EMPLOYMENT TRIBUNALS

Claimant: Mrs Aeffit Hussain

Respondents: Helping Hands Midshires Care Ltd

Heard at: Southampton (by CVP) **On:** 13 February 2023

Before: Employment Judge Beever
Mr J Ruddick
Mr L Wakeman

Appearances
For the claimant: not attending
For the respondent: Mr Maini-Thompson, Counsel

WRITTEN REASONS

Introduction

1. The Hearing of this claim took place by CVP on 13 February 2023. The claimant did not attend. The tribunal proceeded in the claimant's absence and heard the case and gave oral reasons in respect of its determination that the claimant's claim of direct race discrimination contrary to section 13 of the Equality Act 2010 was not well founded and was dismissed and the claimant's claim of automatic unfair dismissal contrary to section 103A of the Employment Rights Act 1996 was not well founded and was dismissed.

2. A judgment was sent to the parties on 24 February 2023, in which the parties were further reminded of Rule 62(3), Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 regarding written reasons not being produced unless requested in accordance with Rule 62 (3).

3. On 26 February 2023, the claimant emailed the tribunal seeking, "to appeal the decision as the reasons for the dismissal had not been published". The tribunal has treated the claimant's email as a request for written reasons. The provisions regarding reconsideration and appeal apply to these written reasons as set out in the accompanying explanatory letter.

The Issues

4. By claim form dated 12 August 2021, the claimant brought claims of unfair dismissal and race discrimination. At a Preliminary Hearing on 7 September 2022, REJ Pirani, identified the issues that the tribunal at the final hearing would be required to determine [40]. Those issues are repeated here.

5. Direct race discrimination, contrary to section 13 of the Equality Act 2020.

   5.1. The claimant identifies herself as British Asian. The claimant alleges that she was less favourably treated because of a race in that (i) she was dismissed, and (ii) the respondent did not give a reason why she was put on garden leave.

   5.2. The tribunal will have to decide whether the claimant was treated worse than someone else was treated. There must be no material difference between the circumstances and those of the claimant. If there was nobody in the same circumstances as the claimant, the tribunal will decide whether she was treated worse than someone else would have been treated. The claimant has not named anyone in particular who she says was treated better than she was and therefore relies upon a hypothetical comparator.

   5.3. If so, was the treatment because of race?

   5.4. Is the respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected with race?

6. Automatic unfair dismissal on grounds that she was dismissed because she made protected disclosures, contrary to section 103A of the Employment Act 1996.

   6.1. The disclosure the claimant relies on is that shortly before she was put on garden leave she emailed her area manager, his manager and the CQC compliance manager raising concerns after she reassessed the patient and found circumstances to be unsafe. In particular, she suggested to double up visit was required. Because she no longer has access to her work email is unable to give precise details of the date of the said emails.

   6.2. The issues will be:

      6.2.1. Were these disclosures of information?
      6.2.2. Did she believe the disclosure of information was made in the public interest?
      6.2.3. Was that belief reasonable?
      6.2.4. Did she believe it tended to show that the health and safety of an individual had been or was being or was likely to be endangered?
      6.2.5. Was that belief reasonable?
      6.2.6. If the claimant made a qualifying disclosure, was it a protected disclosure because it was made to the claimant's employer?
      6.2.7. Was the making of any proven protected disclosure the principal reason for the claimant's dismissal?
      6.2.8. The claimant did not have at least two years continuous employment and the burden is therefore on her to show jurisdiction and therefore to prove

that the reason or, if more than one, principal reason for the dismissal was the protected disclosure.

Proceeding in the absence of the claimant

7. The claimant did not attend the hearing. There was email communication between the claimant and the respondent in which the claimant informed the tribunal that she would not attend due to her own employment commitments. On 9 January 2023, the claimant wrote, "so I am requesting that you deal with the case without my presence…". Initially, the respondent wrote, on 10 January 2023, to, "oppose any suggestion that the claimant will not attend in person to present a case to the tribunal". That elicited a response from the claimant on 25 January 2023, confirming that she would not attend the hearing, stating "I appreciate you considering my case whilst I'm not present".

8. The tribunal was informed, by email dated 7 February 2023, from the respondent, that it confirmed receipt of the position taken by the claimant that she will not be attending the tribunal hearing. The respondent also confirmed the position that the claimant had indicated that she had submitted all of the witness evidence and correspondence and would not be relying on other witnesses for the hearing. The tribunal had earlier written to the claimant on 22 January 2023 and confirmed the position by email dated 8 February 2023 wherein it stated "it is noted that the claimant will not attend the hearing as notified to the tribunal, and the tribunal can only attach limited weight to her evidence as earlier discussed".

9. The claimant was aware of the hearing and had made the decision not to attend and instead to request that the tribunal decide the case on the evidence available to it. The tribunal enquired whether there had been an exchange of witness statement evidence and the tribunal was informed that the respondent did send its witness statement to the claimant on 8 February 2023. Nonetheless, and in the absence of an exchange, the claimant would no doubt have been aware that the respondent would rely on its statement and also provide evidence in response to any questions that the tribunal may have and that the tribunal may then proceed to determine the case on the evidence before it. In the event the witness statement relied on by the respondent substantially took the form of the content of the ET3 already in the possession of the claimant.

10. Having considered the circumstances and having regard to the claimant's request for the tribunal to consider the case in her absence, the tribunal determined that it was appropriate to proceed to hear the case in the absence of the claimant pursuant to rule 47.

Findings of fact

11. The tribunal had a PDF bundle of documents of 189 pages. The respondent gave oral evidence by way of one witness, Mr Matt Bristow, who affirmed his evidence, and was taken to his statement which he confirmed to be true and was subject of supplemental questions as well as questions from the tribunal. The tribunal has

reached its findings of fact based on the evidence before it and on a balance of probabilities.

11.1. The claimant was recruited to the role of branch manager at the respondent's Worthing branch on or about 7 June 2021. Her role was to oversee the service and safety of care provided by the respondent to its service users. Mr Bristow was the Regional Care Director of the respondent. One of those reporting to the claimant was Ms Victoria Adenis, a care training practitioner, whose role was to oversee the administration of the care provided to service users.

11.2. There was a difficult relationship between the claimant and Ms Adenis. This first came to Mr Bristow's attention on or about 28 June 2021 when Ms Adenis, by email, informed Mr Bristow that she wanted to "send my concerns before I speak to you". Ms Adenis described in clear terms concerns that she had about the "behaviour and attitude" of the claimant and her belief that it would not be possible to have a "professional and adult conversation" with the claimant who had "already shown that she can be rather hostile" and "VERY unprofessional". She expressed the view that she felt that the claimant disrespected the respondent. The claimant and Ms Adenis were required to work in the same office together for the full working week.

11.3. As a result, Mr Bristow decided to arrange to see the claimant. However, on 29 June 2021, a service user complaint was received [124] (the "SS Complaint"). From Mr Bristow's perspective, the SS Complaint indicated that the claimant had got into an argument with a customer. It was apparent that the customer did not agree with the assessment of care but that, in the words of the customer, the claimant "didn't really discuss the matter so much as argue about it… I wasn't at all happy with the manner" and as a consequence the customer had "decided to terminate our contract with your company".

11.4. After the claimant's care visit to the customer, the claimant wrote to Mr Bristow on 29 June 2021 highlighting "quite a few risks" following her client care assessment [149]. Specifically, the claimant informed Mr Bristow that the client needed to have two carers present when the client was outdoors. This was necessary to reflect the "risk for the client, carer and the public".

11.5. This was the background and context in which Mr Bristow arranged to see the claimant at a meeting on 7 July 2021. The purpose of the meeting was to "complete an investigation over the [SS Complaint]" [152]. The email was in response to the claimant requesting an update and also informing the respondent that she would need to take a day off as Eid was coming up.

11.6. Mr Bristow agreed that it was intended to be an investigation meeting. However the meeting took an unexpected turn. Notes of the meeting are at [155].

11.7. Mr Bristow reflected in evidence that, "when I met her; it summed up the complaints that I had received". Mr Bristow explained that the claimant was "dismissive" of the points raised about her; "abrupt towards me"; had "no empathy" towards anything I was describing (as recalled by Mr Bristow, the gist

of the claimant's words were, "it's happened, so move on"); failing to see the loss of business or the upset caused to the team.

11.8. The tribunal questioned Mr Bristow closely on this: he reiterated that the claimant was "excessively abrupt" and that there were "many times I couldn't finish my conversation". Mr Bristow did not expect this from the claimant who was, in his words, "almost nonchalant".

11.9. Regarding Ms Adenis, the claimant had made her position plain to Mr Bristow. Mr Bristow's evidence to the tribunal was that, "I specifically remember that the claimant said that she would not be willing to work with Victoria and that she wouldn't be willing to change that… I reverted to my thoughts about the claimant's values and rudeness…". At [158], the claimant is recorded as saying, "I just don't like Vikki" and "… If Vikki can't work with [sic] I will be going".

11.10. The meeting on 7 July 2021 concluded in this way:

"MB: I need to take a moment to think about things and reread responses
AH: what are your concerns
MB: Biggest concerns is a lot of what you are saying and been accused of doesn't fit our value as a business, this should always come first
AH: what is the solution
MB: in this early stage I believe it best we mutually agreed to part ways. You have just tipped into the 4 weeks notice mark; I will place you on Gardening Leave from today so that no further disruption can be caused with customer or team. If you can collect your equipment up.
AH: I understand, I don't know why I am being penalised for pointing out floors [sic] in the branch and trying to change things, I would like the email of someone higher than you
MB: I will pass your concerns onto our Senior HRBP"

11.11. In evidence, when Mr Bristow was asked about the claimant's comment about feeling "penalised for pointing out [flaws]", he said that she was "missing the point" because Mr Bristow fully acknowledged that he was there to investigate those concerns but they were not his reasons for acting in the way that he did. He acknowledged in evidence that the claimant had written her concerns in an email following the meeting [161] and that "absolutely, she raises correct points" and that he addressed them as operational tasks but "at no point was the respondent ever unsafe". Mr Bristow was closely questioned about what he did following receipt of the email at [161]. All care plans were worked through to ensure that nothing was missed; carers were reissued with fresh directions on notifying the office of any concerns; all care plans were to get a six month review and a three month quality check but in any event all care plans were revisited; an audit was completed over a 12 month rolling period; regarding recruitment, a branch manager at Eastbourne was asked to review the process of recruitment and nothing of concern was found. The tribunal formed the view that at no stage did the respondent act in any way which suggested a desire to suppress or deny issues of safety or quality of care.

11.12. As the claimant had requested someone "higher than you", Ms Chisango, Senior HRBP became involved. There is email correspondence in which she confirmed to the claimant the fact of the claimant's garden leave and that she was not expected to work in the branch. The claimant asked Ms Chisango the reason why she was placed on garden leave. Ms Chisango did not provide the claimant with an explanation.

11.13. Mr Bristow stated that he had informal discussions with HR regarding the conduct of the meeting on 7 July 2021 and of his decision at that point to "part ways" with the claimant. Mr Bristow was advised that the claimant could, as a matter of procedure, be dismissed on the basis of what was termed to him as "short service dismissal" i.e. without a fuller process that might be due to somebody of sufficient qualifying service. Mr Bristow decided to terminate the claimant's employment. He gave instructions to Ms Chisango to write to the claimant to that effect.

11.14. The termination letter is at [173] and is dated 19 July 2021. It was written by Ms Chisango. It reflected the decision taken by Mr Bristow on 7 July 2021; the decision was "confirmed" to the claimant and she remained on garden leave for the "remainder" of your notice period to 7 August 2021.

11.15. The termination letter does not explain the reason. Mr Bristow was asked why this was so. He could not account for the content of the termination letter or the failure by Ms Chisango to explain the reasons to the claimant for her garden leave and termination of employment. However Mr Bristow confirmed that he had discussed the matter is with HR and further, as regards the claimant, he made it clear to the claimant in the course of the 7 July 2021 meeting and that she understood as a result.

11.16. Throughout all of those events, the relevance of the claimant's race was not evident. The fact of the claimant's British Asian race is not raised and was not suggested by the claimant to have been a motivating or operative reason, whether conscious or subconscious. The tribunal takes account of the fact that the claimant is not present at this Hearing. The tribunal was careful to understand that discrimination is usually not overt and often be said to be "between the lines". Mr Bristow was asked about the claimant's request for time off for Eid [151] and the tribunal is satisfied that he had no concerns at all albeit that he was not the claimant's direct line manager. When asked specifically whether race discrimination was raised or referred to, Mr Bristow was categoric: "no point, in any conversation, was race discussed… The claimant left the respondent because she didn't align with our values". When further questioned about "values", Mr Bristow was equally categoric that these related to issues raised by, "feedback from the team; feedback from the customer; and the claimant's responses and attitude in the meeting".

The Law

Direct race discrimination

12. Direct race discrimination is prohibited by section 13 of the Equality Act 2010.

13. The tribunal is aware that the burden of proving the discrimination complaint rests on the employee bringing the complaint. However it has been recognised that this may well be difficult for an employee who does not hold all the information and evidence that is in the possession of the employer and also because it relies on drawing inferences from evidence. The concept of the shifting burden of proof was developed to deal with this. The concept is discussed in a number of cases and is set out in section 136 which states that: "if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred but if A is able to show that it did not contravene the provision then this would not apply".

14. The tribunal has had regard to a substantial volume of case law, including Igen v Wong [2005] IRLR and Laing v Manchester City Council [1995] ICR 1519. In every case, the tribunal has to determine the reason why the claimant was treated as she was. See Nagarajan v London Regional Transport [1999] IRLR 572: "this is the crucial question". It was also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment and that is sufficient to establish discrimination. It need not be the only or even the main reason stop it is sufficient that it is significant in the sense of being more than trivial.

15. In a complaint of direct discrimination, the employee can use an actual hypothetical comparator. In this case a hypothetical comparator is relied on. In Shamoon v Chief Constable of Royal Ulster Constabulary [2003] ICR 337, a "comparison of the cases of persons of a different sex… Was therefore be such that all the circumstances which are relevant to the way they are treated in one case the same or not materially different on the other". The Shamoon case also identifies circumstances in which it may be appropriate simply to ask the single crucial question: why was the claimant dismissed?

Automatic unfair dismissal: section 103A

16. The case management order of REJ Pirani [40] sets out the framework and the relevant questions the tribunal needs to ask.

17. The tribunal is mindful of the proper approach to dealing with a PIDA detriment claim as identified in Blackbay Ventures Ltd (T/A Chemistree) v Gahir [2014] IRLR 416 requiring a tribunal to identify each disclosure relied upon together with the alleged or likely failure to comply with an obligation and to identify the nature of the obligation; to address the basis upon which the disclosure was said to be protected and qualifying; to determine whether the claimant had the necessary reasonable belief (Babula v Waltham Forest College [2007] IRLR 346) to determine, as appropriate, whether the claimant acted in good faith or whether the disclosure was made in the public interest (Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA); and where a detriment

short of dismissal was alleged, identify the detriment and the date of the act or deliberate failure to act.

18. In Cavendish Munro Professional Risks-v-Geduld, it was held there must be a disclosure of facts not simply voicing a concern, raising an issue or setting out an objection. In Kilrane-v-London Borough of Wandsworth [2018] ICR 1850, the Court of Appeal held that 'information' in the context of section 43B is capable of covering statements which might also be characterised as allegations. Thus, 'information' and 'allegation' are not mutually exclusive categories of communication, rather only that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure. It was said that 'it would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined'.

19. The test for establishing a contravention of section 103A is statutory: whether the reason or the principal reason for dismissal was because the claimant made a Protected Disclosure. Kuzel v. Roche Products Ltd [2008] IRLR 530 sets out guidance in dealing with a claim under section 103A relating to dismissal for making a protected disclosure.

Discussion and Conclusions

Was there a Protected Disclosure?

20. The tribunal identified the disclosure referred to within the order of REJ Pirani [40] as relating to the disclosure by email and made by the claimant on 29 June 2021 at [149].

21. There was a disclosure of information. The claimant identified risks in the course of a client assessment. She disclosed that the client needed to have two carers present. The claimant identified this because of "the risk to the client, carer and the public". In the course of the email, the claimant attached the care worker's comments which the claimant adopted, including the fact that it was necessary in order to safely take the service user out in public that two carers, or a "double up", was needed. The claimant's disclosure tended to show that the health and safety of an individual was endangered and that the claimant believed this to be so. The tribunal is satisfied that it was a disclosure made in the public interest given the risk that a vulnerable service user may present not just to those helping but to the general public. The claimant reasonably believed that it was a disclosure in the public interest. The disclosure was made to the employer. This was a Protected Disclosure.

What was the reason for dismissal?

22. The tribunal is satisfied that the decision maker was Mr Bristow. He properly took advice from HR but, having heard Mr Bristow's evidence, the tribunal is satisfied that he was capable of making, and did in fact make, the decision to dismiss.

23. The decision to dismiss was taken at the 7 July meeting. The meeting was intended as an investigation meeting to enable Mr Bristow to look into the colleague complaint and the SS Complaint, wherein the theme of each, as perceived by Mr Bristow, was the claimant's attitude which at times was perceived as abrupt, hostile, and volatile.

24. When the meeting got underway however, the claimant's attitude, in the words of Mr Bristow, "summed up the complaints". In other words that the claimant continued to evidence a hostile and abrupt attitude and an unwillingness or inability to empathise with the issues or the impact on the business. The tribunal accepted Mr Bristow's evidence which he gave with reflection and a sense of perspective. He did frankly acknowledge shortcomings that existed in the respondent's handling of the claimant's initial introduction/induction in June 2021 albeit the relevance of those events in the issues before the tribunal is peripheral. The tribunal accepted that Mr Bristow recognised that the claimant had raised issues which had "some substance" and that improvement to processes were needed. His evidence was persuasive because he was plainly able objectively to reflect on the substance of those issues and the same time express clearly his views about the claimant's attitude and approach.

25. Mr Bristow did not expect the claimant, as a manager, to conduct herself in the way that she did. He was entitled to expect that the claimant would not be "abrupt" or be unable or unwilling "to sustain a relationship with a colleague".

26. The tribunal is satisfied that as a result of the combination of the feedback from Ms Adenis and the feedback from the SS Complaint as well as the claimant's responses and conduct during the course of the 7 July 2021 meeting, Mr Bristow decided to terminate the claimant's employment and verbally informed her of that at the meeting. He then instructed HR to confirm the termination in writing to the claimant which Ms Chisango duly did.

27. The tribunal took a step back to consider whether the question of race played any part whatsoever in the decision to dismiss. There is no indication from the evidence that it did. There is no evidence that the claimant's race played a material part in any decision taken by Mr Bristow. He was questioned closely as to his reasons and the tribunal is satisfied that there were genuine business reasons relating to the feedback from the colleague, the SS complaint and the claimant's own conduct toward the issues and towards Mr Bristow in the course of the 7 July 2021 meeting.

28. The Protected Disclosure was not an operative reason for the claimant's dismissal. Mr Bristow was not influenced in his decision by the fact of the Protected Disclosure or the underlying issues that were raised by the claimant, not least because Mr Bristow accepted that there was substance to many of the issues; that they were investigated; that improvements to processes were needed and were made and/or were to be made.

29. Having considered all of the evidence, and again taking a step back, the tribunal is satisfied that the respondent did not treat the claimant in that way, i.e. terminating her employment, because of any safety concerns that she had raised arising out a service user's carer assessment. The disclosure at [149] sets out such concerns by

the claimant but that disclosure was not an operative reason, let alone the main or principal reason for the claimant's dismissal.

30. It follows that the automatic unfair dismissal claim, contrary to section 103A of ERA is not well founded and is dismissed.

31. Further, the tribunal is satisfied that the respondent did not treat the claimant in that way, i.e. terminating her employment, because she was British Asian. The tribunal is also satisfied that the respondent would not have treated another person who did not share the claimant's race but was in materially the same circumstances, namely a person the subject of feedback from a colleague and from a service user complaint and who conducted themselves in a manner in a meeting with a manager that was at times abrupt and hostile and "almost nonchalant", any differently.

32. There is no evidence that the reason operating on the mind of Mr Bristow was, whether consciously or subconsciously, in any sense whatsoever related to the claimant's race. It follows that the claimant's claim of direct race discrimination, as identified by REJ Pirani, at [40], at paragraph 71.1, is not well founded and is dismissed.

33. At [40], at paragraph 71.2, REJ Pirani identified a second allegation of less favourable treatment, namely, that the respondent did not give a reason why she was put on garden leave.

34. The respondent did give a reason. Mr Bristow was clear in the meeting on 7 July 2021 that it was in order to avoid further disruption with either customer or team. It was because of his concerns that it was not in the interest of the business, as explained to the claimant at the time, to keep the claimant in the workplace given her behaviour and attitude toward the "Customer and the Team". On that ground, the claimant's claim of less favourable treatment is not made out.

35. It is unfortunate that HR did not provide a further explanation when invited to do so by the claimant. Mr Bristow had told HR to implement the termination that he had decided upon in the course of the 7 July meeting. the tribunal is satisfied that HR did not exercise any decision-making nor influence Mr Bristow's decision. Its role was an administrative one in this situation. The tribunal is satisfied that the failure to provide the claimant with a further explanation was unfortunate but it was nothing more than administrative in its omission and the tribunal is satisfied that it had nothing whatsoever to do with the claimant's race.

36. The claimant has not established facts from which the tribunal could decide, in the absence of any other explanation, that the respondent had committed an act of race discrimination. In any event, the tribunal regards the omission to provide the claimant with a further explanation as unfortunate but administrative and without any inference or indication of race. It follows that the direct race discrimination claim, contrary to section 13 of the EqA is not well founded and is dismissed.

EMPLOYMENT JUDGE BEEVER
Date: 24 March 2023

Judgment sent to the Parties: 04 April 2023

FOR THE TRIBUNAL

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