



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms G Holland

**Respondent:** Zion Care (St Albans) Limited

**Heard at:** Liverpool (by CVP)

**On:** 12 – 16 December 2022

**Before:** Employment Judge Benson

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr J Middleton - solicitor

**JUDGMENT** having been sent to the parties on 22 December 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Claims and Issues

1. The claims brought by the claimant are a claim of automatic unfair dismissal contrary to Section 103A of the Employment Rights Act 1996 (Public Interest Disclosure) and a claim of wrongful dismissal in respect of the claimant's notice period.
2. There have been two Case Management preliminary hearings during the course of these proceedings, on 28<sup>th</sup> May 2021 and on 1<sup>st</sup> October 2021. In the second of those, a List of Issues was prepared by the Employment Judge who conducted the proceedings and within that List of Issues was a further claim, being a claim of detriment pursuant to Section 43B of the Employment Rights Act 1996. The only detriment relied upon was the claimant's dismissal, and at the outset of this hearing, I raised with the claimant her detriment claim, and how that was put. The claimant confirmed that the detriment which she says she suffered was that she had been dismissed because she made protected disclosures to the respondent relating to the care of vulnerable

residents, for which she was classed as a troublemaker. The only respondent to these proceedings was the claimant's employer and there were no individual respondents. Having regard to Section 47B(2) ERA, which prevents or excludes a claim of detriment against an employer where the act of detriment is a dismissal, and having heard submissions from the parties, for reasons given orally at the hearing, I struck out the claim of detriment on the grounds that it had no reasonable prospect of success.

3. The list of issues was therefore as per the case management order of 1 October 2021 (excluding the detriment claim). The claimant relied upon 29 disclosures set out at PD1 to PD29 in the list of issues.
4. The agreed issues to be determined were as follows:

Unfair dismissal

- a. Was the reason or principal reason for dismissal that the claimant made a protected disclosure etc? If so, the claimant will be regarded as unfairly dismissed.

Wrongful dismissal / Notice pay

- b. What was the claimant's notice period?
- c. Was the claimant paid for that notice period?
- d. If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

Protected disclosures

- e. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:
  - i. What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions: [PD1 – PD 29 in the list of issues].
  - ii. Did she disclose information?
  - iii. Did she believe the disclosure of information was made in the public interest?
  - iv. Was that belief reasonable?

v. Did she believe it tended to show that:

1. a criminal offence had been, was being or was likely to be committed;
2. a person had failed, was failing or was likely to fail to comply with any legal obligation;
3. the health or safety of any individual had been, was being or was likely to be endangered;
4. information tending to show any of these things had been, was being or was likely to be deliberately concealed.

vi. Was that belief reasonable?

f. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

5. It was agreed by Mr Middleton that the basis upon which the respondent disputed that the claimant's complaints amount to protected disclosures within section 43B ERA was that the respondent does not consider that the claimant had a reasonable belief that the concerns she raised tended to show either (paraphrased), that there was a failure to comply with a legal obligation or that health and safety of any person was endangered as set out in section 43B (1)(b) and (d) or that she held a reasonable belief that the disclosure was in the public interest. He did not seek to argue that the claimant had not raised the issues alleged or that there was no disclosure of information. I therefore do not consider it is necessary to my judgment to set out those disclosures in detail in the list of issues or reasons. I describe the nature of the disclosures as necessary in my finding below.
6. Mr Middleton did raise the issue of whether there might be potential **Polkey** reductions, and/or contributory fault. It was agreed that all remedy matters would be left until after liability had been considered by the Tribunal.

### **Restricted Reporting Order**

7. The respondent made an application prior to these proceedings for these proceedings to be heard in private and/or a Restricted Reporting Order made. As part of the proceedings and contained within the bundle before the Tribunal were photographs of residents, including photographs of intimate parts of their persons. I heard submissions from both parties, and the claimant felt strongly that all issues should be available to the public. In accordance with Rule 50 of the Employment Tribunal Rules of Procedure, I balanced the convention rights (Article 8 right to privacy) of the residents and of the families of those who were pictured, and those of the principles of open justice and freedom of expression (Articles 6 and 10). The claimant said that

all of the residents who were in the photographs had passed away and felt that was a relevant consideration. Having balanced these rights, I considered that it was in line with open justice that this hearing should not be in private and rejected that application. I did however consider that the families of those individuals who were in the photographs and might be identified had their own rights to privacy and that it would cause them considerable upset to have the risk of photographs, particularly of intimate or potentially humiliating images of their loved ones to be published. I therefore made a Restricted Reporting Order in relation to the photographs of residents which appeared in the bundle but noted that this did not prevent a description of what was seen in the photographs from being reported.

### **Additional Disclosure**

8. There were additional documents produced by both the respondent and the claimant, all of which I considered were relevant and necessary for the fair determination of these proceedings. As such they were admitted and added to the agreed bundle of documents which have been produced.

### **Evidence and Submissions**

9. The claimant gave evidence on her own behalf, and also called an agency colleague, Amy Wright who provided additional evidence. Both provided witness statements and were cross examined. The respondent called three witnesses, being Michelle Harwood, a Regional Manager who was the Dismissing Officer, Lisa Charlesworth, who was another Regional Manager, and Lisa Culey who was an HR and Projects Manager, and who heard the claimant's appeal. I was provided with written submissions supplemented by oral submissions from Mr Middleton and received oral submissions together with a further document commenting upon Mr Middleton's submissions from the claimant. All were helpful to me in my deliberations. Mr Middleton set out a helpful summary of the law and I referred to his authorities in addition to other decisions set out in the section of my judgment entitled The Law.

### **Findings of Fact**

10. The claimant was employed as a Senior Night Carer with the respondent at their home in Knott End-on-Sea, Lancashire. Her employment commenced on 19 February 2019 and on 15 May 2020 she was dismissed. The respondent says that that was by reason of her conduct. The respondent's home provides residential care and support for older people and those with dementia.
11. Many of the facts in this case are agreed. There are however some areas where there is dispute and I have made findings in respect of those matters based upon the evidence I have heard and the documents I have seen. I have made by findings based upon what I consider is more likely to have happened.
12. During 2019, the claimant was concerned about matters which she found in the care home relating to the poor care and neglect of residents. She took photographs on her own phone and brought these to the attention of the then

Manager, Christine Stephenson and the Deputy Manager Samantha Smith. Each home, including the one in which the claimant worked had a Manager and Deputy Manager, and there were Regional Managers within the company each of whom had responsibility for all homes as opposed to being responsible for any particular one.

13. The claimant continued to raise these issues. As there was no improvement, she made enquiries of one of the Regional Manager, Ms Charlesworth, about how this should be taken forward. A copy of the photographs was sent to Ms Charlesworth. She recommended that the claimant speak with Carl Jones, another Regional Manager as she was too busy to deal with the issue at that time. The claimant had a meeting with Mr Jones in December 2019 and she provided him with a full explanation of her concerns and copies of the photographs which she had taken. Very shortly after this meeting Mr Jones left the respondent organisation.
14. On 23 December 2019 Ms Charlesworth emailed Samantha Smith, the deputy manager of the home with a copy of the photographs asking her to investigate. That email was copied to Michelle Harwood, the third Regional Manager and to Lisa Culey who was the HR Manager. Ms Smith responded on 29 December to say that she could only identify some of the residents and incidents from amongst the numerous photographs which had been provided by the claimant. Shortly afterwards, the claimant received a call from Ms Culey who said that she was collaborating with Carl Jones and asked to meet in order to get better copies of the evidence and to gather any further information she might have. Although Carl Jones had already left the company, Ms Culey did not advise the claimant of this, and the claimant only found out in late January that Mr Jones had left and that he was no longer investigating the concerns she had raised.
15. Ms Culey's initial suggested time to meet was not convenient to the claimant and further she asked to meet during her working hours. This matter was then taken no further forward as Ms Culey did not pursue a meeting. There has been a text provided by the claimant which I accept she sent, and I find that Ms Culey received. Although that text might not be entirely clear as to Ms Holland's intentions concerning arranging the meeting, Ms Culey, nor anyone else within the respondent sought to speak to the claimant thereafter about any of the issues she raised in her complaint or in respect of the photographs. This was the case even though Ms Smith had not been able to provide information about a number of the photographs and issues. The claimant was never told how that matter was progressed and I accept that she did ask Samantha Smith whether there was any news on it at the time that Ms Smith became Manager in mid-January 2020.
16. Ms Holland hoped and anticipated that with Ms Smith becoming Manager, matters in the home would improve.
17. A short one-page complaints form was completed by Ms Charlesworth. It is headed 23 December as the date of the complaint but there is nothing which indicates when the investigation or the form was completed. It records that Ms Smith verbally indicated that the issues had been previously addressed. Further that Ms Culey had attempted to meet with the claimant but that she

cancelled the appointment. It also notes that any pictures which could not be identified were sent to Ms Smith to discuss with the claimant and that Ms Smith had confirmed she had discussed these with the claimant. It notes that the CQC were informed. No other contemporaneous documents have been produced such as any report to the CQC or outcome, or any correspondence with Ms Smith

18. In February 2020 Ms Smith received a diagnosis of terminal lung cancer. Upon that diagnosis, Louise Chard was brought into the home as an Acting Manager. She had worked for the company for some twenty years. The claimant brought to Ms Chard's attention ongoing matters concerning the care and neglect of residents and Covid risks to staff. Those matters are set out as PIDs within the list of issues and the detail is as set out in a document later prepared by the respondent (p467) detailing the complaints which were raised by the claimant from December 2019 onwards.
19. Some of those complaints were minor operational issues, but many of them were matters which brought to the attention of management failures in respect of the care, health, safety and cleanliness of residents. The claimant's particular issues of concern were raised regularly, on 22 February, 28 February, 10 March, 20 March, 21 March, 23 March, 25 March, 1 April, 4 April, 5 April, 7 April, 8 April, 18 April, 21 April, 22 April, 23 April and 27 April and 28 April 2020.
20. On 8 April 2020 Amy Wright, an agency carer within the home emailed Ms Chard to bring to her attention tensions between staff members at the home and an incident which had occurred on the night of 7/8 April 2020. She noted that the staff members Michelle, Ruth and the claimant did not get on. Ms Wright's email gave a balanced view of the relationships but commented that the claimant continually asked for better communication and on other days when the claimant worked without Michelle and Ruth, the team was well led, and there was a better atmosphere.
21. The claimant's colleagues then brought to Louise Chard's attention complaints about her. Ms Chard carried out an investigation including emailing Ms Wright acknowledging her email of 8 April but and asking her specific questions about the claimant's behaviour on a night shift on 31 March.
22. Ms Wright responded on the basis that she could not properly recall the events of two weeks ago.
23. As a result of that investigation, on 28 April the claimant was called into a meeting with Michelle Harwood to discuss the complaints which had been made against her by her colleagues. The claimant asked Ms Wright to accompany her. At the outset of that meeting, Ms Harwood advised the claimant that there was a very real possibility of instant dismissal at the end of the meeting. There was a dispute as to what was said in relation to potential dismissal, however, I accept that the evidence provided by Ms Wright is correct in that she could clearly remember what was said and was independent. There were minutes of that meeting provided, and the claimant and Ms Wright both dispute that those minutes are complete. What is clear is

that in summary, Ms Harwood read out snippets of statements that she or Ms Chard had taken from colleagues about the claimant. The claimant at that stage challenged Ms Harwood that the statements which had been provided and the complaints made, were in retaliation for the fact that she had raised issues concerning the care of residents, and particularly that a number of her colleagues were not providing the care that they should. She raised further that the initial concerns which she had brought to Mr Carl Jones' attention and the Regional Team's attention in December were still outstanding. She said that she considered that she was being seen as a troublemaker and that was why she had been brought in to answer these allegations. Although Ms Harwood was aware of the earlier concerns and photographs from December, having been copied in on the email in December 2019, she did not acknowledge that, either having forgotten or realising that that matter had not been resolved.

24. The meeting concluded and Ms Harwood indicated she would investigate these matters further and then come back to the claimant. Prior to this meeting, Ms Harwood had carried out little investigation into the complaints brought by the claimant's colleagues and that did not change. Following the meeting, she made some enquiries of the claimant's colleagues, but most of her focus was on finding out what had happened to concerns raised by the claimant in December 2019. The claimant was suspended following this meeting.
25. On 5 May 2020 Ms Harwood telephoned Ms Smith to clarify whether the claimant's complaints raised in December 2019 had been dealt with and whether there had been any official grievance raised by the claimant. I have been provided with a transcript of a recording of that meeting, and within it, Ms Harwood's questions of Ms Smith and her interpretations of her answers are with the intention of obtaining confirmation that all matters were concluded and properly investigated. She continues to hold that position in evidence before the Tribunal, but it is clear from the transcript that was not what Ms Smith was saying, particularly in relation to the photographs of 2019. It was very much a case of Ms Harwood attempting to put words into Ms Smith's mouth.
26. Between 30 April and 7 May 2020, the claimant was regularly emailing Ms Harwood to find out the position on her suspension.
27. On 7 May 2020 Ms Harwood emailed the claimant advising her that another issue had arisen, being a further allegation from Ms Chard that the claimant had found a tablet down the side of a chair and had left it there posing a risk to residents. The claimant provided an immediate response explaining that that it was not her who found the tablet, but a colleague. There was further correspondence by email between Ms Harwood and the claimant in which Ms Harwood told the claimant that she needed to provide further information in relation to any other allegations of abuse, and the claimant directed Ms Harwood to the complaints that she had already made and which she said were in the homes' office.
28. On 11 May 2020 Ms Harwood wrote to the claimant saying that she had looked into the historic complaints, and they had been resolved. In respect of

the present complaints, as she described them, Ms Harwood picked out one which she said had been addressed and resolved.

29. On 13 May 2020, Ms Harwood, along with Ms Charlesworth attended at the office within the residential home to look for the information which the claimant said was there. Whilst accessing Ms Smith's personal computer, they accessed her private Facebook Messenger page which included conversations with the claimant. These were private conversations between the claimant and Ms Smith over a period of time. I do not accept that Ms Smith was involved in the provision of a password or any other way of accessing her messages and accept that it was likely that it was open on her computer.
30. Ms Charlesworth and Ms Harwood took the opportunity to read through all of the messages, which were numerous, and discovered a small number of messages, compared with the overall number of messages which they considered, which were derogatory and inappropriate. Those messages appear within the bundle and I have read through them. They included photographs of some residents, including residents with Snapchat filters applied to them.
31. On 23 April 2020 a telephone conversation took place between Ms Charlesworth and Ms Smith. Ms Charlesworth was calling for some information and to see how Ms Smith was. During the course of that conversation Ms Smith raised a telephone call that she had had with Ms Chard, in relation to the claimant. Various parts of the conversation with Ms Charlesworth are relevant to these proceedings, and these appear particularly at page 193, 194, 195, 196 and 197 of the bundle. That call was recorded, and I have seen the transcript. It is clear from that transcript, that Ms Smith's reported conversations with Ms Chard are referring to the concerns the claimant has raised about the treatment and neglect of residents and other issues she had brought to the respondent's attention. It is apparent from Ms Smith's reporting of hers and Ms Chard's conversations that their view was that the claimant was a troublemaker and causing problems by the concerns she had been raising. Ms Smith's advice was to dismiss her rather than going through any disciplinary action. Ms Smith makes reference to whether Ms Chard knew about the photographs, and Ms Charlesworth acknowledges that she was aware of them. One part of the conversation which I have listened to relates to the entry on page 194 which is transcribed as Ms Charlesworth saying, "yes she's not made it easy for herself and the problem is Jill [the claimant] can be a damn good carer". Having listened to this, I am satisfied that what was said by Ms Charlesworth was "yes she has not made it easy for her and the problem is Jill can be a damn good carer". I accept that for much of that conversation, Ms Charlesworth was letting Ms Smith talk and simply because she was commenting "yeah" did not necessarily mean she agreed with every comment Ms Smith was making. What I am satisfied it demonstrates is that both Ms Chard and Ms Smith were in agreement that the claimant raising the various concerns that she had, should result in her dismissal.
32. By way of the letter of 15 May 2020, Ms Harwood advised the claimant that they had found several very concerning photographs and videos of her and



residents on social media which could be interpreted as potential abuse and amount to gross misconduct. She proposed a Skype video meeting that day at 3pm. The email was sent at 1.50pm. Ms Harwood stated that unfortunately if the claimant he was not able to have the discussion at that time, in view of the seriousness of the allegations she may make a decision based on the evidence which she had and that could result in the termination of the claimant's employment. She also advised her that she had raised an alert with safeguarding and CQC due to the serious nature of the material found.

33. The claimant replied at 2.45pm asking for a face-to-face meeting in view of the serious nature of the allegations. She also asked for some details of the allegations. The claimant asked Ms Harwood to provide a time and date that she could attend and said that she was free from 8pm that evening. By 4.50pm she had no response. At 5.50pm, Ms Harwood replied and advised the claimant that she was available at 8pm that evening for a Zoom meeting such that she could share her findings with her and that she would send a link to the meeting with a password and ID. At 6.00pm the claimant asked that somebody else take over the investigation and that as her email had not been answered until after normal working hours, she wasn't able to seek advice. She disputed any alleged allegations and asked that she be allowed to speak to her legal advisor on Monday morning.
34. At 8.02pm Ms Harwood advised the claimant that she had made the decision to terminate her employment on the grounds of gross misconduct with immediate effect and that an outcome letter would be received the following week.
35. That outcome letter was sent on 21 May 2020 confirming that her employment had been terminated with immediate effect. In her witness statement, Ms Harwood summarises her findings in respect of the messages between the claimant and Ms Smith as "messages, pictures and videos of vulnerable residents whereby they have been mocked for her own amusement, racial remarks had been made and with zero empathy". These included a racial comment about a colleague, a video of a resident singing what she described as inappropriate words and photographs of residents with snapchat filters applied to them. She noted that although interacting with residents can greatly improve their quality of life and that this could involve taking photos or videos, none of the residents in the photographs and video had capacity to consent to them being taken and further they were taken on the claimant's own mobile phone. She concluded that the videos and photos were degrading and undignified and amounted to an abuse of the claimant's power such that she was dismissed with immediate effect. The claimant was not provided with an opportunity to address these issues or to provide any explanation. She was reported for safeguarding issues to the Disclosure and Barring Service. The detail is set out at page 259.
36. Thereafter, the claimant appealed against the decision to dismiss her, and an appeal hearing took place on 3 June 2020. Ms Culey upheld some of the individual allegations, and partially upheld others.

37. Prior to that, the claimant had prepared a detailed explanation in relation to the allegations against her. She denied the allegations. The claimant explained that the snapchat filters were enjoyed by the residents, who laughed when they were shown pictures of themselves. That all of the photos had been put on the Home staff Facebook page and that she firstly sent them to Ms Smith to check they were ok. That she was never stopped or told by the nurse in charge or other staff member that her actions were inappropriate and that other colleagues such as the person who took the video were also engaged in these interactions with residents. That the resident who was singing, had picked up the words from a film on the television. She enjoyed singing and continued to sing along with the song at the time and afterwards. They did encourage her because she enjoyed it. That the use of the racial remark was a colloquial term and was not an act of racism nor was it taken as such by Ms Smith. It was in a private conversation. That Ms Harwood had been selective with the messages she had referred to and she gave examples where later messages in the chain a different emphasis to the comments.
38. The claimant participated in the appeal meeting, and although she disputes some of the minutes, she was given an opportunity to put her point of view. Ms Harwood's decision to dismiss was upheld, and she found that the claimant had produced degrading and wholly unacceptable media that was often accompanied by comments showing her amusement which clearly contradicted her strong belief of wanting the best care for the vulnerable residents.

#### Inferences

39. During the course of the proceedings before me very little evidence was produced by the respondent as to what had happened to any of the concerns which the claimant had raised. Although there was a summary of the outcomes in the bundle, which was produced in approximately May 2020, the only original document which confirmed the outcome of any report that had been made or investigation carried out was the internal complaints form dated 23 December. No copies of any of the original concerns raised by the claimant, nor any reports to the CQC or outcomes were produced. I have drawn an inference that the respondent did not treat such concerns seriously and that there was no real effort made to investigate these issues at the time. In drawing this inference, I have had regard to the serious pressures which the care industry was under at the early stages of the Covid pandemic, however, note that a similar approach was taken in respect of the concerns raised prior to the pandemic.

#### **The Law**

##### 40. Protected Disclosures

41. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

“s43A: 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.

s43B(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) ...
- (d) that the health or safety of any individual has been, is being or is likely to be endangered...”

42. The Employment Appeal Tribunal (“EAT”) (HHJ Eady QC) summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17**, a decision of 13 October 2017:

“23. As to whether or not a disclosure is a protected disclosure, the following points can be made:

- 23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.
- 23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.
- 23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.”

43. The decision of the EAT in **Kilraine** was subsequently upheld by the Court of Appeal at **[2018] EWCA Civ 1436**. The concept of “information” used in section 43B(1) is capable of covering statements which might also be characterised as allegations.

44. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong or formed for the wrong reasons. In **Chesterton Global Ltd and anor v Nurmohamed [2017] IRLR 837** the Court of Appeal approved a suggestion from counsel as to the factors normally relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest.

45. In **Chesterton** Underhill LJ addressed the question of the motivation for the disclosure in paragraph 30, saying that:

“... while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.”

46. Sections 43C – 43G address the identity of the person to whom the disclosure was made. In this case it was accepted that the alleged disclosures were made to the employer (section 43C).

47. Unfair Dismissal

48. Section 103A of the Act deals with protected disclosures and reads as follows:-

“an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure”.

49. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

“A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.”

50. In **Beatt** the Court of Appeal described the reason for dismissal as

“the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what 'motivates' them to do so...”

51. In a case within section 103A the Tribunal has jurisdiction over the claim even though the employee has not been employed continuously for two years: section 108(3). However, in such cases it is for the claimant to establish that the Tribunal has jurisdiction, so the claimant bears the burden of showing that the sole or principal reason for dismissal was the protected disclosure: **Jackson v ICS Group Ltd UKEAT/499/97**.

## Decision and Conclusions

### Public Interest Disclosure

52. I must firstly consider whether the disclosures which the claimant made as set out as PD1 to PD29 in the List of Issues amount to protected disclosures within the meaning of section 43A ERA. As set out above the basis upon

which the respondent disputes that the claimant's complaints amount to protected disclosures is that the respondent does not consider that the claimant had a reasonable belief that the concerns she raised tended to show either (paraphrased), that there was a failure to comply with a legal obligation or that health and safety of any person was or is being endangered or likely to be endangered as set out in section 43B (1)(b) and (d) and further that she held a reasonable belief that the disclosure was in the public interest.

53. The claimant made 29 disclosures over the period of some 5 months. The respondent has not disputed that these issues were raised. They vary in nature but the content of the majority of those disclosures is that the safety and welfare of individual residents of the home is or was being endangered. Some of the later concerns also relate to the safety of staff and there is disclosure (PID 16) which relates to a staff member being in possession of drugs.
54. I find that the claimant had a belief, at the time she brought her concerns to the attention of the respondent, which was reasonably held, that PID2 and PID4 being the disclosure of photographs of residents which had been provided to management at the home in December 2019 and the majority of the remaining disclosures, tended to show that the health and safety of residents was or is endangered. I accept that I am not familiar with the care of elderly or vulnerable people within care homes, but the nature of the photographs and concerns which the claimant raised about the care of the residents are sufficient to demonstrate that health and safety of those residents who feature is at risk.
55. The respondent has not produced the many written complaints made by the claimant, and as I have stated there is very little evidence from the respondent about the various complaints and the outcomes of any investigation, they say took place. I accept that there is a summary sheet but nothing to evidence when and how those issues were looked into or reported to the CQC. That is a feature of this case. I rely in part upon the inferences I have drawn that the respondent did not treat the claimant's concerns seriously and that there was no real effort made to investigate these issues at the time.
56. I also accept that the issues raised by the claimant from mid-March 2020 onwards were made at the height of the Covid19 pandemic and as such the actions taken by the respondent to investigate them must have been severely impacted by the operational concerns overwhelming them at the time. Regardless of this, the concerns raised by the claimant, including those relating to Covid19 were because she reasonably believed there was a health and safety danger to residents.
57. Turning to whether the claimant had a reasonable belief that these disclosures were in the public interest? I must consider whether the claimant subjectively believed that was the case at the time she raised the concerns and that her belief was reasonable.
58. I am asked by Mr Middleton to find that because the claimant had earlier in 2019 made comments to her manager in a series of messages between them in a private conversation which the respondent says were derogatory

and disrespectful to residents and made fun of residents by way of Snapchat filters, that she did not raise the health and safety issues in the public interest. I cannot agree. It is clear to me that the claimant had a clear and genuine belief that the residents in the home were not being cared for to the standard they should have been, such that there was a risk to their health and safety and that the management were not addressing these issues. The failure by the respondent to action her concerns in December 2019 when she brought serious matters to their attention supported her view that she must continue to raise issues and not have them 'swept under the carpet'. A private chat between her and a manager, even where the comments and photographs were disrespectful of residents, does not negate her concerns about their physical wellbeing nor that of the staff within the home in relation to the later Covid19 issues which she raised. I am satisfied that her belief was reasonably held.

59. Although not necessary in view of my findings that the vast majority of the disclosures were protected, there are a few (eg PD22 and PD15) which I find do not individually meet the threshold set out in section 43B(d) ERA and which might amount more to operational issues as described by the management, but when moving to consider the reason for the claimant's dismissal, I am permitted to look at whether the protected disclosures cumulatively are the reason or the principle reason for dismissal, such that these few unproved disclosures are not important.

60. I therefore find that there was there a series of protected disclosures made by the claimant between 20 December 2019 and 28 April 2020.

#### Unfair Dismissal

61. The burden of proof in a claim under section 103A of the ERA when a claimant has less than two years' service is on the claimant. That means that the claimant must show on the balance of probabilities that the reason or principal reason for her dismissal was that she had made a protected disclosure or disclosures. In considering this, I must decide what was the reason which operated on the respondent's mind at the time of the dismissal. In this case, the claimant puts her case on the basis that she made multiple disclosures, and these, taken as a whole were the reason for her dismissal. Essentially, she was seen as a troublemaker by the respondent, and they wanted her gone.

62. I must therefore look at what was motivating the respondent in their decisions, specifically Ms Harwood who made the decision to dismiss, but also Ms Culey who upheld it on appeal.

63. Often there is a dearth of evidence as to an employer's motives in deciding to dismiss an employee. It is appropriate for me to draw reasonable inferences should I wish to as to the real reasons for an employer's actions on the basis of principle finding of facts.

64. I find that the claimant has shown that Ms Harwood's motivation for dismissing her were the multiple protected disclosures which she had made. My reasons for that conclusion are as follows:

65. The claimant's original disclosures in December 2019, had not been dealt with. There was minimal effort by the respondent to look into them once Carl Jones had left. The Regional team pushed the matter back to the management of the home to provide information. This was the case even though the reason it had been escalated was because the home had not dealt with the claimant's original concerns. Ms Smith provided information about the photographs and concerns to the extent as was within her own knowledge and it was left with Ms Culey to follow up with the claimant. I do not accept that Ms Culey did not receive the claimant's text about meeting up. The text isn't entirely clear however if the claimant was going to fabricate this text, which is the only other explanation put forward, then I consider she would have been much more direct in what it was saying. Whether the text was entirely clear or not, in view of the serious nature of the concerns which were being raised, such that the claimant had asked for a meeting in the home on 4 November 2019 and then asked for a meeting with the Regional Manager, it is surprising that Ms Culey or the Regional team did not want to follow this up. Further I consider that any referral to the CQC at this time was on the basis of the limited photographs that Ms Smith had been able to identify and not the full range of concerns which the claimant had raised. No original documentation was produced to this Tribunal with the report to the CQC or its outcome and from the evidence we heard, I find that the report was by way of a phone call and the issues were downplayed.
66. The claimant continued to raise any concerns she had with Ms Smith when she became Manager in mid-January 2020 but as she was her friend and she considered that Ms Smith would have the will to deal with these issues, she did not raise her ongoing concerns outside the home. She continued to ask Ms Smith about the previous issues she had raised. Ms Smith understandably had other matters on her mind from February 2020 when she was diagnosed with terminal cancer. From mid-February 2020, Louise Chard became the acting manager in Ms Smith's absence. The claimant thereafter brought frequent and regular matters of concern to Ms Chard. These included concerns about the actions of other staff members.
67. It is clear from evidence which I have heard in relation to Ms Chard that the disclosures resulted in the disciplinary investigation into the claimant in April 2020.
68. I have read carefully the transcript of the call between Ms Smith and Ms Charlesworth and cross referenced it with the timeline of disclosures. Ms Smith is clearly referring to the disclosures brought by the claimant as being the reason for her view (which she has discussed with Ms Chard) that the claimant should be dismissed. Ms Charlesworth does nothing to suggest this is an inappropriate view bearing in mind there has been no investigation as yet, rather she goes with the flow of Ms Smith's comments even if she does not express any agreement with her. I listened to the short extract and although I accept that work is 'her' rather than 'herself', this does not change my view.
69. Further I note that the statements of the staff containing their complaints about the claimant have not been disclosed, but there is an exchange of emails between Ms Chard and Ms Wright in which it is clear that Ms Chard's

investigation is focussed on the claimant's conduct in respect of the disagreement during a night shift rather than asking Ms Wright for her more general comments on what happened. Further even though Ms Wright's view as an independent observer to the events complained about is that there was no real issue, that is ignored and the matter proceeds to Ms Harwood being appointed to investigate.

70. Ms Harwood met with the claimant on 28 April, I accept Ms Wright's evidence as to what the claimant was told at the outset of that meeting being "There is a very real possibility of instant dismissal at the end of the meeting". Both the claimant and Ms Harwood put their own slant on their versions, but I accept Ms Wright's. I find that Ms Harwood went into that meeting intending to dismiss the claimant. She had done no real investigation by speaking with any of the claimant's colleagues who had provided statements. It was only when the claimant raised the fact that she considered this was a 'witch hunt' and that it was because she had raised concerns about treatment of the residents that Ms Harwood paused. When Ms Harwood asked the claimant for details of the allegations, she fails to acknowledge that she was copied into to the original complaint and photographs in December 2019 and continued to ask the claimant to provide details.
71. At this stage, Ms Harwood had no knowledge of the matters for which the claimant was later dismissed.
72. Ms Harwood's investigation thereafter was primarily focussed on what had happened to the claimant's disclosures made in December 2019 and whether anything had been raised and with Ms Smith. No evidence was produced to show the investigation she carried out into the complaints by colleagues about the claimant thereafter. She says she spoke to colleagues and decided it was a 'tit for tat' situation. The allegations were however wider than that and related to residents, but there was no explanation as to why these were not pursued.
73. Ms Harwood spoke to Ms Smith in respect of the December 2019 disclosures, and I find the transcript of that call demonstrates Ms Harwood's defensive approach to the disclosures which were made and her concern about them. I consider that during that call she had an agenda of obtaining Ms Smith's agreement that all issues had been investigated and concluded. Although Ms Smith is for instance saying that only four of the photos were dealt with, she pushes Ms Smith to say that everything is dealt with when Ms Smith is saying that it has not been. I consider that Ms Harwood's defensive approach was because of her concerns relating to the disclosures which the claimant had made and the respondent's failure to address them.
74. I accept that when looking to locate the written complaints which the claimant said she had made, Ms Charlesworth and Ms Harwood attended the home and that the Facebook messenger account of Ms Smith was open. I do not consider that Ms Smith provided her password or assisted the respondent in this regard. I accept Ms Charlesworth send the video to herself from Ms Smith's messenger account and that explained why it appeared to the claimant that Ms Smith may have been involved.



75. Both Ms Charlesworth and Ms Harwood did however seize an opportunity which was presented to them. They went through a large number of private messages between the claimant and Ms Smith and picked out those issues which they considered amounted to potential misconduct issues.
76. On 15 May having obtained evidence of matters which they considered were serious conduct issues, Ms Harwood notified the claimant that no action would be taken for the issues for which she was originally suspended but that new matters had been discovered for which she could be dismissed. I consider that the timing of the dropping of one set of allegations and its replacement with another, demonstrated the respondent's intention to terminate the claimant's employment. This is supported by the unexplainable speed at which this process was conducted, without giving the claimant any opportunity to understand the allegations against her and not allowing her time to take any advice. There was an agenda that the claimant was to be dismissed.
77. The respondent contends that the reason for the claimant's dismissal was the Facebook messages. Ms Harwood was however already intending to dismiss the claimant before they came to light. The claimant's raising of the various disclosures, some about the actions of her colleagues, was causing frustrations and conflict in her home. Ms Chard reported that to Ms Smith whose view was that the claimant should be dismissed. I find that Ms Harwood continued with that agenda and Ms Culey supported it. Both had the added concerns that the serious issues which were brought to the respondent's attention in December 2019 involved them and had not been properly dealt with and they belatedly sought to avoid criticism for that failure.
78. There is also a clear contrast in the lax approach the respondent took to investigating the disclosures brought to it by the claimant in December 2019, which on the face of it seem more serious in that they related to potential physical harm to residents, and the rigorous way in which it investigated the claimant for the original allegations and then the Facebook private messages which the respondents found were disrespect and degrading of residents.
79. Although the respondent may have considered that there was sufficient evidence to dismiss the claimant for those messages, I find that the claimant has shown that the motivation of the respondent and principal reason for her dismissal was the fact that they saw the claimant as a troublemaker, disrupting the home with her various complaints and as those complaints were protected disclosures, her dismissal was automatically unfair.

#### Wrongful dismissal

80. Having found that the principal reason for the claimant's dismissal was not her conduct, but that she made protected disclosures, it is not open to the respondent to terminate her contract without notice. As such the respondent is in breach of contract. The claimant was entitled to a notice period of 4 weeks.

Employment Judge Benson  
Dated 11 May 2023

REASONS SENT TO THE PARTIES ON  
22 May 2023

FOR THE TRIBUNAL OFFICE

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