



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103622/2022

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Held in Glasgow on 20 to 22 March 2023

**Employment Judge B Campbell
Members Ms J Ward and Mr A Matheson**

10 **Ms S Classick**

**Claimant
In Person**

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The Richmond Fellowship Scotland Limited

**Respondent
Represented by:
Ms A Stobart -
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the tribunal is that:

1. The respondent did not directly discriminate against the claimant on the basis of either sex or race contrary to section 13 of the Equality Act 2010;
- 25 2. The respondent did not subject the claimant to any detriment by reason of making protected disclosures contrary to section 47B(1) of the Employment Rights Act 1996;
3. The respondent did not make unlawful deductions from the claimant's wages contrary to section 13 of the Employment Rights Act 1996; and
- 30 4. The claims are dismissed.

REASONS

General

1. This claim relates to the claimant's employment by the respondent between 13 December 2021 and 22 April 2022. The respondent is a charity which provides support to individuals in local communities throughout Scotland. It
5 operates in the care sector. The claimant was engaged as a Support Practitioner.
2. The claimant alleges a number of types of discrimination against the respondent, that separately she was subjected to detrimental treatment after making protected disclosures, and claims that certain sums due to her were
10 not paid. The complaints are described in more detail below.
3. The hearing took place over three days. The claimant represented herself and the respondent was represented by Ms Stobart of counsel.
4. Evidence was heard from the claimant. The respondent called three witnesses – Mr William Johnston, Team Manager; Ms Sharon Douglas, Area
15 Manager and Ms Melissa Curtis, Human Resources Business Partner. Each individual was found to be generally credible and reliable in their recollection of events. Any more specific comments about the witnesses or their evidence are dealt with below in the findings of fact and/or discussion and decision.
5. A joint bundle of documents was prepared for the hearing, and numbers in
20 square brackets below correspond to page numbers of that bundle.
6. The claimant provided a schedule of the losses she claimed which was included in the bundle, and spoke to this in her evidence.
7. The parties had also prepared a list of issues for the tribunal to determine. Some of the issues had fallen away by the time of the hearing, for example
25 because a second respondent had been removed from the proceedings. The tribunal summarises the issues below.
8. The parties provided oral submissions after the evidence had been heard. The respondent also provided a skeleton note of submissions.

9. The hearing was to deal with liability in relation to the issues and also remedy as appropriate.

Legal issues

The legal issues to be decided by the tribunal were as follows:

5 *Time limits*

1. The claimant commenced ACAS Early Conciliation on 16 June 2022 and presented her claim form on 23 June 2022. Were all or any of her complaints of discrimination, detriment by reason of having made protected disclosures and unlawful deduction from wages presented within time, in each case as
10 adjusted for the early conciliation process?
2. Was any act or omission of the respondent complained about which is out of time part of conduct extending over a period or part of a series of deductions from wages which continued to a date within the relevant time limit, so that it should be considered as raised within time?
- 15 3. If not, was it just and equitable to extend the time permitted for presenting any such discrimination claims or was it not reasonably practicable for the claimant to have presented any such claims of detriment by reason of making protected disclosures or unlawful deductions from wages?

Direct sex discrimination – section 13 of the Equality Act 2010 ('EQA')

- 20 4. Did William Johnston treat the claimant less favourably than he would have treated a male comparator:
- a. on 27 January 2022 via email and several calls, by instructing her to request 90 days' unpaid leave; and
- b. on 31 January 2022 by sending an email to her referring to (among
25 other things) the claimant's potential restoration to the SSSC register?

Direct race discrimination – section 13 ('EQA')

5. Did Mr Johnston treat the claimant less favourably than he would have treated a non-English comparator:

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- a. On 8 April 2022 by telephone and by email in discussion about her personal circumstances; and
 - b. On 15 April 2022 by telephoning her and discussing a recent interaction he had had with the SSSC in relation to her potential restoration to the register?

10 *Detriment on the ground of making a protected disclosure – section 43A and 47B ERA*

6. Did the claimant's email to Mr Johnston on 27 January 2022 at 10.47am constitute a protected disclosure by:

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- a. Disclosing information to her employer;
 - b. Her having a genuine and reasonable belief that the information disclosed fell within at least one category of information set out in section 43B(1); and
 - c. Her having a genuine and reasonable belief that the information was being disclosed in the public interest?

20 7. If the claimant made a protected disclosure, did the respondent subject her to a detriment on the ground that she did so by:

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- a. Mr Johnston on 28 January 2022 stating to her that if she did not forward information about a historic case, her employment would be terminated; and
 - b. The sending of an email on 15 April 2022 to the claimant in which reference was made to her potential restoration to the SSSC register?

Unlawful deduction from wages – section 13 ERA

8. Did the respondent make an unlawful deduction from the claimant's pay by:
- a. Paying her less in January 2022 than she had earned;
 - b. Deducting amounts from her pay in December 2021 and January 2022 in respect of PVG fees; and
 - c. Requiring her to pay the SSSC restoration application fee in January 2022?
9. If so what is the amount of the deduction in each case.?

Applicable law

1. Section 13 EQA prohibits direct discrimination by reason of a protected characteristic. Sex and race (including nationality) are protected characteristics. An employer must not treat an employee less favourably than it does, or would, treat another employee because of a protected characteristic. This requires a comparator, whether real or hypothetical, who is in materially the same circumstances as the claimant except for the protected characteristic being relied on.
2. An employee must not be subjected to a detriment on the ground that they have made one or more protected disclosures – section 47B ERA. A protected disclosure is a disclosure of information about one or more prescribed circumstances, made in the genuine and reasonable belief that those circumstances apply and that the disclosure is in the public interest. The circumstances which a protected disclosure may be about are set out in section 43B(1) ERA and include that a person has failed, is failing or is likely to fail to comply with a legal obligation and that the health or safety of any individual has been, is being or is likely to be endangered. A disclosure will only be protected if made to the proper person. Disclosure by an employee to their employer will qualify.
3. By virtue of section 13 ERA a worker is entitled not to have unauthorised deductions made from their wages. Therefore, subject to specific exceptions

provided for in that part of the Act, there will have been an unauthorised deduction if the worker is paid less than they have earned, depending on how their earnings are calculated, or not paid at all for their work. The date of the deduction is deemed to be either the day when less is paid to them than they have earned, or when they would normally have been paid but were not. A complaint can be made about a series of deductions if the situation is repeated.

Findings of fact

The following findings were made as they are relevant to the legal issues.

- 10 1. The respondent is a registered charity and supports individuals with particular needs in independent living. It has branches across Scotland. One of the main ways it provides support is through the work of Support Practitioners.
- 15 2. The claimant applied for a Support Practitioner role in or around November 2021 and was offered the position by letter from the respondent dated 25 November 2021 [83-84]. Her start date was 13 December 2021 and she was to be based in the respondent's Annandale and Eskdale service with its offices in Dumfries. The offer letter enclosed a more detailed statement of particulars of employment which would apply [85-95] and a role profile with person specification [96-102].
- 20 3. The claimant was to join Mr William Johnston's team. He was a Team Manager.
4. The claimant's role with the respondent involved working alone with people from vulnerable groups and she required to obtain 'PVG' clearance. She obtained the necessary document from Disclosure Scotland.
- 25 5. The role was also regulated by the Scottish Social Services Council ('SSSC'). This meant that she had to be registered with the SSSC to hold the role. She was aware of this when applying for the job.
6. Clause 17 of her particulars of employment stated as follows:

'17. REGISTRATION AND QUALIFICATIONS

If your position with the organisation requires you to be registered with the Scottish Social Services Council (SSSC), you will be required to arrange your registration within 1 month of taking up the post or within 1 month of the appropriate register being opened. You will also be responsible for ensuring that your registration remains valid and for any costs associated with registration.

...

Should you fail to register with the SSSC within the required timescale or maintain your registration or be excluded from the register, your continued employment with the organisation will be subject to review which may result in your demotion, compulsory transfer to another service or another location or dismissal. ...'

7. The SSSC allows employers to engage individuals in registered roles pending their application for registration being dealt with.

15 8. The claimant had worked in the care sector before but had subsequently taken time working in other areas. Before taking up her role with the respondent she had worked for a nursery until around October 2012 and in that role she was registered with the SSSC.

20 9. Unknown to the claimant when she applied for her role with the respondent, she had been removed from the SSSC register some time after 2012, and from the documents likely to have been in 2015. The decision to remove her from the register had been taken by a panel appointed by the SSSC and was related to findings made in relation to her role with the nursery. She had moved house some time after her employment in that role ended, with the result that she did not receive any notification of the panel hearing and had no opportunity to make representations to it. She had understood she had merely allowed her registration to lapse upon its annual renewal date in
25 January 2013, and would be able to renew it quickly to take up her role with the respondent.

10. As a consequence of being removed from the SSSC register, the claimant could not simply renew her registration. The SSSC rules require that such a person must apply for 'restoration' to the register. Unlike individuals applying for registration for the first time, they cannot work in a registered role in the
5 meantime.
11. After she accepted the respondent's offer of employment in December 2021, the claimant applied for registration with the SSSC. The process was dealt with by way of an online portal. The claimant completed the standard application and submitted it on or around 15 January 2022. She believed all
10 was in hand and that her registration would be renewed.
12. The claimant was notified on or around 26 January 2022 that there was an issue with her application. She telephoned the SSSC on that day and a Ms Anna Fairweather called her back to explain that she had been removed from the register as a result of an investigation into events under her previous
15 employment, and would need to apply for restoration to the register rather than a fresh registration. A note was made by Ms Fairweather of the call [150]. Later that day Ms Fairweather emailed the claimant a copy of the 'Restoration Application Form' which needed to be completed and returned. Also enclosed were some guidance notes and a copy of the original decision removing her
20 from the register.
13. The claimant emailed Mr Johnston about this development in the evening of 26 January 2022 [152]. She did so by putting a summary of what she had learned from Ms Fairweather into the subject field of the email rather than the
25 body, with the effect that Mr Johnston did not receive the whole message and it was unclear to him what the claimant was saying. At 9.00 am the next day he replied to say that he had apparently not received the full message as intended [153-154]. He was able to work out that the claimant was saying her registration was not proceeding on track, and said to her:
- 'This is your opportunity to provide relevant background on why you should
30 legally be able to be employed and work for TRFS and I would urge you to send what you can in your defence urgently or another decision is going to be*

made on solely the information we hold i.e. you have been formally removed from the register so are unable to work in social care.'

In saying this Mr Johnston was urging the claimant to send material to the SSSC, although the claimant misunderstood him to be requesting that any items be sent to him.

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14. The claimant sent a lengthier email back to Mr Johnston later in the morning of 27 January 2022 [153]. In this email she went into details about events that had happened at the nursery where she previously worked. It did not clarify that the claimant had been removed from the register and was now being told she would need to apply to be restored.

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15. Mr Johnston sent the claimant's second email to Ms Sharon Douglas, Area Manager and his line manager, and Ms Melissa Curtis, HR Business Partner.

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16. Mr Johnston then had a conversation with the claimant about her email and was able to gain a better understanding of the issue. It was now clear that she would be unable to carry out her role unless and until she was restored to the register. Although the claimant had not met the conditions of her engagement, Mr Johnston was willing to help her by allowing more time to resolve the issue rather than simply terminate her employment. He was mindful of there being a shortage of staff in the care sector at the time and the challenges the respondent faced in recruiting suitably qualified carers. He therefore offered the claimant the choice to take 90 days of unpaid leave in which to resolve matters with the SSSC. The claimant agreed to this.

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17. After his conversation with the claimant he sent a further email to Ms Curtis which forwarded the claimant's request for unpaid leave [158-159]. He calculated that the leave would run out on 28 April 2022, although the correct date was 22 April 2022. He confirmed to Ms Curtis that *'this option now gives her 90 days to try and sort this out and, if she can manage to get restored to the register, return to her post.'*

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18. Mr Johnston confirmed to the claimant by email that she had been granted 90 days of unpaid leave to resolve the issue with her SSSC registration. He

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stated that she had until 28 April 2022 to do so. He said that she needed to submit an online restoration application and urged her to begin the process immediately as the 'clock is already ticking'. He explained that she needed to apply for restoration to the part of the register she had been removed from, and that she should contact him once she heard she had been restored, whereupon she could begin working in her role.

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19. The claimant experienced some uncertainty with her application for restoration. She had understood from Ms Fairweather that her application for restoration should be submitted via the online portal, but was then sent a paper form to complete. She emailed some information to the SSSC on 28 January 2022 but was not sure whether it was all they needed. She believed that a part of the form had to be signed by someone from the respondent (a point Mr Johnston did not accept since he saw that the respondent had no authority to state a position on what had happened with a previous employer) and she had difficulty in getting a response from the people she telephoned. There was also a fee to pay to apply for restoration. Mr Johnston was mindful that time was passing and emailed the claimant on 30 January 2022 with some guidance from the SSSC on the restoration process and clarification of the fee payment process. The claimant paid the restoration fee on 31 January 2022.

20. Around the beginning of April 2022 the claimant was experiencing difficulty with her neighbours who were behaving antisocially. She asked Mr Johnston if he could help advise her how to deal with them. He did not know himself, and did not have time to become involved in any event, but in an email pointed her in the direction of the respondent's appointed staff counselling service and the Citizens Advice Bureau [166].

21. On 15 April 2022 the claimant received an email from the SSSC with the heading 'Application Acknowledgement'. It confirmed receipt of her application for registration, and said that if she was eligible to pay a fee she would be notified. This was a reference to the fact that at the time the Scottish Government were subsidising the cost of some new registrations in order to

help with recruitment into the sector. The email also said that applications would be processed in date order and could take up to three months.

22. Around the same time Mr Johnston was sent the claimant's application to endorse on the respondent's behalf. At this point it became clear to him that he had been sent a new application the claimant had made for registration rather than an application for restoration, which in any event would not require an endorsement by him. On 20 April 2022 he telephoned the SSSC to clarify the position and was told that the claimant had paid the restoration fee and had then been sent a hard copy restoration application pack, but that it had not been completed and returned.

23. Mr Johnston emailed Ms Curtis, and copied Ms Douglas, on the same day to update her and went on to say:

'Accordingly, we need to move forwards and dismiss as now no possibility of her being restored by Friday 22nd so please advise next steps. I have tried to call her back and explain the situation and fact she seems to have not completed and returned the paper application to be restored but no answer at present.'

24. As was evident from his email, Mr Johnston expected that if the claimant had not returned her application for restoration on 20 April 2022, it would not be processed by the time her 90-day leave period came to an end two days later.

25. Ms Douglas took the decision to terminate the claimant's employment and telephoned her on 22 April 2022. She made a note of the conversation [172]. She told the claimant her contract of employment was being terminated with immediate effect as she had been unable to have her name restored to the SSSC register. The claimant understood, but felt it was an injustice. She gave an account of issues which occurred at the nursery she had previously worked at, and how she had responded to them. Ms Douglas was sympathetic but explained that this was not relevant to the present situation of her not being on the register, an absolute requirement for carrying out her role.

26. Ms Douglas explained that she would send out a letter confirming the termination of the claimant's employment. The claimant asked that it not be sent to the home address which the respondent held on record, as there were issues there around her receiving mail. She said she would email an alternative address to Ms Douglas and the letter should be sent there. Ms Douglas agreed. The call ended.

27. Ms Douglas did not receive an email from the claimant with an alternative postal address. A termination letter and P45 were sent to the address which the respondent held for her.

10 Discussion and decision

28. The tribunal reached the following conclusions in relation to the legal issues in the claim.

Jurisdictional matters

Time bar

15 29. The claimant commenced ACAS Early conciliation on 16 June 2022. Any event complained about on or after 17 March 2022 was accordingly within time, whether occurring on a single date or as part of a continuous act carrying on until at least that date.

20 30. The position in relation to which of the claimant's complaints are within time is as follows:

- a. The two complaints of direct sex discrimination, alleged to have occurred on 27 and 31 January 2022, were out of time;
- b. The two complaints of direct race discrimination, said to have taken place on 8 and 15 April 2022, were within time;
- 25 c. One of her complaints of detriment by reason of protected disclosures, asserted to have taken place on 27 January 2022, was out of time but the other, allegedly occurring on 15 April 2022, was within time; and

d. Her claims that (i) she had not been paid the correct salary in January 2022, (ii) unauthorised deductions were made from her pay in December 2021 and January 2022 to cover PVG certification costs and (iii) in respect of the SSSC restoration fee paid on 31 January 2022 were all out of time.

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31. The discretion available to an employment tribunal to decide claims which are out of time, and therefore provisionally outside of its jurisdiction, varies depending on the type of complaint being made. In each case the extent of the power is set out in the statute which provides the right to make the claim itself.

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32. Thus, claims of direct discrimination can be heard when out of time if the tribunal considers it is 'just and equitable' to do so – section 123(1) of EQA. By contrast, both a claim of detriment by reason of making protected disclosures and a claim of unlawful deduction from wages can only be decided when out of time if the tribunal is satisfied both that it was 'not reasonably practicable' for the claim to be submitted to the tribunal on time and that the claim was submitted 'within such further period as the tribunal considers reasonable' – sections 23(4) and 48(3) ERA.

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33. It can be appreciated therefore that a tribunal has more scope to allow a late discrimination complaint to be heard than a whistleblowing detriment or wages deduction claim.

Discrimination complaints

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34. Dealing with the out of time discrimination complaints first, the tribunal decided to use its power to decide these on their merits on the basis that it was just and equitable to do so. It took into account that:

- a. The claimant was not legally or otherwise professionally represented at the time when the matters arose which she complained about or when she commenced ACAS Early Conciliation;

- b. That the tribunal would have to hear little or no additional evidence to do so, given that it would require to familiarise itself with the factual background in order to decide the claims which were within time;
- c. Any complaints which were out of time were only late by a relatively small margin, and there was no apparent loss of relevant documents or detrimental effect on the recollection of those involved. The respondent was able adequately to respond to the allegations;
- d. It was possible that some matters appearing to be out of time could be part of a continuous act, or conduct extending over a period; and
- e. The respondent was essentially neutral in its position on this question and did not put forward arguments as to why the tribunal should not take this approach.

35. The tribunal therefore decided to determine each of the claimant's complaints of direct discrimination on their merits.

15 *Whistleblowing detriment and wages deduction complaints*

36. The tribunal accepted that it was not reasonably practicable for the claimant to have presented her late complaint of whistleblowing detriment within time. The tribunal accepted that she may not have immediately identified a situation as a detriment, or if so appreciated whether it was connected to anything she considered to be a protected disclosure, at the time. The alleged event occurred on 27 January 2022. She would have reflected on it in light of her employment being terminated on 22 April 2022, but if so that would only have given her some four days to make contact with ACAS.

37. However, the tribunal reached the view that the claimant did not present her late claim of whistleblowing detriment within a reasonable time after the time limit expired. She did not commence Early Conciliation until 16 June 2022. There was nothing apparent to stop her doing so shortly after her employment was terminated, i.e. around the end of April. Nothing further of note occurred after that to change the way the claimant would consider what claims were open to her.

38. The tribunal considered that the claimant's late claims of unlawful deduction from wages were more clear-cut than her whistleblowing detriment claim in the sense that she could see from her December 2021 and January 2022 payslips what she had been paid, and also note where the respondent had made deductions and for what reason. Had she been unhappy at that she could have sought advice and raised a claim soon after.
39. The tribunal accepted that it was less practicable for the complaint in respect of the SSSC restoration fee to be made within time, since the claimant did not know at the end of January when she paid it what the outcome of the process was going to be, and therefore in effect whether or not that was money well spent.
40. In any event, for the same reasons as in relation to the out of time whistleblowing detriment claim, the tribunal again considered that the claimant did not present her late wages claims within a reasonable period after the time for doing so expired. That is to say, again she should have reflected on her position following her employment being terminated on 22 April 2022 and acted more promptly after that date than she did.

Direct sex discrimination complaints

First complaint

41. The claimant's first direct sex discrimination complaint was that on 27 January 2022 via email and telephone calls, Mr Johnston instructed her to request 90 days of unpaid leave. This was the less favourable treatment alleged. She relied on a hypothetical male comparator – i.e. she believed that a man in otherwise identical circumstances to hers at the time would not have been told to request unpaid leave. She did not specify what more favourable treatment a man would have received.
42. In a complaint of direct discrimination the onus is on the claimant to prove 'primary facts' which at least provisionally suggest that discrimination has taken place because of the protected characteristic - see for example ***Royal Mail Group Ltd v Efofi [2021] UKSC 33***. If a claimant can do so, the onus

moves to the respondent to show that no discrimination occurred, and if it cannot do that the complaint is likely to succeed. If a claimant cannot identify those primary facts, the onus does not transfer to the respondent and the complaint is likely to fail.

5 43. The claimant was unable to establish any such primary facts. On the evidence before it, the tribunal concluded that Mr Johnston did not instruct or direct the claimant to request 90 days' leave. He suggested it to her as an option, knowing that otherwise the claimant's employment would have to be terminated. The option of leave, albeit unpaid, gave the claimant the chance
10 of retaining her job. She freely and willingly requested it. There was no evidence of a man, or indeed any other employee of the respondent, being in the situation the claimant was in at the time because it was so unusual for someone to apply for a role which required SSSC registration whilst removed from the register and without being restored first.

15 44. The claimant did not suggest how the respondent would have more favourably treated a male in similar circumstances. The tribunal did not see any evidence for example that the period of unpaid leave would have been longer, or that the individual would have been paid for some or all of it. The claimant working in her role pending restoration to the register was not a lawful option. The
20 most likely approach the respondent would have taken towards a man would have been the same as the approach taken to the claimant.

Second complaint

45. The second complaint of direct sex discrimination was that in sending the claimant an email on 31 January 2022, Mr Johnston treated her less
25 favourably than he would a hypothetical male comparator.

46. The email in question incorporated text from the SSSC website giving guidance on the process for seeking restoration to the register. On the face of it the email is helpful and that was the intention of Mr Johnston in sending it. The claimant perceived it as unfavourable as she saw it as an example of
30 a wider approach where Mr Johnston was interfering or 'inserting' himself into the process which was between herself and the SSSC.

47. The tribunal reached the view that the claimant was being favourably rather than unfavourably treated in this instance. Mr Johnston was attempting to help the claimant follow the correct process under pressure of time. He liaised with the SSSC regularly in relation to endorsement of new applications and it was not unusual that he communicated with Ms Fairweather in order to help the process along.

48. In any event there were again no primary facts on which the tribunal could conclude that the claimant had been less favourably treated than a hypothetical male comparator. Had her perception of Mr Johnston's actions been correct, he was not acting as he was because she was a woman, but because she needed to follow a particular process by a deadline. The tribunal saw no reason why Mr Johnston would have done anything different if it were a male employee needing to apply for restoration.

49. Therefore, the tribunal concluded that the claimant's complaints of direct sex discrimination were unfounded.

Direct race discrimination complaints

First complaint

50. The claimant's first complaint of direct race discrimination related to matters on 8 April 2022. The claimant was still pursuing restoration and spoke to Mr Johnston by telephone. As part of the conversation she asked him whether anyone within the respondent gave advice in relation to housing as she had a query of her own. She also mentioned her antisocial neighbours and wished to pursue a claim against an engineer who had carried out work on her boiler as she believed that had caused her and her daughter to suffer from carbon monoxide poisoning. Mr Johnston said he had no expertise in those areas but suggested she call a local Citizens Advice Bureau. He followed this up with his email on the same day, which suggested she contact the confidential counselling service arranged by the respondent, and provided a telephone number for the Citizens Advice office.

51. The claimant's complaint was that Mr Johnston would have been more helpful to an employee in those circumstances who was not English. This was her hypothetical comparator.

52. There were no primary facts on which to reach even a provisional conclusion that the claimant was less favourably treated than another employee by reason of her race or nationality. For example, there was nothing in what Mr Johnston said that suggested the claimant's nationality was a factor in how he chose to respond to her, and there was no evidence of Mr Johnston treating a person of another nationality more favourably in a comparable situation.

53. The tribunal was satisfied that Mr Johnston was favourably treating the claimant, by again trying to assist her in whatever limited way he could. There was no basis in any event to conclude that he would have treated, for instance, a Scottish employee more favourably. He simply did not have the expertise or the time to offer the claimant more assistance than he did.

Second complaint

54. The second direct race discrimination complaint was that Mr Johnston on 15 April 2022 telephoned the claimant and discussed with her communication he had had with the SSSC in relation to her restoration application. The claimant asserted that this was unfavourable treatment again as it showed he had imposed himself on the process which was one for the claimant to follow. She also alleged that he was impatient and short-tempered with her. She believed that he would not have taken this approach with a non-English employee in the same circumstances.

55. It is factually correct that Mr Johnston spoke to Ms Fairweather at the SSSC after he was copied in on an email from the SSSC to the claimant dated 15 April 2022 [170]. That email was a standard response thanking an individual for applying for registration. Mr Johnston recognised that this email was inconsistent with the restoration process the claimant should have been following. Ms Fairweather told him that the claimant had not returned the restoration application form and that the correct point of contact for any

queries was the Fitness for Practice officer. Mr Johnston then telephoned the claimant to alert her to the fact that she had initiated the wrong process.

56. Mr Johnston acted as he did because he noted the claimant was pursuing the wrong process with the SSSC and because there were only a few days left before her 90 days of unpaid leave came to an end. He was treating the claimant favourably by helping her. If the claimant was justified in her perception of him playing an unwanted part in the process, there was no evidence that he did so because of her nationality, and would have treated a person of a different nationality differently and more favourably. The reason for his actions was based on the claimant's circumstances and not her nationality. If he was impatient with her it was because she had all but used up her 90 days of leave without obtaining restoration (and indeed without even returning the proper form to the SSSC).

57. The tribunal therefore concluded that neither of the claimant's allegations of direct race discrimination were well founded.

Detriment by reason of making protected disclosures

58. The claimant relied on her email to Mr Johnston of 27 January 2022 [153] as being a protected disclosure. It contained a detailed account of events which had taken place at the nursery where she had worked up until late 2012.

59. She asserted that it fell within the terms of section 43B ERA by making reference to:

- a. a past breach of health and safety law, thus falling within subsection (1)(d);
- b. a course of bullying and harassment that she had suffered, and therefore a breach of a legal obligation her employer had owed her, thus falling within (1)(b); and
- c. her employment tribunal claim against her employer, also describing a breach of a legal obligation within subsection (1)(b).

60. The email was a disclosure to her employer in the sense that it was sent to her immediate line manager in that capacity. It was a disclosure of information by being sufficiently detailed to describe the events and issues being relied upon.

5 61. However, the claimant could not have held the reasonable belief that any disclosure of information within the email was being made in the public interest. Whether a worker making a disclosure had a reasonable belief that the public interest was being served is to be tested objectively. Therefore what they do believe in that respect is illustrative but not definitive. The tribunal
10 considered that any such belief was not reasonably held because:

a. the claimant was describing events which had occurred at least ten years ago;

b. They had been the subject of various legal processes designed to determine whether any laws or standards had been breached, and to
15 deliver an appropriate remedy if so – including action by the Health and Safety Executive, the SSSC and the claimant's own employment tribunal claim; and

c. There was nothing the respondent could now do about the matters being raised and no relevance in the disclosure being made to them.

20 62. Therefore the claimant did not make a protected disclosure.

63. It follows that the claimant could not therefore be subjected to a detriment because she made a protected disclosure. In any event, the tribunal was satisfied that the claimant was not subjected to a detriment in the way she alleged.

25 64. The alleged detriment was that the claimant was sent an email on 15 April 2022 by an unnamed person within the SSSC about her restoration application. This is the email at page [170] of the bundle. It was not sent by anyone within the respondent and therefore cannot be said to be an act, or omission, by them, whether viewed as a detriment or not.

65. Nor was Mr Johnston's conduct as prompted by the email an example of detrimental treatment of the claimant. As discussed above in relation to the claimant's race discrimination complaints, he was helping the claimant, not subjecting her to a detriment.

5 **Unlawful deduction from wages claim**

66. Despite confirming above that each of the three complaints made in respect of unlawful deduction from wages was out of time, the tribunal wished to record that it would not have upheld any of them had they been treated as presented within time.

10 67. The claimant provided extracts from her bank account statements which were cross-referenced to her monthly payslips to confirm that in each month she received the amount of net pay calculated for her once appropriate deductions had been made.

15 68. Her first complaint was that she was underpaid in January 2022. It became clear on review of the claimant's payslips that a payslip had been prepared on the basis that she worked, and was paid for, the full month but that this was superseded by a second payslip once she agreed with the respondent to take 90 days of unpaid leave, a few days of which fell in that month. The second payslip, showing less monthly pay, was therefore the correct one and
20 the claimant's bank account showed she received the same net pay figure as it stated. She was therefore not underpaid.

25 69. The tribunal found no evidence that the respondent wrongly deducted the cost of PVG clearance from her pay in December 2021 and January 2022. It customarily spread the cost over two months. The claimant suggested that the Scottish Government had waived this fee during the Covid-29 pandemic but produced no material or even a link to a document where this was confirmed. The tribunal found no evidence of such a waiver. Mr Johnston understood that the Scottish Government had waived the fee for applying to the SSSC for registration for some new applicants, but this was different and
30 would not apply to the claimant. Therefore the tribunal would have been unable to find in the claimant's favour in this complaint.

70. Finally, the claimant alleged that she had effectively been forced by Mr Johnston to pay the SSSC restoration application fee of £35 and that this money had been a needless expense because she had been dismissed before the restoration process had been completed. This complaint could not
5 succeed as it did not involve the respondent making a deduction from her pay at all. She paid the fee out of her own money. Mr Johnston did not force her – the SSSC would not consider her application for restoration until she paid it. It therefore did not fall within the terms of section 13 ERA.

Conclusion

10 71. Based on the above findings of fact and conclusions, all of the claimant's complaints are dismissed.

15 **Employment Judge: B Campbell**
Date of Judgment: 18 April 2023
Entered in register: 19 April 2023
and copied to parties