoke to Ms Harkness on 6 September 2021 she informed her that she had never seen the training agreement before and had not signed it.

7.1.2 Also on 6 September 2021 she sent an email to Mr Ashfield raising informal complaints regarding the false signature.

7.1.3 On 22 September 2021 she repeated these concerns during the course of an "informal grievance meeting" with Ms Harkness.

7.1.4 On 27 September 2021 she raised a formal grievance reiterating that she had not signed the document.

7.2 Did she disclose information?

7.3 Did she believe the disclosure of information was made in the public interest?

7.4 Was that belief reasonable?

7.5 Did she believe it tended to show one of the relevant matters set out in section 43B(1) of the Act. The claimant relies upon the following:

7.5.1 a criminal offence had been, was being or was likely to be committed (ie the fraudulent signature);

7.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation (ie to pay the claimant her full wage and not to make any unauthorised deduction).

7.6 Was that belief reasonable?

7.7 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to her employer.

Detriment

7.8 Did the respondent do the following things:

7.8.1 failed to carry out a fair grievance process; and/or

7.8.2 make an unauthorised deduction from her pay?

7.9 By doing so, did it subject the claimant to detriment?

7.10 If so, was it done on the ground that she made a protected disclosure?

7.11 What remedy, if any, should be awarded to the claimant including:

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

7.11.2 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) ("the Code") apply?

7.11.3 Did the respondent or the claimant unreasonably fail to comply with it?

7.11.4 If so is it just and equitable to increase or decrease any award payable to the claimant, and by what proportion, up to 25%?

7.11.5 Was the protected disclosure made in good faith?

7.11.6 If not, is it just and equitable to reduce the claimant's compensation, and by what proportion, up to 25%?

Unauthorised deductions

7.12 Did the respondent make any deductions from the claimant's wages?

7.13 Was any deduction required or authorised by statute or by a written term of the contract?

7.14 Did the claimant agree in writing to the deduction before it was made?

7.15 How much is the claimant owed?

Consideration and findings of fact

8. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the hearing and the relevant statutory and case law, including that referred to by Miss Cheetham, (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by it on the balance of probabilities.

8.1 At the time relevant to these proceedings, the respondent was an independent provider of pre-hospital education and student training, and also provided ambulances and ambulance crews to various NHS Trusts.

8.2 The claimant was employed by the respondent from 3 November 2016 until 29 November 2021, latterly as an Associate Ambulance Practitioner ("AAP"). She was well thought of and no untoward issues had arisen during her employment as is evidenced by the efforts made by the respondent to retain her after her resignation. One point note is that in January 2021 the claimant raised a grievance regarding her pay which, following investigation, was upheld and her salary was increased.

8.3 During her employment, the claimant had undertaken certain training in respect of which she had entered into training agreements examples of which are at pages (101) and (104). On 28 March 2019 the claimant commenced a training course to become an AAP. The Tribunal had before it a copy of a training agreement relating to that course ("the Agreement"), which is headed, "For the recovery of professional and vocational training expenses" (107). At the end of the Agreement is typed, "Total Cost of Course £_____" into which has been written in manuscript "25,116.00". The Agreement appears to have been signed on 19 March 2019 by the claimant and Mr English, a director of the respondent. The claimant's evidence was that she did not sign the Agreement. Mr Ashfield's evidence was that it is a copy of the Agreement downloaded from a data cloud, Live Drive, where, shortly after his appointment, he had stored this and other documents, and that it is an accurate copy upon which the respondent was entitled to rely and enforce. Mr Ashfield explained that shortly after his appointment he became aware that the respondent was at risk of not adhering to the General Data Protection Regulations so he scanned certain documents, including the Agreement, and secured them on Live Drive before placing them temporarily in a locked attic. They would need to be retained for six years.

8.4 The claimant successfully completed the training in respect of which she was assessed on 20 January 2021 and received the relevant certificate on 7 April 2021.

8.5 The claimant then became dissatisfied with a number of aspects of her employment as she explained to Ms Harkness at their meeting on 22 September 2021 (133) and in her letter to Mr Ashfield on 7 October 2021 (152). Although the claimant had spoken to Ms Harkness about being the 'burnt out' she did not raise that matter clearly at the time.

8.6 In these circumstances, the claimant secured alternative employment (at a reduced salary) and, on 6 September 2021, she handed to Ms Harkness her letter of resignation (121), which is written in terms complimentary of the respondent and those with whom she had worked.

8.7 Before the claimant formally resigned, Mr Ashfield had become aware that she intended to do so and that the provisions in the Agreement would become applicable. He therefore sought to retrieve the copy of the Agreement from the claimant's personnel file but it was not in the file. His oral evidence was that he concluded that "maybe there had been a little bit of foul play" by which he explained that the claimant "may have taken it" and that if someone is "accountable for a large amount of money they may take steps out character". In answering a question from the Tribunal as to whether Mr Ashfield's belief that the claimant had herself removed the Agreement from her file had coloured is appropriate to these matters and particularly his conduct of the grievance process, Mr Ashfield replied that that was "Fair".

8.8 Mr Ashfield located a copy of the Agreement elsewhere and gave it to Ms Harkness. On the claimant handing to Ms Harkness her letter of resignation, Ms Harkness immediately produced and gave to the claimant the copy of the Agreement, which caused the claimant to be shocked and become very upset. Such was the claimant's upset that, according to Mr Ashfield's oral evidence, she made a threat to her own life, which was taken seriously in that Mr Ashfield and Ms Harkness agreed to involve the Safeguarding Lead. Importantly, on being shown the Agreement, the claimant immediately informed Ms Harkness that she had not seen the document before and had not signed it.

8.9 In addition to informing Ms Harkness that day, 6 September, that she had neither seen nor signed the Agreement, the claimant also raised informal concerns in this respect with Mr Ashfield and requested a breakdown of the £25,116.00, which was provided (123).

8.10 In an email exchange the claimant also requested the original Agreement, which Mr Ashfield purported to supply under cover of his email of 7 September (124) but it was not actually the original. The claimant replied that she would come into work the following day for the original document to which Mr Ashfield responded that she would not be able to take the original document away. The claimant replied that she would still like to see the original and would like a copy printed out for her there and then.

The claimant also requested copies of other documents that bore her signature so that she could compare the signatures.

8.11 As arranged, the claimant attended work on 8 September to view the original Agreement and found that it was not what she refers to as the "wet ink copy" but was a print.

8.12 The Tribunal interjects that on 7 September the claimant submitted a Data Subject Access Request to Mr Ashfield (146) to which he did not and still has not responded. His evidence was that that was a "regrettable mistake", "I thought I had complied but it turns out I hadn't".

8.13 On 17 September the claimant set out her concerns to Ms Harkness (129). On 22 September the claimant met with her in what has been termed an informal grievance meeting. The claimant was not challenged as to the accuracy of the notes of that meeting that she had made (133). Ms Harkness said that she did not make a note of the meeting at the time but did make a note afterwards, but that had not been disclosed.

8.14 The claimant formalised her grievance on 27 September 2021 (138) in which she restated that the signature on the Agreement was not hers. Mr Ashfield replied on 28 September (142) advising the claimant that her grievance would not be investigated because she had previously raised her concerns as informal grievances. His evidence was that he had decided not to pursue the claimant's grievance any further as there was no added information and it could be seen as trying to overturn a decision made informally through attrition. He said that that featured in the respondent's grievance policy as vexatious (78), which he was satisfied it was. As Mr Ashfield conceded when questioned, that is an incorrect construction of the grievance policy. As he put it, that was, "probably not my greatest decision". The policy states, "If, on conclusion of a grievance investigation it is deemed that the grievance has been submitted in bad faith or has been made with the intention of causing inconvenience, harassment or expense to the company or any of its employees, the disciplinary procedure maybe invoked". The key point, which Mr Ashfield accepted, is that this provision is only applicable if bad faith etc is identified, "on conclusion of a grievance investigation" and in this case there had been no such investigation.

8.15 The Tribunal finds that our other matters in Mr Ashfield's letter of 28 September which are unsatisfactory including as follows:

8.15.1 Mr Ashfield referred to the claimant's grievance having been previously investigated and there having been an outcome whereas there had been neither investigation nor an outcome. On this point, Ms Harkness' evidence was clear that she and the claimant had simply had "a chat" on 22 September and there had been no grievance outcome.

8.15.2 Mr Ashfield stated that the claimant's accusation that there was an act of fraud "lacks proof, credibility and motive" without having met claimant to assess these matters.

8.16 In that letter of 28 September Mr Ashfield does state that the claimant could provide "additional details or evidence" within five working days (which the Tribunal calculates to be the 5 October) but the dispatch of his letter was delayed and was not received by the claimant until 4 October 2021. Mr Ashfield continued in his letter that if the claimant were to provide fundamentally different information it would be passed over "to a qualified Investigating Officer to investigate under the formal grievance procedure."

8.17 The claimant's solicitors wrote to Mr Ashfield by email dated 5 October 2021 (144). Those solicitors were critical of Mr Ashfield's decision not to investigate the claimant's grievance or hold a formal meeting to discuss her concerns which they suggested was unreasonable, not in the spirit of the Code and contrary to the respondent's Grievance Policy. In that letter the solicitors requested the original signed Agreement, stated that the claimant would be submitting an appeal, suggested that it would be appropriate for the appeal to be considered by someone impartial and stated that the claimant was comfortable with the respondent instructing a handwriting expert to see if the signature in question was genuine or forged.

8.18 The claimant replied to Mr Ashfield's letter on 7 October (152), providing the further information he had requested. Her letter is in two parts: the first is headed "Background" and contains nine points of detail; the second part sets out the claimant's formal grievance and contains five points of detail. Contrary to what Mr Ashfield had stated in his letter of 28 September, Mr Ashfield did not pass this further information to a qualified investigating officer.

8.19 Mr Ashfield responded to the claimant on 11 October (163). He summarised all 14 points that had been set out by the claimant in her letter rather than addressing only the five points of grievance that she had raised in the second part of her letter; those points of grievance being summarised by Mr Ashfield in bullet points 12 to 18 in his letter. In this connection, Mr Ashfield accepted in cross examination that he should have called the claimant to a grievance meeting and it was a mistake not to done so.

8.20 The claimant provided a detailed response by letter of 14 October (166) in which she provided yet further information relating to her grievance (bullet point 12 onwards in Mr Ashfield letter), which she asked should be taken into account as part of her grievance. In cross examination Mr Ashfield accepted that it appeared that he had not taken this further information into account. Additionally, in her letter of 14 October the claimant noted that, contrary to what Mr Ashfield had stated previously, he had not mentioned the qualified investigating officer. The claimant also raised concerns about Mr Ashfield's continuing involvement and again requested the original Agreement for analysis.

8.21 Mr Ashfield briefly replied on 15 October (169). He stated, amongst other things, that the respondent would investigate the authenticity of the

Agreement and supply the claimant with the information. He explained that the investigation of the claimant's grievance would be undertaken by Ms Maslowska who would chair what he referred to as "the concluding meeting" in respect of the claimant's grievance. He confirmed that, as the claimant had requested, he would not be the notetaker/witness at that meeting. Finally, he stated that after speaking with legal counsel the claimant's request for a handwriting expert costed by the respondent was considered an unreasonable request and would not be pursued. In the event, the respondent did not investigate the authenticity of the Agreement and neither did Ms Maslowska conduct any meeting with the claimant.

8.22 Ms Maslowska produced her investigation report on 19 October 2021 (187). That is a lengthy report and, being a matter of record, its content does not need to be set out in detail in these Reasons. Suffice it to say that of the claimant's six numbered grievances only that numbered 2 was upheld, namely that the claimant was the main person qualified to work A&E and to train students between January 2021 and April 2021. Only the claimant's grievance numbered 6 is relevant to these Tribunal proceedings however; that being that she had never signed the Agreement and that her signature had been forged. Ms Maslowska did not uphold that grievance giving her reason that there was no evidence that the Agreement had been forged (196). Importantly, Ms Maslowska made that finding without having met the claimant so as to gain her input into the process and, in her oral evidence, she fairly conceded that she had tried to do a good job but her report was not as detailed as it should have been due to her lack of experience. Similarly, Mr Ashfield accepted in cross examination that Ms Maslowska's report was inadequate.

8.23 By letter of 23 November (231) Mr Ashfield wrote to invite the claimant to attend a grievance hearing on 2 December 2021. He enclosed a copy of the investigation report and informed the claimant of her right to be accompanied. In light of Mr Ashfield's oral evidence in particular, that was not to be a grievance hearing such as the Tribunal would recognise it but was simply to enable Mr Ashfield to inform the claimant of the findings of the investigation report (which the respondent had apparently accepted without more) and particularly, therefore, that her grievance in respect of the forging of her signature had not been upheld. As Mr Ashfield wrote to the claimant in an email dated 30 November 2021, "This meeting is to go over the report and explain the reporting and the reasons for why they conclusion was come to" (175). As such, this meeting was not intended to be a meeting that would be conducted in accordance with the ACAS Code, which provides as follows:

> ""Employees should be allowed to explain their grievance and how they think it should be resolved"".

8.24 In that same email of 30 November, Mr Ashfield addressed a point that the claimant had raised about consultation stating that the policy of the respondent was that, "**If further information is required** [*Mr Ashfield's emphasis*] about the grievance following receipt of the Grievance Initial Formal Report, a meeting can be arranged with the individual to discuss

the grievance in more detail" (176). He continued, "Unfortunately for you, you have signed a contract stressing that you adhere to the policies and processes of the company and this will include the grievance process ….". In cross examination Mr Ashfield stated that he regretted the use of the phrase. "Unfortunately for you".

8.25 An important point in Mr Ashfield's email of 30 November is his construction of the respondent's grievance policy to the effect that a meeting is only necessary if further information is required; hence the emphasis that he applied to that phrase in the excerpt in the paragraph above. Mr Ashfield made the same point in his witness statement in which he stated that as the respondent already had nine pages of information submitted by the claimant, "we did not want to delay this process any further by requesting Claire come in to confirm the information she had already submitted, as permitted by our policy (p.80)." That evidence and Mr Ashfield's email of 30 November reveal a misunderstanding of the policy by Mr Ashfield. The section of that policy to which he was referring is headed, "Grievance Meeting" and it is right that it is provided as set out in Mr Ashfield's email that, "If further information is required about the grievance", a further meeting can be arranged to discuss the grievance in more detail. It is clear from the policy, however, that that is intended to be an initial meeting to gather information to inform the remainder of the process including the investigation and the grievance hearing and the Tribunal accepts that such a meeting might not be necessary if sufficient information is already to hand. That "Grievance Meeting" is, however, different to the "Grievance Hearing" (82). That section of the policy states, without condition or exception, "HR will invite the employee to attend a grievance hearing". Thus, in not inviting the claimant to attend a hearing the respondent did not follow its policy; neither did it comply with the provisions of the Code, that employees "should be allowed to explain their grievance and how they think it should be resolved".

8.26 In a letter dated 25 November 2021 (233) Mr Ashfield informed the claimant that at the time of her resignation the amount of £25,116 remained due in relation to the Agreement meaning that she would be responsible for 100% of the costs incurred by the respondent for her training course. Accordingly, a deduction of £480.61 had been made from her final salary payment.

8.27 As Ms Maslowska had not upheld the claimant's grievance, on 26 November the claimant informed Mr Ashfield of her intention to appeal the grievance outcome (234), which she did by email dated 30 November 2021 (237). She nevertheless made it clear to Mr Ashfield in an email dated 2 December (181) that although she believed that the grievance outcome had been predetermined (pointing to the unlawful deduction from her wages and his letter of 25 November 2021) she nevertheless wished to attend the grievance meeting so that she could verbally raise her concerns. In that same email the claimant stated that she believed the deduction from her wages "to be wholly unlawful and a penalty clause".

8.28 The claimant sought to postpone the grievance hearing with Mr Ashfield (181) due to the unavailability of her companion. She proposed an alternative date of 7 December. Mr Ashfield initially did not respond but then replied on 3 December (182) that the alternative date of 7 December "would not be an option as this is a busy period leading up to Xmas". In this respect, Mr Ashfield's oral evidence was that he wanted to conclude the process and "made the mistake of sacrificing accuracy for process". In deciding not to postpone the meeting, Mr Ashfield seems either to have been unaware of or not had regard to the provisions of section 10(4) of the Employment Relations Act 1999, which provides (subject to the conditions in that section) that if a worker's chosen companion will not be available at the time proposed for the hearing the employer must postpone the hearing to the time proposed by the worker.

8.29 Mr Ashfield's evidence in his witness statement was that on conclusion of the investigation it had been found that the claimant attending a meeting for the investigation would have been disruptive to the business, as she did not accept the conclusions of the report and wanted to use this as an opportunity to argue her case. That of course is the very point. Acknowledging the obvious repetition, the Tribunal repeats that, as is clear from the Code, "Employees should be allowed to explain their grievance and how they think it should be resolved". The claimant was denied the opportunity.

8.30 In an email to Mr Ashfield dated 7 December (184) the claimant asked whether she would have the opportunity to attend the appeal meeting. Mr Ashfield replied, "Due to the circumstances and information supplied your attendance will not be necessary or as an ex-employee called upon" (184).

8.31 The respondent's auditor, GD, was appointed to consider the claimant's appeal. His report (241) is again a matter of record and does not need to be set out in detail here. An important point is that, as Mr Ashfield had indicated, it was produced without GD meeting the claimant to enable her to have an input into the process. He accepted in cross examination that this was contrary to the Code. Additionally, the claimant was not provided with a copy of this report until it was disclosed in the course of these proceedings. Mr Ashfield explained that at the time he wanted to get the outcome letter sent to the claimant and close the matter, "It was a mistake on my behalf …. I should have included the report".

8.32 As with the original investigation report, a number of matters were addressed in the appeal report that are not relevant to these proceedings. The aspect that is relevant related to the claimant's contention that her signature had been forged. In that regard, GD stated that he had compared the claimant's signature on the Agreement with other signatures of hers and while none appeared exactly the same they did appear to be similar; albeit her signature on the grievance bore no resemblance to that on the Agreement and she appeared to have changed her signature quite recently. He could find no reason why the Agreement had been

fraudulently signed and for these reasons, found the claimant's grievance to be unfounded.

Submissions

9. After the evidence had been concluded the representatives made submissions, Miss Cheetham by reference to a written skeleton argument. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from its findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account by the Tribunal in coming to its decision.

10. That said, the key points made by Mr Hendley on behalf of the respondent included as follows:

Protected disclosure – detriment

10.1 The following points were conceded:

10.1.1 the claimant had provided information on 6 September, 17 September and 22 September and in the form of a formal grievance on 27 September;

10.1.2 a relative failure had been identified in the shape of the committal of a criminal offence or the failure of a legal obligation;

10.1.3 the disclosures had been in the public interest.

10.2 It was not accepted, however, that the claimant had a reasonable belief because there was no history of ethical problems or dishonesty with this company.

10.3 The claimant's signatures on various documents look the same.

10.4 The matters in relation to which the respondent might be criticised had been due to the lack of experience and qualifications of those who dealt with the claimant's grievance and not because the claimant had raised disclosures. It was attributable to bad management: Ms Maslowska accepted that she had not been as thorough as she could have been and Mr Ashfield that he had not followed the Code.

10.5 Any detriment was not due to the claimant having made qualifying disclosures but to the ineptness of their work.

Unauthorised deduction

10.6 The Tribunal should not look at the authority for considering a penalty clause because the Agreement is null and void. If the respondent had just taken the fees of £6,000 and not the salary of £19,000 it would be legitimate.

11. The key points made by Miss Cheetham on behalf of the claimant included as follows:

Protected disclosure – detriment

11.1 The respondent had not disputed that the claimant had made protected disclosures as follows:

11.1.1 on 6 September 2021 when she emailed Mr Ashfield raising informal complaints regarding the false signature and informed Ms Harkness of that and that she had never seen the Agreement before;

11.1.2 on 17 September 2021 when she detailed her concerns in writing to Ms Harkness;

11.1.3 on 22 September 2021 when she had an "informal grievance meeting" with Ms Harkness;

11.1.4 on 27 September 2021 when she raised a formal grievance reiterating that she had not signed the document.

11.2 The claimant had made those disclosures in the reasonable belief that they were in the public interest and showed that a criminal offence had been committed (the fraudulent signature) or that the respondent had failed or was likely to fail to comply with a legal obligation, namely to pay the claimant and not to make an unauthorised deduction from her pay.

11.3 As a result she suffered detriment from the respondent failing to carry out a fair grievance procedure (which was flawed and the outcome predetermined) and making an unlawful deduction from her pay.

Unauthorised deduction

11.4 The claimant did not sign the Agreement and, therefore, the respondent did not have agreement or consent from the claimant to take the deduction, which was therefore unlawful.

11.5 In any event, in accordance with the decision of the Supreme Court in Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67, the relevant clause in the Agreement is a penalty clause and is unenforceable.

ACAS Code of Practice

11.6 At every stage the respondent failed to follow the ACAS Code of Practice despite all the witnesses claiming to be aware of it.

The Law

12. The principal statutory provisions that are relevant in this case are to be found in the Employment Rights Act 1996. With some editing so as to be relevant to the claimant's complaints they are as follows:

"13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

43A. Meaning of "protected disclosure".

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

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,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, 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.

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,

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.

Consideration – application of the facts and the law to determine the issues

13. The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant statutory and case law.

Unauthorised deduction

14. The Tribunal first considered the claimant's complaint that, contrary to section 13 of the Act, the respondent had made an unauthorised deduction of £713.13 from the wages that were due to her. The respondent has conceded that it made the deduction but asserts that it was an authorised deduction.

15. The key issue in this respect is whether the Agreement is valid and enforceable. As set out above, the claimant's evidence was that she did not sign the Agreement while Mr Ashfield's evidence was that it is an accurate copy of the Agreement, which the claimant had signed, and therefore the respondent was entitled to rely upon it and enforce it.

16. In deciding which of these versions it prefers, the Tribunal has brought into account all the evidence before it, both documentary and oral, and in particular the following, in no order priority:

16.1 The Tribunal found the claimant generally to be a reliable, consistent and credible witness of relevant events in respect of most of which she was not challenged in cross examination. In contrast, much of the evidence in the witness statements of the respondent's witnesses lacked credibility and was not consistent with their oral evidence. To their credit, as set out above, Mr Ashfield and Ms Maslowska acknowledged the inconsistencies and the mistakes each had made.

16.2 In this connection, the claimant kept fairly detailed notes of meetings etc, which at least in the earlier stages of these matters the respondent did not.

16.3 The sum of £25,116, which is written at the end of the Agreement, is a significant amount of money and exceeds the claimant's gross salary at the time of £19,122 and would have had to be repaid out of her net income of, perhaps, some £15,000. In the circumstances the Tribunal accepts the claimant's evidence that she would not have signed such an agreement to repay such a large amount without at least discussing the implications with her husband.

16.4 The signatures that appear at the end of the Agreement (108) are different to those on other documents before the Tribunal; not only the signature of the claimant but also, and perhaps particularly so, the signature of Mr English.

16.5 The Tribunal does not hold itself out as having the skills of a graphologist but this was a serious allegation by the claimant that her signature had been forged, which could readily have been countered by the respondent by various means including the following:

16.5.1 recovering the original of the Agreement from the attic where Mr Ashfield had placed it when he had scanned it onto the data cloud to be retained for six years;

16.5.2 instructing a graphologist or agreeing to fund an expert instructed by the claimant, which she had requested;

16.5.3 undertaking an appropriate investigation, for example, first, as to whether anyone had seen the claimant's sign the Agreement and, secondly, whether Mr English could say that he saw her signature written on the Agreement when he came to sign it.

16.6 The evidence of Ms Harkness was clear that when she showed the Agreement to the claimant on 6 September 2021, the claimant's reaction was that she was shocked and very upset and, more importantly, she immediately informed Ms Harkness that she had not seen the document before and had not signed it.

17. On the above bases, the Tribunal prefers the evidence of the claimant that she did not sign the Agreement and, that being so, it cannot be enforced against her.

18. Had the Tribunal's conclusion on this point been to the contrary, it is satisfied that, in any event, the Agreement is void and unenforceable due to the repayment provision it contains amounting to a penalty. In this respect, the Tribunal applies the guidance it draws from the decision of the Supreme Court in Cavendish Square Holding BV, which was relied upon by Miss Cheetham. In particular, the Tribunal is satisfied that the amount of £25,116 "does not represent a genuine pre-estimate of any loss likely to be sustained" by the respondent but "is substantially in excess of that sum"; the amount in question "bears little or no relationship to the loss actually suffered" by the respondent as a result of any breach by the claimant; the obligation to pay that amount imposed a detriment on the claimant "out of all proportion to any legitimate interest" of the respondent in the enforcement of the Agreement; at the time of the Agreement the predominant contractual function was to deter the claimant from breaking the contract rather than to compensate the respondent for any breach. Indeed, in this connection, Mr Ashfield conceded in cross examination that the figure did not represent the loss to the respondent (as he put it "Strictly speaking, no") not least because throughout the period of the relevant training the claimant was providing work to the respondent for which she was entitled to be paid. This would contrast with her, for example, being seconded to a year's training or being allowed to take unpaid leave to undertake the training. Furthermore, Ms Harkness explained that the purpose of the repayment provision was not to compensate the respondent but was to keep employees in its employment, which the Tribunal is satisfied would be contrary to public policy.

19. Even if the Agreement was enforceable, the undertaking it contains was to "repay any fees or expenses, paid by Medipro Clinical Services in respect of my taking part in the above training". The Tribunal is not satisfied that "fees and expenses" includes salary. In this connection also, the claimant received assurances from Mr English that she would be paid as normal and funded throughout the course.

20. In all the circumstances set out above, the Tribunal is satisfied that the deduction the respondent made from the claimant's wages was not authorised.

21. The Tribunal interjects, as an aside, that it notes that all such agreements have now been revoked, including in respect of those employees who were trained alongside the claimant, those who have recently commenced such training and those who have recently concluded such training.

Protected disclosure – detriment

22. There is no dispute between the parties that the claimant made the four disclosures of information as follows:

22.1 On 6 September 2021 she informed the respondent, in the shape of both Ms Harkness and Mr Ashfield, that she had not seen the Agreement before and had not signed it.

22.2 She set out those concerns in writing on 17 September 2021 to Ms Harkness and repeated that she did not believe that the Agreement was authentic and that the signature was not hers.

22.3 In the informal meeting with Ms Harkness on 22 September 2021 the claimant repeated the above points.

22.4 On 27 September 2021 the claimant submitted a formal grievance once more repeating the above points in respect of which she requested a full investigation noting that she still had not seen the original Agreement and requesting that the respondent did not deduct any money from her pursuant to the Agreement.

23. Pursuant to section 43B of the Act, they were qualifying disclosures as the claimant disclosed information that in her reasonable belief that was in the public interest and tended to show,

23.1 that a criminal offence had been committed (the forging of her signature); or

23.2 that the respondent had failed to comply with a legal obligation (again the forging of the signature); or

23.3 was likely to fail to comply with a legal obligation (to pay her the full amount of the salary that was due to her by making an unauthorised deduction).

24. Additionally, pursuant to section 43C of the Act, the qualifying disclosures were made to the claimant's employer.

25. The Tribunal is further satisfied that the respondent subjected the claimant to detriment in the two ways contended for:

25.1 It failed to carry out a fair grievance process; this for the reasons explained in the Tribunal's findings of fact.

25.2 Also for those reasons and on the basis that the Tribunal has found that the Agreement was not enforceable against the claimant, it made unauthorised deductions from the claimant's wages.

26. The final question is whether those detriments were on the ground that the claimant made protected disclosures.

27. It is clear to the Tribunal that the slipshod approach to considering the claimant's grievance (which it is repeated amounted to a detriment) was on the ground that she had made the protected disclosures. As the Tribunal has recorded, there is no dispute that the claimant had previously been an employee who was well thought of and in respect of whom a previous grievance had been conducted properly. On this occasion, however, the nature of the disclosure was such as to give rise to the detriments contended for by the claimant in respect of which Mr Ashfield conceded that his approach had been coloured by his initial thinking that the claimant had herself been guilty of wrongdoing in interfering with her file. Similarly, the Tribunal is satisfied that the approach to the deduction from the claimant's wages was on the ground of the disclosures having been made; this again due to the nature of the disclosures which it is clear Mr Ashfield found to be repugnant.

28. In the above circumstances, the claimant's complaint of having been subjected to detriment on the ground that she made protected disclosures is well-founded.

Remedy

29. After the Tribunal had announced its decision on the merits of the claimant's claims as set out above it moved on to consider remedy in respect of which the claimant had produced a Schedule of Loss (51) and the respondent had produced a Counter Schedule of Loss (53).

Unauthorised deduction

30. In discussion with the representatives, Mr Hendley agreed on behalf of respondent that the unauthorised deduction that had been made by the respondent amounted to £893.74 as shown in the claimant's Schedule of Loss, which comprised £713.13 underpayment of salary on 30 November 2021 plus, on that same date, £180.61 underpayment of overtime pay.

Protected disclosure – detriment

31. The claimant had detailed in her witness statement relevant points relating to compensation for injury to feelings in respect of which she was not challenged by Mr Hendley in cross examination. These included the following:

31.1 Since raising these concerns she had felt incredibly stressed, intimidated and exhausted emotionally, physically and mentally.

31.2 She feels very anxious and had not cried as much in her life as she had in the past 11 months.

31.3 She had experienced panic attacks, which had been terrifying.

31.4 She had lost enjoyment in a lot of things.

31.5 She had suffered with mild alopecia and had lost all her hair which was very upsetting.

31.6 Her sleep was and continues to be affected; she is exhausted.

Submissions

32. The Tribunal invited submissions on behalf of the parties.

33. The key points made by Mr Hendley in submissions included as follows:

33.1 The Tribunal had not seen any evidence or indications in respect of the claimant's claim for injury to feelings such as a note from her GP or specialist relating to help with her problems.

33.2 The claimant suffering from alopecia since September 2021 might be a coincidence.

33.3 This had been a one-off incident in relation to which an award under Band 1 was appropriate. A figure of £4,000 was suggested. The sum of £8,000 proposed by the claimant might be appropriate if someone has lost their job but that is not the case here. The claimant moved seamlessly to a new job.

34. The key points made by Miss Cheetham included as follows:

34.1 The sum of £8,000 is in the lower band. The claimant had not been asked in cross examination about medical help.

34.2 The impact on the claimant is as set out in her witness statement (*which the Tribunal has summarised above*). Further, it was the respondent's case that the claimant had said that she would kill herself.

34.3 Whether or not the claimant lost a job there was still stress and upset and severe emotional impact.

34.4 An award at the upper end of the lower band, no lower than £6000, the appropriate.

34.5 In light of the Tribunal's findings, there had throughout been a failure on the part of the respondent to follow the Code in relation to the grievance procedure and an uplift should apply. Almost every clause had been disregarded and if this case did not justify an award of 25% is hard to see a case does

Consideration and findings as to remedy

Unauthorised deduction

35. The Tribunal relied upon the outcome of the discussions with the representatives referred to above.

36. In accordance with section 24 of the Act the Tribunal orders the respondent to pay to the claimant the agreed sum of £893.74.

Protected disclosure – detriment

37. In relation to this complaint the claimant only sought compensation in respect of injury to feelings in the sum of £8,000.

38. In this connection, the Tribunal brought into account the guidance initially given by the Court Appeal in its decision in Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102 CA (upon which both representatives relied) as updated in subsequent case law and the relevant Presidential Guidance in this respect. The claimant's claim form was presented on 4 February 2022 at which time the lower band was between £900 and £9,100. On the basis of the evidence before it as summarised above, the Tribunal is satisfied that that is the appropriate band of compensation, and within that band the appropriate amount of compensation is £7,000.

39. The Tribunal then considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, which provides as follows:

> *207A Effect of failure to comply with Code: adjustment of awards*
>
> *(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*
>
> *(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*
>
> > *(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
> >
> > *(b) the employer has failed to comply with that Code in relation to that matter, and*
> >
> > *(c) that failure was unreasonable,*
>
> *the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.*

40. The Tribunal has considered the above provision in light of the guidance given in the decision in Rentplus UK Limited v Coulson EA-2020-000809-LA, in which other relevant decided cases are considered. The Tribunal addresses the four questions identified in that decision as follows:

40.1 **Does the code apply?** Given that the respondent accepts that the claimant submitted a grievance about her treatment, there can be no dispute that the claim to which these proceedings relate concerns a matter to which a relevant Code of Practice applies.

40.2 **Has there been a failure to comply with the Code?** The Tribunal has identified above the several failures on behalf of the respondent to comply with the Code some of which were conceded by the respondent's witnesses. For ease of reference, the Tribunal's findings in this respect are recorded at the following paragraphs of these Reasons:

> 8.14 The claimant's grievance would not be pursued.
>
> 8.18/19 Upon receipt of the further information the claimant's grievance was again not progressed notwithstanding Mr Ashfield's indication that he would pass it to a qualified investigating officer and, in particular, she was again not invited to a meeting.
>
> 8.20 Following the claimant's detailed response by letter of 14 October these matters were again not progressed as a grievance and she was not invited to a meeting.
>
> 8.21 Ms Maslowska did not conduct a meeting with the claimant.
>
> 8.22 As was conceded by Ms Maslowska, her investigation report was inadequate.
>
> 8.23 The meeting was to provide the claimant with the outcome not to gain her input into any process.
>
> 8.25 Mr Ashfield's explanation as to why there had not been a meeting is inaccurate.
>
> 8.28 The grievance hearing was not postponed.
>
> 8.28 The claimant was not invited to attend the appeal meeting despite her request to do so.

40.3 Applying the approach in Lawless v Print Plus (Debarred) UKEAT/0333/09/JOJ, the Tribunal is satisfied as follows:

40.3.1 the procedures were applied only to a very limited extent;

40.3.2 the failures to comply were deliberate rather than inadvertent; and

40.3.3 there are no circumstances that might mitigate the blameworthiness of the failures.

40.4 **Was the failure to comply with the Code unreasonable?** In this regard the Tribunal took into account the submissions of Mr Henley that the matters in relation to which the respondent might be criticised had been due to lack of experience and qualifications, bad management and

ineptness and not because the claimant had raised disclosures. Nevertheless, in all the circumstances, on the evidence before it the Tribunal has failed to identify anything to support a contention that the failures on the part of the respondent were reasonable; that being contrary evidence of the respondent's witnesses themselves.

40.5 **Is it just and equitable to award an uplift and, if so, by what percentage?** In this regard, the Tribunal applies the decision in Sir Benjamin Slade v Biggs [2022] IRLR 216.

40.5.1 It is satisfied that this case is such as to make it just and equitable to award an uplift.

40.5.2 Such are the failures on behalf on the respondent in this case, that the Tribunal considers a just and equitable percentage to be 25%.

40.5.3 That uplift does not overlap with other general awards.

40.5.4 Applying a final sense-check, the sum of money represented by that percentage is not disproportionate in absolute terms.

41. In summary of the above considerations, for the reasons explained in its findings of fact the Tribunal is satisfied, with reference to section 207A of the above Act, that in relation to the grievance process the respondent failed to comply with the Code and that that failure was unreasonable. Further, the Tribunal considers it just and equitable in all the circumstances of this case to increase that award of £7,000 by 25%. Thus, that award is increased by £1,750 making a total award of compensation of £8,750.

42. The respondent is ordered to pay that amount of £8,750 to the claimant.

43. In summary as to remedy, therefore, the respondent is ordered to pay to the claimant a total of £9,643.74 the component parts of which are set out above.

Judgment

44. The unanimous Judgment of the Tribunal is as follows:

44.1 The claimant's complaint under section 23 of the Act that the respondent made unauthorised deductions from her wages contrary to section 13 of the Act (in that in respect of the final month of her employment it did not pay her the correct amount of her salary or the correct amount of overtime pay due to her) is well-founded.

44.2 In respect of the above unauthorised deductions, pursuant to section 24 the Act, the respondent is ordered to pay to the claimant the agreed sum of £893.74; that comprising £713.13 underpayment of salary plus £180.61 underpayment of overtime pay.

44.3 The claimant's complaint that, contrary to section 47B of the Act, the respondent subjected her to detriment on the ground that she made protected disclosures is well-founded.

44.4 In respect of that contravention, pursuant to section 49 of the Act, the Tribunal awards compensation of £8,750 to be paid by the respondent to the claimant; that award being initially calculated at £7,000 but then increased by £1,750 pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 14 November 2022