EMPLOYMENT TRIBUNALS

Claimant: **Mr R De Guzman**

Respondent: **Care UK Community Partnership Ltd**

Heard at: **London South Employment Tribunal**

On: **3 – 7 July 2023**

Before: Employment Judge Dyal, Mrs Beeston, Mrs Hazzard

Representation:

Claimant: in person

Respondent: Ms Niaz Dickinson, Counsel

RESERVED JUDGMENT AND ORDERS

1. Unfair dismissal:

    a. The Claimant was unfairly dismissed contrary to s.94 and 103A Employment Rights Act 1996. The principal reason for his dismissal was that he had made public interest disclosures ('PIDs');
    b. Both the basic and compensatory award are reduced by 30% on account of blameworthy conduct.
    c. No *Polkey* reduction is made.

2. Victimisation: the Claimant's dismissal was in material part because he had done protected acts and so was an act of victimisation contrary to s.27 Equality Act 2010.

3. Direct race discrimination: this claim fails and is dismissed.

4. Harassment related to race: this claim fails and is dismissed.

5. The parties shall liaise to seek to agree remedy. If remedy has not been agreed by 30 August 2023 they shall write to the tribunal notifying it of the same, stating the points of remedy that are agreed and the points that are disputed and asking for a remedy hearing to be listed.

REASONS

Introduction

1. The matter came before the tribunal for its final hearing.

The issues

2. The Respondent prepared a list of issues in advance of the hearing. At the outset of the hearing both parties agreed that the list of issues correctly identified the issues for adjudication. However, on day 2, the Claimant said that he had spotted two errors and asked to amend the list as follows;

   2.1. Paragraph 8(f) to read that the Claimant raised a verbal concern at a staff meeting on August 2021 to Mrs Fisher and Ms Rushton that Mrs Fisher had allowed a carer to leave work early for a football match on 11 July 2022;
   2.2. Paragraph 8(g) to correct the date to 4 August 2020.

3. The Respondent consented to these amendments and they were accordingly made. The final list of issues then is as follows:

> (Introductory paragraph 1 omitted)
>
> A. Unfair Dismissal - s.98 ERA
>
> 2. Did the respondent dismiss the claimant for a potentially fair reason, as per s.98(2)(b) ERA, in this case for a reason related to conduct?
>
> 3. If so, did the respondent act reasonably in treating this reason as sufficient for dismissing the claimant, as per s. 98(4) ERA?
>
> 4. More specifically:
>
> a) did the respondent have a genuine and reasonable belief that the claimant had committed the misconduct alleged and did it reach this belief at the conclusion of a thorough and fair investigation process;
>
> b) did respondent follow a fair procedure and follow its own disciplinary procedure; and
> c) was dismissal within the band of reasonable responses for the respondent in all the circumstances?
>
> B. Direct Race Discrimination - s. 13 EqA
>
> 5. Did the respondent treat the claimant less favourably on the grounds of his race, as per s.13 EqA? The claimant describes himself as of Asian ethnicity and Filipino national origins.

The claimant is specifically alleging that his dismissal by Jagpal Singh, Home Manager, constituted less favourable treatment on the grounds of his race.

6. For this claim, the claimant is relying on the following named comparators:

a) Kelly Fisher, a White British Team Leader for the respondent, concerning an incident on 21 July 2021;

b) Donna Freeman, a White British Team Leader for the respondent, concerning an incident on 13 September 2021; and

c) Nicole Beard, a White British Team Leader for the respondent, who the claimant alleges should have completed the report relating to the first allegation in the disciplinary proceedings that led to his dismissal, but was not subject to any disciplinary procedure.

The claimant avers that these individuals committed similar conduct to him, but were not dismissed as a result.

C. Automatic unfair dismissal on the grounds of raising a protected disclosure - S.103A ERA

7. Did the claimant make a qualifying disclosure to the respondent within the meaning of s 43B ERA which, in the reasonable belief of the claimant, was made in the public interest and tended to show that:

a) a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and/or
b) the health or safety of any individual has been, is being or is likely to be endangered?

8. For this claim, the claimant is seeking to rely on the following alleged protected disclosures:

a) a group grievance letter raised in writing by the claimant and others in 2018 concerning allegations of how BAME staff were treated. This was raised to the then Regional Director, Karen Seabrook
b) a second group grievance letter in writing dated 24 August 2020 to the respondent's Human Resources Director, also concerning the alleged treatment of BAME staff;
c) a complaint raised by the claimant to Ms Seabrook in writing on 30 October 2020 concerning health and safety of a resident and sixteen other residents with dementia;
d) a letter of concern in writing dated 7 March 2020 from the claimant and other members of the respondent's night staff concerning an unlocked door;
e) a concern raised by the claimant verbally on 1 1 July 2021 in a meeting with Christine Fisher (Home Manager) and Jeni Rushton

(Support Manager), about how Mrs Fisher had allegedly allowed a carer (ML) to leave work early to watch a football match;
f) the Claimant raised a verbal concern at a staff meeting on August 2021 to Mrs Fisher and Ms Rushton that Mrs Fisher had allowed a carer to leave work early for a football match on 11 July 2022;
g) a Health and Safety Concern at work form raised in writing by the claimant on 4 August 2020 concerning an alarmed door not working.

9. If the claimant did make a protected disclosure, was the reason (or principle reason) for the claimant's dismissal the fact that he raised that protected disclosure, as per S.103A ERA?

10. If it is found that the claimant has made a public interest disclosure, was it made in bad faith and, if so, should any compensation awarded to the claimant be reduced accordingly?

D. Victimisation - s.27 EqA

11. Did the claimant carry out a protected act (or did the respondent believe that the claimant carried out a protected act), as per s.27(1) EqA?

12. For this claim, the claimant is seeking to rely on the following alleged protected acts:

a) a group grievance letter raised in writing by the claimant and others in 2018 concerning allegations of how BAME staff were treated. This was raised to the then Regional Director, Karen Seabrook;
b) a second group grievance letter in writing dated 24 August 2020 to the respondent's Human Resources Director, also concerning the alleged treatment of BAME staff;
c) a complaint raised by the claimant to Ms Seabrook in writing on 30 October 2020 concerning health and safety of a resident and sixteen other residents with dementia;
d) a letter of concern in writing dated 7 March 2020 from the claimant and other members of the respondent's night staff concerning an unlocked door;
e) a concern raised by the claimant verbally on 1 1 July 2021 in a meeting with Christine Fisher (Home Manager) and Jeni Rushton (Support Manager), about how Mrs Fisher had allegedly allowed a carer (ML) to leave work early to watch a football match;
f) the Claimant raised a verbal concern at a staff meeting on August 2021 to Mrs Fisher and Ms Rushton that Mrs Fisher had allowed a carer to leave work early for a football match on 11 July 2022;
g) a Health and Safety Concern at work form raised in writing by the claimant on 4 August 2020 concerning an alarmed door not working.

13. If the claimant carry out one or more of the above alleged protected acts, did the respondent subject the claimant to a detriment because he did that protected act? For this claim, the claimant is alleging that the detriment he suffered was his dismissal.

E. Discriminatory Harassment - s. 26 EqA

14. Did the respondent engage in unwanted conduct related to the claimant's race that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant?

15. For this claim, the claimant is relying on the conduct of Omar Taylor and Jeni Rushton during the disciplinary appeal hearing on 13 October 2021, and specifically that they:

a) threatened the claimant that he was not allowed to leave the meeting room until he had returned documents in his possession;
b) looked through the claimant's bag and folder for those documents; and
c) took those documents and did not return them; and
d) blocked the claimant's way out of the room and only allowed the claimant to leave the meeting room when the claimant told them to call the police for help if they forced him to get all of his documents.

Remedy Issues

16. If the claimant is successful in any of his claims, the Tribunal will need to consider issues of compensation.

Contributory Conduct

17. If the respondent did unfairly dismiss the claimant, should any compensation payable to him be reduced to reflect that the claimant's conduct contributed to his dismissal and, if so, by how much?

Polkey

18. If, the tribunal finds that the dismissal was procedurally unfair, should compensation payable to the claimant be reduced to reflect that the claimant would have been dismissed in any event and, if so, by how much?

The hearing

4. *Documents before the tribunal*:

4.1. Joint bundle running to 382 pages including index;
4.2. Accident and Incident Reporting Policy, disclosed by Respondent and admitted by consent on day 2;
4.3. A biography on the Respondent's website showing a short biography for Christine Fisher, adduced by the Claimant on day 2;

4.4. A handwritten note of Christine Fisher taken from the communication book relating to the locking of the care home, adduced by the Claimant on day 2.

5. During the course of cross-examining Mrs Fisher, the Claimant indicated that he wanted to rely on certain further documents:

   5.1. The last two documents on the list above: these were admitted by consent but on the proviso that counsel could take instructions from Mrs Fisher on them and she could give further evidence in chief about them if necessary. Counsel did take those instructions and indicated that it was not necessary for Mrs Fisher to give any further evidence about them beyond what she had said in cross-examination.
   5.2. Some documentation relating to Divinia Guitba, a current employee of the Respondent. This included a rota, some email trails and a certificate to recognise long service. The gist of it was that Ms Guitba very recently (in June 2023) sought to change her working pattern and the Respondent refused her request. The Claimant wonders if this is because she is Filipino. We refused to admit these documents. They raised a completely new issue that would involve expanding the inquiry and were raised on zero notice to the Respondent. We did not think it would be fair to expect the Respondent to deal with this matter now. Furhter, the issues with Ms Guitba's working pattern were at the very best background information and the Claimant had already led a vast amount of background information in support of his claims. We saw minimal if any predjucie to the Claimant in refusing the application to admit the documents. Further, the timetable was already very tight and expanding the inquiry risked derailing it.

6. *Witnesses the tribunal heard from*:

   6.1. For the Claimant:
      6.1.1. The Claimant
      6.1.2. Ms Ramune Kieliene
      6.1.3. Ms Festivale Ngerageze
      6.1.4. Ms Nelly Mambote

   6.2. For the Respondent:
      6.2.1. Mrs Christine Fisher
      6.2.2. Mr Jagpal Singh
      6.2.3. Mr Omar Taylor

7. The Claimant and his witnesses were cross-examined on day 1 (pm) and day 2 (am and part of pm). The Respondent's witnesses were cross examined on day 2 (remainder of pm), day 3 and a small part of day 4 (am).

8. Ms Niaz-Dickinson cross-examined the Claimant and his witnesses in a focussed way as is typical of experienced counsel. The Claimant's cross-examination of the Respondent's witnesses was very detailed. However, he often went over and over peripheral points before being guided to move on and guided to ensure his questions at the covered the matters on the list of issues, not just background matters. It is entirely to be expected that he did not have the same efficiency as

experienced counsel (and we are making no criticism of him). But this difference in his ability to focus his questions and counsel's ability to focus her's explains why, in accordance with the overriding objective to put the parties on an even footing so far as possible, the Claimant had longer to cross-examine than the Respondent did.

Format of the hearing:

9. The Respondent was given permission for Mrs Fisher and Mr Singh to give their evidence remotely in advance of trial. In the course of the hearing the Respondent applied for them and for Mr Singh to observe the hearing remotely. We granted that permission, though the Claimant opposed it. Essentially, we saw no prejudice to the Claimant by the Respondent's witnesses observing remotely. They had their cameras and microphones off save if the tribunal needed to address them (and in the case of Mrs Fisher and Mr Taylor when giving evidence; Mr Singh's evidence was given in person). On the other hand it enabled those joining remotely to observe the hearing.

10. Counsel applied to attend day 5 of the hearing by videolink on account of childcare commitments arising from the teachers' strike. We allowed that application but in the event were in chambers on day 5 and reserved judgment.

Timing of Mr Taylor's evidence.

11. Mr Taylor was timetabled to give evidence on the afternoon of day 3. However, he was in fact unavailable and this was not communicated to the tribunal in advance of day three by a simple oversight. Ms Dickinson-Niaz applied for him to give his evidence first thing on day 4. The Claimant opposed the application on the basis that it was not what had been agreed either in the Preliminary Hearing (at which a a draft timetable was sketched) or at the outset of this hearing. Those were fair points but ultimately the balance of prejudice favoured allowing Mr Taylor to give evidence on day 4. As it turned out, his evidence would likely have gone into day 4 in any event.

Agreed facts and request to recall Mrs Fisher

12. At the outset of Day 4 the Claimant said that he had made some inquiries that arose out of the evidence the tribunal heard and that he wanted to convey some further information.

    12.1. That Kelly Fernandes was Indian;
    12.2. That Kelly Fernandes became a senior team leader after the Claimant left;
    12.3. That Bilal Jan was Afghan;

13. Judge Dyal explained that the case had to be decided on the evidence the tribunal had heard and that beyond that information of the sort the Claimant had given could not be taken into account unless it was agreed with Respondent (i.e., became agreed facts). The tribunal gave the Respondent time to take instructions.

14. The Respondent's position was that:

    14.1. It was agreed that Ms Fernandes is Indian (so this became an agreed fact);
    14.2. It was agreed that Mr Jan was Afghan (so this became an agreed fact);
    14.3. Ms Fernandes was training as Senior Team Leader in 2021, signed a contract as a senior team leader on 21 February 2022 and was promoted again to Unit Manager for Nights on 16 May 2022.

15. The Claimant agreed that Ms Fernandez signed a contract as a senior team leader on 21 February 2022 and that she was promoted again to Unit Manager for Nights on 16 May 2022 (so these became agreed facts).

16. The Claimant did not agree that Ms Fernandes was in training to be a Senior Team Leader in 2021 at least not during his employment.

17. The Respondent applied for Mrs Fisher to give further evidence on the issue of when Ms Fernandez started training to be a Senior Team Leader. We refused permission for that. The tribunal had already heard a lot of evidence from Mrs Fisher and issues related to Ms Fernandez role had been explored. A full and fair opportunity for Mrs Fisher to give evidence about Ms Fernandez's role had been given. The significance of the date Ms Fernandez' began training was at the very best of background importance only. On balance, it was neither necessary nor proportionate for Mrs Fisher to be recalled nor was it in the interests of justice.

Protected disclosures and protected acts

18. The Respondent indicated at the outset of the hearing and again in counsel's closing skeleton argument what its position was in respect of the Claimant's putative PIDs/protected acts. As set out in more detail below:

    18.1. It admitted that some were indeed PIDs and/or protected acts;
    18.2. It denied that some were PIDs and/or protected acts and where this was denied it gave a focussed reason for the denial. This was very proper and helpful and meant that it was not necessary to explore in evidence and argument all limbs of the tests for each putative protected disclosure/act. Rather, evidence, argument and ultimately decision could focus simply on the disputed issue.

19. For the sake of ease of presentation and to avoid repetition, we interpose our conclusions on whether the Claimant did or did not make the putative PIDs/protected acts in our findings of fact at the appropriate chronological places.

Closing submissions

20. The Respondent's counsel produced detailed written closing submissions which were focussed and helpful. She made oral submissions to augment the written argument. The Claimant also made a helpful short closing statement. We considered the submissions carefully.

Findings of fact

21. The tribunal made the following findings of fact on the balance of probabilities.

22. The Respondent is a multi-site care-home provider. One of those homes, at which the Claimant was based, was known as Laurel Dene ('the Home'). It catered for elderly residents including those with dementia.

23. The Claimant was employed by the Respondent as a life skills support worker from July 2008 to April 2011, as a Care Assistant from March 2013 to November 2015 and as a Team Leader from December 2015 to his dismissal on 13 September 2021.

24. The Claimant identifies his race as Asian and Filipino.

Policy documents

25. The Respondent had a *Death of a resident (including sudden or unexpected death) policy.* At point 4.0 it made detailed provision about record keeping in the event of a death of a resident. It said nothing about recording the names of police officers or paramedics.

26. The Respondent also had an *Accident and Incident Reporting Policy*. It contained important information about how to respond to accidents and incidents at point 8.0. We will not attempt a comprehensive summary but note it says:

    26.1. Accidents and incidents must be reported to the person in charge (or manager) as soon as possible;
    26.2. "A written report must be made using the template supplied on the care record system (caresys) or on an accident/incident form… This must be completed at the earlierest opportunity following the accident or incident and should, ideally, be completed by the individual who witnessed the incident or first identified the problem". The written report referred to is known as an A&I report.

27. The policy therefore gives only limited guidance as to who it is that needs to make an A&I report. Mr Singh was asked for more detail about this and his evidence, which we accept, is that:

    27.1. It would be for a team leader rather than a carer to complete an A&I report. Carers do not have access to caresys;
    27.2. Where more than one team leader is made aware of an incident, the one who should complete it is the one responsible for the part of the home the incident occurs in. If two team leaders are made aware of the incident, and both are responsible for the part of the home the incident occurred in then it is a matter for agreement between them who will complete the A&I.

27.3. It takes around 15 minutes to complete an A&I report. It should be completed as soon as possible. Obviously attending to the accident or incident itself and e.g. administering first aid takes priority.
27.4. If the incident occurs at the end of a team leader's shift they should stay to complete the report rather than complete it on their next shift. There are various reasons for that including that the information may be needed before their next shift e.g. if someone dies unexpectedly the family may have many questions that a properly completed A&I form has answers to.
27.5. If an A&I form is not completed with sufficient detail a manager can ask the person who completed to return to it and add more detail.

28. The A&I report is an electronic document. The form has a number of different sections.

28.1. The main section is called 'Accident details'. Whenever information is recorded here, the form automatically records the date and time of the entry as well as the user-name of the person making the entry.
28.2. There is a notes section. In this section the date/time of the entry and the user-name of the writer are not automatically recorded.

Claimant's role as spokesperson for ethnic minority staff

29. The Claimant saw himself and was seen by others as a de facto leader and spokesperson for the staff at the Home from ethnic minority backgrounds. He routinely took the lead in raising matters of concern with management for both himself and other ethnic minority staff. He approached this work in an impassioned, determined and persistent way.

Christine Fisher

30. Mrs Fisher's employment with the Respondent began in 2015 as a Team Leader at the Home. She was promoted to internal Senior Team Leader in 2017. She was further promoted to Home Manager in January 2020. Mrs Fisher is white British.

31. From Mrs Fisher's promotion to Senior Team Leaders onwards the Claimant and Mrs Fisher had a difficult relationship. The Claimant was of the view that she was racist and discriminated against him and other staff from ethnic minority backgrounds. He was open and direct about this contemporaneously including to Mrs Fisher herself. He told her his views about this regularly.

32. As a result of the difficult relations between the Claimant and Mrs Fisher, Ms Jeni Rushton, Regional Support Manager, began attended routine staff meetings at the home that the Regional Support Manager would not ordinarily attend. It is safe to say that the Claimant was 'on senior management's radar' for some time prior to the critical events in this case.

"My girls" (in-group and out-group)

33. The Claimant's evidence is that Mrs Fisher routinely used the expression 'my girls' in reference to a group of employees whom she favoured in her treatment of staff. His evidence is that she would overlook errors made by 'my girls' and treat others who were not 'my girls' harshly. Further his evidence is that most of the 'my girls' group were white British while most of the others who were treated harshly were not.

34. Mrs Fisher's evidence is that she did not use the term 'my girls' but did use the term 'the girls'. Her evidence about who she used this term in reference to was a bit inconsistent and confused. Initially she said it was a shorthand for Kelly, Tasha, Amanda and Megan and it was easier to say the girls. The Claimant put to her that most "of your girls" are white British. She responded saying it was pretty even and that Kelly Fernandez was not white British (she is Indian) and she then said Gustavo was Brazilian and then referred to Ola (Mr Olayanji Olasunkanmi).

35. Gustavo and Mr Olasunkanmi are men. Judge Dyal asked Mrs Fisher if she referred to them as 'the girls'. She said she did not. Judge Dyal asked her to clarify what made the people she referred to collectively as 'the girls' a group. She said that the were team leaders. This did not make complete sense as several of the team leaders (including at the least Gustavo, Mr Olasunkami, the Claimant, Mr Jan) were men.

36. Having heard the competing evidence, we find that Mrs Fisher did use the expression 'my girls' and this did denote a group of employees whom she particularly liked and favoured. They were a sub-set of team leaders.

37. This was a workplace in which, we think, having heard a great deal of evidence on the matter, there was an 'in-group' of staff and an 'out-group' of staff when it came to relations with Mrs Fisher. The in-group was comprised of day shift staff who were mainly white-British. The out-group was comprised of night-shift staff who were mainly not white-British.

The office

38. There is a dispute in the case about offices. The Claimant's case is that originally, all team leaders were allowed to use what we will call the 'big office'. However, at some point, the big office became off limits to him and others how were not in the 'in-group'. He and others not in the in-group were required to use a difference office we will call the 'small office'. The Claimant's case is that after his dismissal, the office usage reverted to the original position.

39. Mrs Fisher's account is that there was a change of office usage but this was because the big office became the preserve of the senior team leaders who needed access to confidential information. The exclusion from that office was simply on account of the Claimant and others not being senior team leaders. There was a reversion to the original position after the Claimant's dismissal but

the dismissal was not in any way causative of that. It arose from the further promotions of Kelly Fisher and Kelly Fernandes.

40. On this matter we prefer the evidence led by the Claimant and his witnesses. The access to the big office was not determined by role but rather by what we call in or out group status. This was a matter that turned on oral evidence alone (there was photographic evidence of the offices but that did not resolve the issue of who as permitted to use which). The Claimant and his witnesses were, we thought, much more convincing and credible in their evidence about this and it better survived the scrutiny of cross-examination.

PID/Protected act: para 8(a)/12(a) List of Issues

41. On 5 August 2017, the Claimant wrote a group letter of concern. In essence it complained that Mrs Fisher treated "foreign workers" differently to white British ones. She dealt harshly and severely with "foreign workers" whilst dealing supportively and even covering up for white British workers. The Claimant's evidence is that in November 2018, he gave a copy of this letter to the then home manager, Dacre Lassauniere. We accept that.

42. We find that this was clearly a protected act since it made a complaint of less favourable treatment because of race by a manager towards employees in the work-place.

43. We also find that it was a protected disclosure. The only dispute on that front is that the Respondent submits that disclosures amount to nothing more than an allegation. i.e., no information was disclosed.

44. In our judgment this disclosure did include not only allegations but also information. It was not very well particularised information, but it was information nonetheless. It was suggested that there was a pattern of Mrs Fisher discriminating against ethnic minority staff in favour of white British staff by:

    44.1. Using bullying and discriminatory words;
    44.2. Making unfair judgments;
    44.3. Covering up and ignoring errors by white British staff even when they were in the wrong and "pressing down" on "foreign workers" when they had made simple mistakes;
    44.4. Speaking to ethnic minority staff in sarcastic and intimidating way.

45. We therefore find that this was indeed a PID. In the Claimant's reasonable belief it disclosed information that tended to show a breach of a legal obligation, namely the prohibition on race discrimination in the work-place.

46. On 5 November 2018, the Claimant also emailed Ms Karen Seabrook, Regional Director with regards to a meeting that he had arranged with the then home manager. In the email he said that "*we feel discriminated as foreign workers and we seem like an easy target of accusation and intimidation…. In short we feel treated like criminal… I am speaking in behalf of the workers who had left*

because of this problem and for those who are still loyal to the company like myself".

PID/Protected act: para 8(d)/12(d) List of Issues

47. On 6 March 2020, Mrs Fisher instructed the night staff to stop locking the external front door of the care home at night. There was an external front door which led to a porch and internal door that was keypad controlled.

48. On 7 March 2020, the Claimant wrote to Mrs Fisher on behalf of the night staff. In essence he expressed concern about the security of the home if the front door was not locked. He said that many people knew the key-pad code and the night staff did not know who was, and who was not, a legitimate visitor by sight (that is because they tended not to see friends and family because such visits tended to be during the day). He said that visitors were welcome at night but they should use the doorbell as a precaution. The nightshift, he said, was frightening and there was a very high risk of intruders if the front door was not locked. The letter referred to the residents of the home being vulnerable.

49. The Respondent submits this was not a PID because it does not refer to health and safety being endangered nor did it engage legal obligations.

50. In our view, it is plain that the Claimant believed that the disclosure tended to show that there was a risk to health and safety and we think that was objectively reasonable. The context is that this was a home for vulnerable people and was a place of work in the London area. The Claimant was clearly expressing a concern that there was a risk of intruders with bad intentions entering the home if the external front door was not locked. Such an intruder could obviously pose a health and safety risk to staff or residents or both or indeed that intruder may commit crime. It is plain that this is what the Claimant was getting at.

51. We find this was a PID. However it was not a protected act. It had nothing at all to do with race, protected characteristics, discrimination or the like and did not amount to a protected act.

52. Ultimately, the night staff's views on this matter prevailed and Mrs Fisher accepted that the external door should be locked.

PID/Protected act: para 8(g)/12(g) List of Issues

53. On 4 August 2020, the Claimant emailed Mrs Fisher and gave her an account of an incident with a resident. The resident had wandered around the home at night and was found in the morning in the garden having had a fall. She suffered injury. She had managed to exit the building by a door in the dining area.

54. Mrs Fisher asked the Claimant to produce a statement in respect of the incident. The Claimant sent Mrs Fisher a statement about the incident and in it he recited what had happened. He included a reference to the paramedics saying that the

door should have been alarmed for a resident with the type of behaviour and mental health condition that the resident who fell had.

55. The Respondent submits that this was not a protected disclosure on the basis that it did not refer to endangering health and safety or engaging legal obligations. We disagree, it is obvious from the terms of the statement that the Claimant believed it tended to show that the resident's health and safety had been put at risk by the door not being alarmed. She in fact fell and hurt herself. This was a home at which there were residents with dementia and there was an obvious safety risk of such a residents leaving the home in an unmanaged way as this resident did. The Claimnt's belief was objectively reasonable. We find this was a PID.

56. However it was not a protected act. It had nothing at all to do with race, protected characteristics, discrimination or the like and did not amount to a protected act.

57. In her witness statement Mrs Fisher's position was that this door was alarmed and an engineer who attended after the accident could not explain why the alarm had not sounded. Mrs Fisher decided to replace the alarm as a precaution. Mrs Fisher was cross-examined about this door at some length and it was put to her that the door was not alarmed and that she knew it was not alarmed, that it was convenient for her that it was not alarmed so she and others could exit the building via the door to access the smoking area. The gist of her evidence was that as far as she knew the door had been alarmed, that she had relied on the night staff reports for that knowledge and that she had no part in removing an alarm from the door. However, completely absent from her oral evidence was any reference to what we have just recited from her witness statement. The nature of the questions were such that this was extremely surprising and amounted to a significant inconsistency, albeit on a matter that is relevant to credibility alone.

58. The Claimant's evidence is that Mrs Fisher was very angry when she received his statement and said she words to the effect she would not use the statement. Mrs Fisher denies that. However, we prefer the Claimant's evidence on this matter which we found to be much more credible.

PID/Protected act: para 8(b)/12(b) List of Issues

59. On 24 August 2020, the Claimant raised a group grievance, on its own terms, on behalf of the "immigrant workers":

    59.1. The group felt that they were not treated as part of the team and were easy targets;
    59.2. A colleague from an ethnic minority background (Gemma) had been dismissed for an honest mistake in relation to medications but a similar case (from a white British background) had been treated differently;
    59.3. The Claimant had not been permitted to speak at this colleague's appeal hearing;
    59.4. The incident of 4 August 2020 (unlocked door, resident fall in garden) was referred to and a complaint made that Mrs Fisher had refused to accept

the statements that had been made by the Claimant and a carer even though they were the truth;

59.5. The lockers of some of the night staff had been opened with no notice and had taken some of their personal belongings.

59.6. Complaints about the night staff rota compared to the day staff rota

59.7. Night staff were always blamed for issues at work but issues with the day staff were just brushed off. The letter questioned whether this was because the night staff were immigrants or of different skin colour.

59.8. The letter was signed by the Claimant and six other employees.

60. The Respondent accepts, and we find, that this was both a PID and a protected act.

61. Ms Rushton tried to set up one to one meetings with each of the signatories. However, on their behalf the Claimant refused this and said that they would only attend a group meeting.

62. On 24 August 2020, the Claimant emailed Ms Seabrook and told her she had been mistaken to prevent him from talking at the hearing for Gemma, where he had accompanied her. The companion's role was not limited to listening. He referred to having taken advice from the CAB and pasted some guidance on the right to be accompanied.

63. There was a group meeting to discuss the collective grievance on 7 September 2020 and an outcome was given. It did not uphold any allegation of discrimination.

64. On 9 November 2020, Ms Seabrook emailed Ms Sharon Quinn, Head of Reward, and Mr Moiz Khan (and HR Manager), subject line, "*Laurel Dene concerns*". She said this:

> *Just to let you know I have a meeting with Russel today on the outcome of the concerns raised. I have attached the appeal letter concerning the member of the staff dismissed who is at the centre of this and Russel believes to be dismissed unfairly for making a simple mistake.*

65. In our view it is clear that the concerns at Laurel Dene were the ones raised in the group grievance. The case of the employee (Gemma) who was dismissed in circumstances that the Claimant thought were a simple mistake was referred to extensively in the group grievance. The chain continued, and on 17 November 2020, Ms Seabrook sent a further email to Ms Quinn and Mr Khan:

> *Moiz – I need to catch up with you about the next steps and further action concerning the individuals behaviour which is destructive as well as his competence. The T/L has come back to me with his disagreement to the findings, I don't expect the situation to improve and likely to get worse before it gets better.*

66. We did not hear evidence from the writer or recipients of this email chain. Ms Niaz-Dickinson submitted we therefore could not read much into it. She also

noted that the witnesses the tribunal had heard from had not been taken to the document, save for Mr Taylor who was asked who Moiz Khan is.

67. In our view, this email forms part of the evidential material before us, and we are entitled to take it into account. Neither the writers nor the recipients were called (not itself a criticism) but if they had been no doubt they could have been asked about the chain. We do not see that there was any obligation on anyone to put the email chain to the witnesses who did give evidence since they were not (so far as we know) party to the emails and did not give any evidence in chief about them. Judge Dyal did however, specifically draw the email to counsel's attention in closing submissions to ensure she had the chance to make submissions about it (she did and said all that could have been said on the Respondent's behalf).

68. In our view it is clear that the email chain is about the Claimant. He is the person who's behaviour is referred to as destructive and who's competence is questioned.

PID/Protected act: para 8(c)/12(c) List of Issues

69. On 30 October 2020, the Claimant emailed Ms Seabrook and Ms Rushton. He reported a matter that had been brought to his attention by two night carers that while he had been on leave the previous week, Ms Kelly Fisher (who is Mrs Fisher's daughter) had signed documentation to indicate that she had given medications to residents but she did so falsely and in fact she had not given the medications.

70. The Respondent concedes this was a protected disclosure and we find it was. However it was not a protected act. It was not expressed as having anything at all to do with race, protected characteristics, discrimination or the like.

71. There was an internal investigation which found that the medication had been given and that the complaint was malicious. We make no finding either way of our own, it being unnecessary to do so.

Training on reporting

72. On 4 March 2021, the Claimant attended a training session at the Home delivered by Mr Jagpal Singh, Home Manager of a different one of the Respondent's care homes and Ms Rushton. This was the first time the Claimant and Mr Singh met. The topic was *Safeguarding, recording and reporting workshop* and the session was with a small group.

73. In early 2021, the Respondent rolled the training out to all of the care homes in the Richmond local authority area. Mr Singh delivered the training to over 100 members of staff.

Resident JH

74. On 29 April 2021, resident JH passed away unexpectedly. The Claimant was on shift as was Mr Olayanji Olasunkanmi, another team leader.

75. This was on any view an incident which required the completion of an A&I report.

76. An A&I report was commenced by Mr Olasunkanmi and the Claimant later updated it as did Mrs Fisher:

    76.1. Mr Olasunkanmi entered the main description of what had happened in the accident details section. The description he gave was quite brief. It included the following. Mr Olasunkanmi attended JH and discovered he was not breathing. Mr Olasunkanmi called an ambulance. The Claimant also attended and they commenced CPR. Mr Olasunkanmi left and went to Tesco [which is next door] to get a defibrillator. When he returned CPR had stopped because a DNAR [Do Not Attempt Resuscitation] had been discovered.
    76.2. The Claimant updated the A&I report at least 5 times between 00:15 and 04.35. on each occasion reported the fact of police officers arriving. He did not identify the names of the police officer. He recorded this in the notes section not in the accident description section.
    76.3. Mrs Fisher, who arrived in the morning, also updated the notes. She referred to police being in attendance at the scene but did not identify their names. She also referred to it taking a while to find a DNAR report.

77. On 6 May 2021, the Claimant attended an investigation meeting with Ms Rushton and Mrs Fisher. The notes record among other things that the Claimant said:

    77.1. he looked in the file, found the DNAR and told the paramedics to stop CPR;
    77.2. the paramedics had not told him that they were going to call the police so that is why JH, who had been sick, was cleaned up;
    77.3. he did not call Mrs Fisher because Mr Olasunkanmi said he would do everything. (The Claimant says that what he in fact said was that Mr Olasunkanmi told him that he had done everything in the system and had called Mrs Fisher. In our view the sentiment is much the same in either case.)
    77.4. CID arrived at 4am and asked who had been on shift and what had happened. The claimant did not call Mrs Fisher then. It was not in his mind. He was asked to return to work at 8am to answer further questions from the police.

78. Mr Olasunkanmi was interviewed on the same day. The notes of the interview record:

    78.1. he could not find the DNAR in the file but it had a sticker on the outside saying DNAR;
    78.2. when he returned from Tesco, the Claimant was looking through the file and found the DNAR and shouted to the paramedics to stop;
    78.3. he left the Home at the end of his shift at 23.00;
    78.4. no question was put to him about contacting the home manager.

79. Ms Rushton produced an investigation report which was critical of both the Claimant and Mr Olasunkanmi, especially the A&I report, including as follows:

79.1. The report did not confirm that DNAR could not be found in patient file;
79.2. It was unclear who told them to commence CPR and to get a defibrillator;
79.3. The time of death was stated in conflicting ways (it was hard to follow this criticism);
79.4. Lack information about the position the patient was found in; whether he was breathing at time and if any observations were taken and if he was moved to the floor before CPR:
79.5. It was an unexpected death, and the A&I report did not say who requested, or why, JH to be moved back onto the bed and given last offices. Normal procedure would be that the body and room remain untouched until the police arrive but in fact JH was moved back to bed.
79.6. It was unclear what the paramedics told the team about calling the police, how many were at the scene and what time they left. It was not recorded that they left and returned nor what they said about police involvement.
79.7. Did not record if the police asked questions.
79.8. Did not inform home manager that police had entered the building and that scene of crime officers were in attendance.
79.9. Added times police arrived and left but did not otherwise up-date the incident report.

80. On 17 May 2021, the Claimant was invited to a disciplinary hearing to answer an allegation of failure to accurately record the facts surrounding the unexpected death of resident JH once immediate first aid had been given.

81. On 21 May 2021, the Claimant had a disciplinary hearing with Mr Singh. The notes of the meeting record the Claimant saying as follows:

81.1. paramedics arrived and he went to look for the DNAR, he found it and shouted stop;
81.2. it was the paramedics' idea to put JH back on his bed;
81.3. Mr Olasunkanmi advised the Claimant that the paramedics had told him they would call the Police.
81.4. the Police had asked for the names of staff who were working that day and night, looked in JH's welfare folder which was not filled and asked about the actions taken after he had been found unresponsive;
81.5. the Claimant when asked "Have you informed management about this incident" said "I was thinking I need to take responsibility and am in charge";
81.6. the Claimant accepted that in the training workshop he had been told the first thing to be done was report to the manager, but the Claimant had felt he could handle the situation and he had reported it to the clinical lead. The Claimant disputes that he said this. In our view, it is more likely that what is said in the notes on this matter is broadly accurate. It has a ring of truth about it. The Claimant was not phased by the death of a patient having dealt with it many times, and we think he was confident in his ability to deal with the police and it is also his own evidence that he told the clinical lead.

82. On 1 June 2021, the Claimant was given a final written warning. The letter specifically criticised him for failing to record the names of the police officers who

attened and for failing to notify the home manager of the unexpected death and the attendance of the police. Mr Olasunkanmi also received a final written warning.

PID/Protected act: para 8(e)/12(e) List of Issues

83. On 11 July 2021, the Claimant made a verbal complaint at a staff meeting that Maddy Lomelino, carer, had been given permission by Mrs Fisher to leave her shift early to watch the European Championships final. Mrs Fisher and Ms Rushton attended the meeting. A dispute developed about whether this had or had not left the unit short staffed. Mrs Fisher's position was that it had not as there were plenty of staff, the Claimant's position was that it had and that at one stage there had been only one carer so the residents were neglected.

84. In the litigation the Respondent denies that this was a protected disclosure on the basis that it related to a mere staffing issue not a disclosure that related to health and safety or a legal obligation. We disagree, it did relate to a staffing issue but the nature of the work place was such that staffing levels and the health and safety of patients went hand in hand. The point the Claimant was making was not merely about favouritism for Ms Lomelino but also that it left the home short staffed and residents at risk of neglect. That is information which in the Claimant's reasonable belief tended to show that the residents' health and safety was in danger.

85. However, this was not a protected act. It was not expressed as having anything at all to do with race, protected characteristics, discrimination or the like.

PB and SS

86. On 18 July 2021, resident PB threw a hot cup of tea over resident SS. The incident was witnessed by a carer, Jorge Branco. It happened at around 20.05. The Claimant's shift had commenced at 20.00. He was taking over from Ms Nicole Beard, a white British Team Leader, whose shift finished at 20.30.

87. Mr Branco made a record of the incident in his handover sheet. No A&I report was completed. We find that this was an incident of a sort that required an A&I report. It was a relatively serious assault of one resident on another that had potential to cause a burning injury (though in fact no injury was caused).

88. It was not for Mr Branco to make an A&I report but for a team leader to do so.

89. Mr Branco was interviewed on 21 July 2021 by Mrs Fisher. The notes of the meeting record his account as follows. He was asked who he reported the incident to. He said he reported it to the Claimant and then asked Ms Beard to help him check SS for blisters, so (and this is what he said not just what we conclude) in effect he had reported it to both. Ms Beard then attempted to check on SS with Mr Branco but SS had refused to give her access to her room.

90. On 22 July 2021, Mrs Fisher interviewed Ms Beard. The notes of her interview state as follows. At 20.25 she and the Claimant had just attended an emergency (a patient fall). She heard Mr Branco report to the Claimant the incident between PB and SS. Mr Branco then asked her to come and assist with checking SS which she did. However, SS was uncooperative.

91. In our view, assuming for the moment that these minutes are accurate the reality of them is that Mr Branco reported the incident to both the Claimant and Ms Beard essentially, and for all relevant purposes, concurrently. Ms Beard was in earshot when he initially spoke to the Claimant but it was Ms Beard who then took the immediate initial action with Mr Branco to manage the situation. The situation was clearly thus reported to her at essentially the same time.

PC

92. On 19 July 2021, Ms Petrover, a carer, reported seeing a bruise on resident PC's arm (at the shoulder). She reported the matter to the Claimant and he told her to record it in the daily care record which she did. She recorded a bruise on the left arm. The Claimant noted in his handover notes "bruise noticed on L shoulder". Nobody completed an A&I report.

93. Ms Petrover was interviewed by Mrs Fisher on 23 July 2021. The notes of the interview record this:

    93.1. She had found PC crawling on the floor at 5am and she had a bruise on her shoulder and a mark that looked like a scratch.
    93.2. She reported the matter to the Claimant.

94. On 11 August 2018, Mr Olasunkanmi was interviewed by Mrs Fisher. The notes of his interview say as follows:

    94.1. In the morning the Claimant had told him that PC had a red mark on her shoulder. He went to see it and there was a bruise/mark on the shoulder. He did not report the matter because he was under the impression that the Claimant had. He did not check because the Claimant said he had reported everything.

MH

95. On 21 July 2021, there was in incident in which ML spilt a cup of cold water on MH. MH was startled and her arm involuntarily banging into a table. She suffered a skin tear. This was an incident in which on any view an A&R report should have been completed, but it was not.

96. Mr Jan, was the team leader on shift at the time. We accept that he told the Claimant that Ms Kelly Fisher, told him not to do an A&I report. We infer and find that Mr Jan told the Claimant this because it was true. That seems the most likely reason why he reported this to the Claimant. This was not a matter that Mrs (Christine) Fisher was able to shed any useful light on. She was asked if she knew whether or not Ms Kelly Fisher had said this. She did not. She then

suggested that Ms Kelly Fisher might not have been working that day. However, it was plain from her evidence that she did not actually know one way or the other so we place no weight on that suggestion.

Investigation process into PB/SS and PC

97. On 22 July 2021, the Claimant was interviewed by Mrs Fisher regarding PB/SS and PC. The notes of the meeting record as follows:

    97.1. The Claimant said he was not in the building when the incident with PB/SS actually happened. He said it was first reported to Ms Beard the day team leader.
    97.2. Mrs Fisher asked if he had completed an A&I report and he said no because SS had no injuries.
    97.3. Mr Branco informed him of the incident at about 20.25 after he (the Claimant) had dealt with an emergency call to another resident and Mr Branco asked for assistance checking SS for blisters. He had checked SS for blisters later in his shift and there were none.
    97.4. Asked about PC's bruise on her left shoulder he said "it was only a small red mark". He did not complete an A&I report because it was just a small mark and there had been no accident to report.

98. The Claimant's evidence is that at the investigation hearing he offered an explanation for not producing an A&I report that has been omitted (deliberately) from the meeting notes. He says, in essence, that he did not make an A&I report because PC had been getting a lot of bruises and the practice was simply to record them in the daily care report. We do not accept that the Claimant offered this explanation at the time. Not only do the notes not record it, but more significantly, the email the Claimant himself sent the following day in which he sought to set out what he had said in the meeting, makes no reference to this.

99. In that email of 23 July 2021, to Mrs Fisher the Claimant said that the incident with PB had been reported to Ms Beard at 8pm and she was on shift until 8.30pm so it was for her to produce the A&I report. In relation to PC, Ms Petrova had reported to him that PC had a red mark. He did not check it himself as she was asleep but he put it in his handover notes. He referred to another resident CR having a massive bruise on her ankle and a swollen knee but no handover or report, and to ML having water poured on her by another resident.

Disciplinary investigation report

100. Mrs Fisher produced an investigation report on 19 August 2021, recommending matter proceed to a disciplinary hearing in respect of two matters:

    100.1. Allegation 1- Failure to record the facts surrounding a safeguarding incident between two residents, which led to a delay in reporting to social services and completing a CQC notification. This incident took place on the evening of 18/07/21.
    100.2. Allegation 2- Failure to complete an A&I for a bruise and wound found during personal care on resident PC, which led to a delay in getting

medical attention for the injury. This incident took place on the morning of 19/07/2021

PID/Protected act: para 8(f)/12(f) List of Issues

101. In August 2021, the Claimant raised a concern orally at a staff meeting with Mrs Fisher and Ms Rushton, that on 21 July 2021, two carers had been drinking alcohol while on shift on the Respondent's premises (in the garden). A dispute in the meeting arose as to whether the carers were on shift or not and the Claimant's position was that they were and that this meant they neglected their caring duties.

102. Before the tribunal, Mrs Fisher's position is that the carers did drink alcohol in the garden but that they were not on shift rather they were waiting for a colleague to complete her shift and go out. Ms Kieliene's evidence was that the carers were in uniform and on shift and that she saw them drinking in front of her. On this matter we prefer Ms Kieliene's evidence which we found the more credible having seen both witnesses be challenged on their evidence.

103. The Respondent's position is that this was not a protected disclosure because the carers were not on duty at the time so not health and safety issue was engaged. In, our view they were, but in any event, the important thing is that the Claimant believed that they were and his belief was reasonable because it was informed by Ms Kieliene who was an eye witness. The disclosure was not just about favouritism but also about resident care and tended to show that the residents were being neglected and that was health and safety issue (not least given the vulnerable nature of the residents).

Disciplinary stage

104. On 27 August 2021 the Claimant was invited to a meeting with Mr Singh. The letter said it was an investigation/fact find interview and at the end of it that Mr Singh would decide whether the matter should proceed to a disciplinary hearing.

105. We accept Mr Singh's evidence that the intention had been to send an invitation to a disciplinary rather than an investigation hearing but by an administrative error the wrong template was used. Be that as it may, the fact is, the invitation was to an investigation hearing and that is - entirely reasonably - what the Claimant understood he would be attending.

106. In advance of the meeting the Claimant asked Mr Singh if he could bring a colleague with him and Mr Singh said he could.

107. On 8 September 2021, Mr Singh emailed Mrs Fisher and copied in Ms Seabrook and Ms Rushton. He asked about resident CR. He said the daily care note for 16/06 stated that "left ankle got swollen and bruised" and he asked for this matter to be investigated. He said there appeared to be no A&I report from the team leader, Ms Kieliene.

108. The daily care records for CR show:

108.1. 15.06.21: found bruise upper left knee and left knee swollen;
108.2. 16.06.21: no injury referenced;
108.3. 17.06.21: left ankle seemed swollen.

109. Mrs Fisher emailed Mr Singh on 9 September 2021 at 8.51 am. She said she could not find any reference to a 'massive bruise' for CR and gave an account consistent with care records just mentioned. She said that CR had arthritis and swollen joints which could be discoloured as a result and that she was seeing the district nurses regularly. In relation to ML she said that "a glass of water was pushed over on the table by another resident and ML was startled raised her arms catching her hand under the table which resulted in a skin tear. Her son was aware".

110. On 9 September 2021, the Claimant attended the hearing with Mr Singh which was, despite the terms of the invitation, in fact a disciplinary hearing. The Claimant brought Mr Branco with him.

111. Before the hearing began there was a discussion about whether or not Mr Branco could attend. It is agreed by the Claimant and Mr Singh that the Claimant said Mr Branco was his witness. There is a dispute about whether or not the Claimant said words to the effect that Mr Branco wanted to correct the account he was recorded as having given in the investigation meeting with Mrs Fisher. Mr Singh has no recollection of that. The Claimant is adamant that he made this point to Mr Singh. On balance we find that the Claimant did indeed make clear that Mr Branco was there to give evidence in the Claimant's favour and correct the account attributed to him in the investigation minutes. Mr Singh's recollection of the meeting we think was much more limited than the Claimant's (not surprising given the relative significance of the meeting to their respective lives) and he was reliant in significant part for recollection on the notes. The notes make no record of a discussion about Mr Branco's attendance although all agree there was one. Further, we think it inherently likely that the Claimant would have made the purpose of Mr Branco's attendance plain.

112. It is also inherently unlikely that the Claimant would have asked Mr Branco to attend unless he knew Mr Branco would say something helpful. That this was Mr Branco's intention is corroborated by an email he sent the Claimant later in the chronology on 12 October 2021, to the effect that he had reported the incident with PB/SS to Ms Beard first, attended SS with her and only later reported it to the Claimant. As seen below this is also the account the Claimant gave at the disciplinary hearing.

113. Mr Singh took advice form HR, who advised him that Mr Branco could not attend because he had given evidence against the Claimant in the investigation and on that basis Mr Branco was not permitted to attend.

114. The notes of the disciplinary hearing record:

114.1. The Claimant's account was that Mr Branco had reported the PB/SS matter to Ms Beard first and by the time Mr Branco reported the matter to him, Ms Beard had already tried to attend to SS.
114.2. Mr Singh's questioning of the Claimant shows that he interpreted the investigation interview notes of Ms Beard and Mr Branco in the same way we do – that Mr Branco reported the matter to the Clamant and Ms Beard at the same time.
114.3. In relation to PC the Claimant's explanation was essentially that he thought Mr O0lasunkanmi had completed an A&I report. The Claimant then referred to other cases in which there had been a failure to complete an A&I report.
114.4. The Claimant said he felt discriminated against and that they were always picking on him but not checking on what others were doing. Mr Singh's response was to suggest that Claimant tell the home manager (Mrs Fisher).
114.5. The Claimant accepted he had made a mistake by dealing with the PC issue verbally however he described it as a little mistake.

115. At the meeting the Claimant showed Mr Singh further care records for PC which showed that on 27 July 2021 and several occasions in August, PC was observed to have bruises on her legs. No A&I report was made on any of those occasions.

116. After the meeting the Claimant emailed Mr Singh some pictures of CR's injured knee and ankle. Mr Singh forwarded them to Mrs Fisher.

117. Mr Singh's evidence to the tribunal was essentially that he had not regarded it as his role to consider the way in which other employees had or had not reported injuries and what the management response to them had been. So far as he was concerned, his role was to look at the allegations against the Claimant and determine them. Anything else was a matter for the Home Manager. We accept that was indeed Mr Singh's approach.

118. On 15 September 2021, the Claimant was summarily dismissed.

119. Mr Singh's evidence was that he was unaware of the disclosures the Claimant had made and of anything related to the Claimant's reputation at the time of the decision to dismiss. For the reasons we give in our discussion and conclusions, we reject that evidence. We find that Mr Singh knew that the Claimant had made the disclosures at paragraph 8/12 of the list of issues, that local (Mrs Fisher) and senior management (Ms Rushton and Ms Seabrook) considered the Claimant to be a disruptive force i.e., a troublemaker.

Appeal stage

120. The Claimant appealed on 22 September 2021. He stated simply that *"I am not happy with the investigation and the outcome of the decision*".

121. There is a statement in the bundle from Ms Petrova dated 22 September 2021, setting an account of the occasion when she discovered that PC had a bruise on her arm/shoulder. It does not take matters much further.

122. On 12 October 2021, Mr Branco sent the Claimant an email titled 'to whom it may concern' giving an account of the incident between SS and PB. This is described above. This message was not passed to the Respondent at the appeal stage.

123. The appeal hearing took place on 13 October 2021. It was chaired by Omar Taylor, with Ms Rushton in attendance as notetaker. Mr Taylor had taken over as Regional Director following Ms Seabrook's promotion to Operations Director. There had been a handover between them. The Claimant was accompanied by Ms Ngerageze. There are a number of controversies about this meeting:

123.1. The Claimant's account is that Mr Taylor said to him numerous times that he was guilty. Mr Taylor denies that. We prefer the Claimant's evidence which we found the more credible. We discerned from the meeting notes and his oral evidence that he gave the Claimant's appeal short shrift. It is plain from the meeting notes themselves the meeting was conducted in a fairly brusque way.

123.2. The Claimant's account is that Ms Rushton was a very active participant in the meeting, questioning him and interjecting. We accept that account, we found it credible and clear.

123.3. Mr Taylor's evidence is that he believed the Claimant had documents with him of resident care records that the Claimant ought not to. He believed that the Claimant had either been improperly given them by colleagues or had taken them himself. We accept he had that belief.

123.4. The Claimant's case is that at the end of the meeting Mr Taylor and Ms Rushton confronted him, said he could not leave unless he gave the documents in his possession back, stood over him and looked into his bag and folder and blocked his way from leaving the room. They only let him leave when he said he would call the police. They did not return some documents the Claimant had given over during the hearing. The Claimant said this dynamic went on for about 20 minutes, at the outset of which Mr Taylor and Ms Rushton had allowed Ms Ngerageze to leave. Mr Taylor denied the detail of this account. He did accept that he had asked the Claimant to return documents but said that the interaction about it had gone on for less than five minutes. We prefer the Claimant's evidence on this matter, he had a very detailed and clear recollection that had a ring of truth about it.

124. In the course of the meeting the Claimant raised a number of issues of a comparative nature. Ms Rushton looked into these issues after the meeting and produced a short report:

124.1. Ms Beard had not completed an A&I report for a bruise on PC's shin. However, there was a good reason for this. A safeguarding lead and a CQC inspector had become involved after the issue of the bruise on PC's shoulder. They agreed she had a tendency to knock her legs on her

wheelchair causing bruises. Her care plan was updated to reflect this. It meant that it was not necessary to raise an A&I report for bruises on the legs. (The care plan is in the bundle and does record this issue about bruises and the wheelchair);

124.2. MH an ML: there was a benign incident where ML knocked a glass of water on MH. ML was startled and moved her arm, knocking on a table causing a skin tear. It was reported in the daily notes by Mr Jan. District nurses treated the wound. Social services attended and the case was closed. Mr Jan was investigated and he was at fault for not completing an A&I report. The resolution was for a one to one meeting with him for further learning. We find that the Claimant said in the appeal meeting (consistently with his email afterwards) that Ms Kelly Fisher had told Mr Jan not to make an A&I report. However that aspect of this incident was not commented on in Ms Rushton's report.

124.3. MH and FM: FM had just been admitted to the home. She was being pushed in a wheelchair by a family member. In the dining room, MH had grabbed her sleeve. There was no bruise or scratch. Ms Donna Freeman was the relevant team leader. Ms Rushton took the view that no A&I was required. We note that the daily care record for FM describes the incident with MH as follows: *"an incident occurred with another resident, which result in a confrontation in the dining room. I intervened and tried to separate MH by taking back to her room. This incident was reported to the Team Leader and it was resolved by the Team Leader."* The words used perhaps describe an incident more serious than what Ms Rushton describes. However, there is no fundamental inconsistency and in the absence of any better primary evidence about what happened we find that the Ms Rushton's report provides the most reliable account.

125. On 18 October 2021, Mr Taylor emailed the notes of the meeting to the Claimant and asked for him to signed them. The Claimant responded attaching his statement of what he said happened in the appeal hearing.

126. In the statement:

126.1. The Claimant said at the meeting he had said: "*I knew by heart that I was targeted because I whistleblown many wrongdoings at work to HR and to the previous Regional Director Karen Seabrook in the past."* We find that he did say this.

126.2. The Claimant said that in the case of MH and the spilt drink, Mr Jan had told him that he had not completed an A&I report because Ms Kelly Fisher had told him not to. We find that he did say this.

126.3. The Claimant said that Mr Taylor told him that at the meeting he was guilty. We find that he did say this and we found the Claimant's evidence about this compelling and Mr Taylor's denial of it under-whelming.

126.4. The Claimant gave an account of the confrontation at the end of the meeting that was broadly consistent with the one set out above.

127. The appeal outcome was given by letter of 26 October 2021, dismissing his appeal. The outcome letter stated, among other things: "it should be noted the

refresher training was an outcome of a previous similar disciplinary issue which resulted in a final written warning." This was untrue. The refresher training pre-dated both JH's death and the final written warning.

128. Mr Taylor's evidence was that he was unaware of the disclosures the Claimant had made and of anything related to the Claimant's reputation at the time of the decision to dismiss. For the reasons we give in our discussion and conclusions, we reject that evidence. We find that Mr Taylor knew that the Claimant had made the disclosures at paragraph 8/12 of the list of issues, that local (Mrs Fisher) and senior management (Ms Rushton and Ms Seabrook) considered the Claimant to be a disruptive force i.e., a troublemaker.

Law

Direct discrimination

129. Section 13 EqA provides: *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

130. Section 23 EqA provides:

(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include each person's abilities if – on a comparison for the purposes of section 13, the protected characteristic is disability…

131. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

132. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above,

when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

133. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'

Victimisation

134. Section 27 EQA 2010 provides as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because–
(a) B does a protected act, or
(b) A believes that B has done, or may do a protected act.
(2) Each of the following is a protected act –
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

135. In ***Chief Constable of the West Yorkshire Police v Khan*** [2001] IRLR 830 Lord Nicholls said *"The primary object of the victimisation provisions is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so."*

136. In ***Aziz v Trinity Street Taxis Ltd*** [1988] IRLR 204, at 29, dealing with the Race Relations Act equivalent to section 27(2)(c) EQA 2010:

"An act can, in our judgment, properly be said to be done 'by reference to the Act' [the Race Relations Act] if it is done by reference to the race relations legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act."

137. The putative discriminator has to have knowledge of the protected act. See, for example, ***South London Healthcare NHS Trust v Al-Rubeyi*** at UKEAT/0269/09/SM.

The burden of proof and inferences

138. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) 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.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

139. In ***Igen Ltd & Others v Wong*** [2005] IRLR 258 the Court of Appeal gave the enduring guidance on the burden of proof. Although that was a case brought under the Sex Discrimination Act 1975, it has equal application to all strands of discrimination under the EqA:

> *(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.*
> *(2) If the claimant does not prove such facts he or she will fail.*
> *(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*
> *(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*
> *(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*
> *(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*
> *(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an*

evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.
(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

140. In ***Madarassy v Nomura Bank*** 2007 ICR 867, a case brought under the then Sex Discrimination Act 1975, Mummery LJ said:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

141. The position was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

> *'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:*
>
> *(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):*
>
> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are*

not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.
57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"

(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues: "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim." He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

142. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

143. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

144. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

Unfair dismissal

145. There is a statutory right not to be unfairly dismissed, s.94 Employment Rights Act 1996. There is a limited range of potentially fair reasons for dismissal (s.98 Employment Rights Act 1996). It is unfair to dismiss someone where the reason or principal reason is that they did a PID.

Public interest disclosures

146. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. A qualifying disclosure is defined by section 43B, as follows:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
> *[…]*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *[…]*
> *(d) that the health and safety of any individual has been, is being or is likely to be endangered*
> *[…]*

147. In ***Williams v Michelle Brown AM***, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> *'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'*

148. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in ***Kilraine v London Borough of Wandsworth*** [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> *'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other […]*
> *31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.*
> *[…]*
> *35. In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).*

> *[…]*
> *36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case.*
> *[…]*
> *41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the Cavendish Munro case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.'*

Unfair dismissal

149. S.103A ERA provides:

> *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.*

150. There is an important distinction between detriment cases, where it is sufficient that the disclosure is a material factor in the treatment, and dismissal cases, where it must be the sole or principal reason (***Fecitt v NHS Manchester*** [2012] ICR 372 CA).

151. The approach to the burden of proof in section 103A claims was summarised by Mummery LJ in ***Kuzel v Roche Products*** [2008] ICR 799 as follows:

> '[…]
> [52] Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.
> [53] Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.

> [54] Fifthly, the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.
> […]
> [56] I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. Thus it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.
> [57] I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
> [58] Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
> [59] The ET must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, it is not necessarily so.
> [60] As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence, in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.'

152. However, as Mummery LJ said

> *[55]* ". . . the burden of proof issue must be kept in proper perspective. As was observed in *Maund* . . . when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof."

153. The 'reason' for dismissal is the factor operating on the decision-maker's mind which causes him/her to take the dismissal decision (**Croydon Health Services NHS Trust v Beatt** [2017] ICR 1420). There are some circumstances in which the net must be cast wider, such as if the facts known to, or beliefs held by, the decision-maker had been manipulated by another person involved in the disciplinary process with an inadmissible motivation, where they held some responsibility for the investigation. That person could also have constructed an invented reason for dismissal to conceal a hidden reason (***Royal Mail Ltd v Jhuti*** [2020] All ER 257.)

154. In ***University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall***, UKEAT/0150/20/VP, HHJ Taylor made some observations that resonate in this case:

> 36.*The very existence of the protection for those who make public interest disclosures shows a recognition of the possibility that managers in an organisation may decide that they want to be rid of a whistle blower. In such circumstances, particularly in a large organisation, the route to the eventual dismissal of the whistle blower may be tortuous and involve a number of people who, to a lesser or greater extent, are in the know about the plan to get the whistle blower out of the door. Such a scenario may involve multiple examples of unexplained unfair treatment. The facts may look much like those found by the Tribunal in this case. As far as the dismissal is concerned, in most such cases the decision maker would be going along with an overall plan to remove the whistle blower. In considering the decision to dismiss, the tribunal only has to determine the reasoning process of the decision maker because that person, as others may have done in taking the decisions leading to the dismissal, acted as he or she did because the employee made protected disclosures. The twists and turns in the journey matter relatively little because it is the destination that counts; the eventual reasoning process of the person who took the decision to dismiss. The fact that the dismissal appears to be the culmination of a plan to get rid of the whistle blower may be circumstantial evidence to support the conclusion that the decision maker dismissed because of the protected disclosure; if there was an overall plan to get rid of the whistle blower, it is plausible that the decision maker was acting in accordance with that plan. Assessing factual scenarios of this nature is precisely what the employment tribunal is there to do.*
> […]
> *41. The paradigm of the single decision maker who dismisses for a clearly expressed reason will often apply where the employer has a legitimate reason for dismissal. If an employer really has determined to rid themselves of a whistle blower the process may be complex and involve people who are keen to appear not to have been involved in the decision making; someone who wishes to ensure an employee is dismissed because of their whistle blowing is likely to try to keep to the shadows. Wrongdoers often wish to distance*

themselves from their decisions. It would be troubling if in such cases excessively complex arguments about the difficulty in determining the precise mental processes of all those involved in the process resulted in a valid claim failing. Fortunately, we can rely on the good sense of the members of employment tribunals to see through such ruses and get to grips with the reason that operated, however it got there, on the mind of the dismissing officer.

Fairness

155. If there is a potential fair reason for a dismissal, the fairness of the dismissal is assessed by applying the test at s.98 (4) ERA.

156. In ***BHS v Burchell*** [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and one based upon a reasonable investigation.

157. However, the ***Burchell*** guidance is not comprehensive, and there are wider considerations to have regard to in many cases. For instance, wider procedural fairness, the severity of the sanction in light of the offence and mitigation are important considerations.

158. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

159. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

160. Live final warnings can be taken into account by the employer even where they relate to a different type of conduct to the matter currently under investigation: ***August Noel Ltd v Curtis*** [1990] IRLR 326.

161. In the ordinary course of events, an employer considering dismissal is not required to re-open the circumstances in which a live final written warning was given. The essential principle is that it is legitimate for an employer to rely on a final warning provided that (***Davies v Sandwell Metropolitan Borough Council*** [2013] EWCA Civ 135 (at paragraphs 20 and 21) and ***Wincanton Group Plc v Stone & Anor*** [2013] IRLR 178 as per Langstaff P):

161.1. It was issued in good faith;
161.2. There were at least prima facie grounds for imposing it; and

161.3. It was not manifestly inappropriate to have issued it.

Polkey

162. In ***Polkey v A E Dayton Services Ltd*** [1987] IRLR 503, Lord Bridge said this:

> *'If it is held that taking the appropriate steps which the employer failed to take before dismissing the employer would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment. Thus, in* Earl v Slater & Wheeler (Airlyne) Ltd *[1973] 1 WLR 51 the employee was held to have been unfairly dismissed, but nevertheless lost his appeal to the Industrial Relations Court because his misconduct disentitled him to any award of compensation, which was at that time the only effective remedy. But in spite of this the application of the so-called* British Labour Pump *principle [*British Labour Pump Co Ltd v Byrne *[1979] IRLR 94, [1979] ICR 347] tends to distort the operation of the employment protection legislation in two important ways. First, as was pointed out by Browne-Wilkinson J in* Sillifant's *case, if the [employment] tribunal, in considering whether the employer who has omitted to take the appropriate procedural steps acted reasonably or unreasonably in treating his reason as a sufficient reason for dismissal, poses for itself the hypothetical question whether the result would have been any different if the appropriate procedural steps had been taken, it can only answer that question on a balance of probabilities. Accordingly, applying the* British Labour Pump *principle, if the answer is that it probably would have made no difference, the employee's unfair dismissal claim fails. But if the likely effect of taking the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation, as Browne-Wilkinson J puts it in* Sillifant's *case, at 96:*
>
> > *"There is no need for an 'all or nothing' decision. If the [employment] tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."*
>
> *An example is provided by the case of* Hough and APEX v Leyland DAF Ltd *[1991] IRLR 194 where the EAT upheld an [employment] tribunal decision that the compensatory award should be reduced by 50% in circumstances where there was a failure to consult over redundancies but the tribunal concluded that such consultation might have made no difference'.*

163. The ***Polkey*** principle is not confined to cases of procedural unfairness but has a broader application. The tribunal's task is to apply ERA 1996 s 123(1) and award 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer'). See e.g. ***Lancaster & Duke Ltd v Wileman*** [2019] IRLR 112.

164. In ***Hill v Governing Body of Great Tey Primary School*** [2013] IRLR 274, the EAT said this:

> *A 'Polkey deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand…*

165. Guidance as to the *Polkey* exercise was given in *Software 2000 -v- Andrews* [2007] IRLR 568 which must be read subject to the repeal of Section 98A, but which otherwise speaks for itself. Similarly, in *Scope -v- Thornett [2007] IRLR 155,* Pill LJ said as follows at paragraph 34:

> "*... The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account ...*"

Contribution

166. The basic and compensatory award can each be reduced on account of a claimant's conduct according to the different statutory tests at Section 122(2), Section 123(6) ERA.

167. The impugned conduct need not be unlawful so as to justify a reduction but it must be blameworthy. Blameworthy conduct includes conduct that could be described as 'bloody-minded', or foolish, or perverse. See further ***Nelson -v- British Broadcasting Corporation (No. 2)*** [1980] ICR 110. In the case of Section 123(6), the blameworthy conduct must also cause, or partly cause, the dismissal.

Discussion and conclusions

The reason for the dismissal

168. The reason for the Claimant's dismissal is the central issue in the case and it has been a difficult matter to determine.

169. The competing positions are:

169.1. The Claimant says it as his race and/or his disclosures/protected acts;
169.2. The Respondent says it was simply misconduct in the form of repeated shortcomings in the Claimant's reporting.

170. The evidence in the case is mixed and does not all point in the same direction. This is a case in which, in our view, the reason for the dismissal can only be established after stepping back from the findings of fact as a whole and considering what inferences (if any) should be drawn from the primary facts as found above.

171. On the one hand, both the final written warning and the dismissal were given ostensibly for conduct related reasons. We agree that there was indeed an element of blameworthy poor performance in the Claimant's reporting of the JH incident, in not completing an A&I report in the cases of PB/SS (or at least by not agreeing with Ms Beard who would do such a report) and in not completing an A&I report for PC. It is also true that both the Claimant and Mr Olasunkanmi were given final warnings in relation to the JH incident. There is no evidence that Mr Olasunkanmi was a whistleblower/did any protected acts.

172. However, in our view, there is a very significant body of evidence which infers that the reason for the dismissal was not entirely as the Respondent stated.

173. There was an in-group and an out-group at the care home and the in-group were treated in more favourable way. The groups did not break down precisely along white-British/non-white British lines but most of the in-group were white-British and most of the out-group were not. The Claimant was a member of the out-group.

174. We readily draw the inference that the Claimant was regarded as a very difficult employee, a troublemaker, and a disruptive force on account of the complaints/disclosures that he made about race discrimination and health and safety. We also readily draw the inference that the senior management (Ms Rushton and Ms Seabrook) wanted to get rid of the Claimant if an opportunity to do so arose:

174.1. The Claimant raised many challenging complaints about both race and health and safety issues in the workplace. He was the spokesperson for a cohort of other employees from ethnic minority backgrounds and raised complaints on their behalf.
174.2. The complaints were quite personal in that they directly impugned Mrs Fisher. Mrs Fisher was a favoured employee in the sense that she must have been well regarded by senior management since she made rapid progress in her career upon joining the Respondent.

174.3. The Claimant and Mrs Fisher had a very difficult relationship and it is clear that this arose at least in significant part out of the complaints that he made.

174.4. This was not simply a local issue, but came to the attention of more senior management. Ms Rushton became a regular attender at staff meetings at the Home which she would not otherwise have routinely attended.

174.5. It is clear that, following the group grievance in August 2020, the Claimant was seen by senior management, Ms Seabrook, in particular, as a destructive force and that she anticipated things would get worse before getting better. This plainly related to the complaints the Claimant was making and leading on behalf of himself and other staff. Her concerns about this were sufficiently entrenched that she shared them with others. The email chain shows it was shared with the Head of Reward and an HR manager and we infer that they were shared more widely.

175. Both Mrs Fisher and Ms Rushton were involved in both of the disciplinary processes that involved the Claimant receiving a final written warning and then being dismissed. In the former process, Ms Rushton was the investigating officer and Mrs Fisher accompanied her at the investigation hearings. And in the latter, Mrs Fisher was the investigator, Ms Rushton conducted investigations following the disciplinary hearing with Mr Singh, attended the appeal hearing with Mr Taylor and was an active participant in it, despite in name being there simply as a notetaker.

176. There are also indicators along the way that not all was as it seemed. In relation to the disciplinary process and JH:

176.1. Some of the criticisms of the A&I report in respect of JH were very peculiar. The Claimant was criticised for not naming police officers. He had never previously been told that he needed to and there was, we accept, no practice of doing so and it had not been a feature of the training. It is also not one of the things which the Death of a Resident Policy required. Mrs Fisher herself attended work to find police officers at the care home and added this information to the A&I report. She did not name any of the officers. Her additions to the report were just underneath the Claimant's.

176.2. Although at one stage of the investigation process the Claimant said that he did not contact Mrs Fisher because Mr Olasunkanmi had told him that he had taken care of everything, Mr Olasunkanmi was not asked whether he had told the Claimant this. He was asked whether he had reported the matter to Mrs Fisher and said that he had tried; but that is a different point to what he told the Claimant. The alleged conversation between the team leaders would have been an important detail in any investigation truly seeking to get to the bottom of the matter in an impartial way.

176.3. One method for rectifying a lack of detail in an A&I report would have been to ask the Claimant and/or Mr Olasunkanmi to add further details. (That would not be a solution for some things, like the names of police officers that had not been captured, but it could have for others such as the incident description). This was never done and if it had been it would have been an informal way of assisting to mitigate the shortcomings in the A&I report.

176.4. The greatest shortcomings in the A&I report were in the initial description

of the incident. The Claimant was not responsible for that part of the report – Mr Olasunkanmi completed it.

176.5. Altogether, giving the Claimant a final written warning in this process was suspiciously severe particularly when compared to how shortcomings in reporting were treated in other instances (e.g. in Mr Jan's case, albeit we are not saying that Mr Jan's case was identical; nonetheless a useful evidential comparison can be made).

177. In the second disciplinary process:

177.1. The Claimant was not allowed to call Mr Branco to give evidence at the disciplinary despite making clear that Mr Branco had relevant evidence to give and that Mr Branco did not agree with the accuracy of the minutes of his interview.

177.2. The Claimant told Mr Singh that he believed that the disciplinary process was a continuation of discrimination that he had been receiving in the workplace. His response was odd in that he simply referred the Claimant back to the home manager (Mrs Fisher).

177.3. The Claimant's appeal got very short shrift and in the appeal meeting itself Mr Taylor told the Claimant he was guilty.

178. The Claimant was treated more harshly than other employees in circumstances that were sufficiently similar to draw a useful evidential comparison:

178.1. In relation to PB/SS, Ms Beard was entirely exonerated though like the Claimant she did not complete an A&I report. The rationale for this, according to Mr Singh in his witness statement, was that it was the Claimant's not Ms Beard's duty to make the report because the incident was reported to him not her and because it was at the end of her shift and the beginning of his. However: that is not a fair reading of the evidence generated by the investigation. Both Mr Branco's and Ms Beard's investigation hearing notes were to the effect that the Claimant and Ms Beard were told of the incident by Mr Branco at essentially the same time and Ms Beard attended SS immediately, the Claimant only later. That is also how Mr Singh had interpreted those documents at the stage of the disciplinary hearing as the notes of that hearing reveal. Further, as to the shift timing, it was Mr Singh's evidence to the tribunal that if an A&I report needed to be done at the end of a shift the team leader should stay to do it. His evidence to the tribunal was also that where there were two team leaders who were both candidates for making an A&I report in respect of an incident, it was a matter for agreement between them who should do it. There was no such agreement either way between the Claimant and Ms Beard. Altogether, the complete and utter exoneration of Ms Beard in this incident, compared to the treatment of the Claimant is very pronounced and is suspicious. Ms Beard is white British and there is no evidence she had done any protected act or PID.

178.2. Both Ms Kelly Fisher and Mr Jan were treated very leniently in the incident in which the resident suffered a skin tear. No A&I report was completed and

clearly an injury was suffered and a report should have been completed. The Respondent's answer to this is limited to: Mr Jan should have produced an A&I report but did not, so was given guidance in a one to one because he was newish to the job and completed other paperwork besides the A&I report. Nonetheless, the treatment of Mr Jan was very lenient in comparison to the way the Claimant was treated when he did not complete an A&I report but should have. The difference of treatment is very wide. Mr Jan had, after all, been at the same reporting training as the Claimant. Further the Respondent has simply not answered the point that Ms Kelly Fisher was at fault for telling Mr Jan not to do an A&I report. She received no criticism for this, though the Claimant raised this during his disciplinary process. There is no evidence that either Mr Jan or Ms Kelly Fisher had done any protected act or PID. Ms Fisher is white British.

179. It was the Respondent's case that neither Mr Singh nor Mr Taylor knew about the Claimant's disclosures/complaints nor anything about his reputation. The Claimant's case was that they well knew. Looking at the facts as a whole including the matters set out immediately above, we think it is more likely than not, and so find, that Mr Singh and Mr Taylor were told about the Claimant's protected acts/PIDs and his reputation (i.e., that he was a troublemaker). We did not find their evidence that they were told nothing about the Claimant beyond what was in the documentation they were provided with for the disciplinary/appeal processes at all realistic or credible. We think that the business did want the Claimant out, that this was because of his protected acts/PIDs and this message found its way to Mr Singh and Mr Taylor and influenced their decisions.

180. Ultimately, we are able to, and do find as a fact, that there were mixed reasons for the Claimant's dismissal:

180.1. The principal reason was that he had made PIDs (some of which were also protected acts (see above)) and was seen as a troublemaking, disruptive force as a result.

180.2. A smaller part of the reason was that the decision makers did think there had been some culpability in the way the Claimant had reported workplace incidents. However, because of the Claimant's PIDs/protected acts, the response to this was inflated firstly to a final written warning and then to dismissal. Had it not been for the PIDs/protected acts the sanctions, in our view, would not have been so severe and the Claimant would not have been dismissed. (We are alive to the fact that in the JH disciplinary process Mr Olasunkanmi and the Claimant were given the same sanction. However, that does not undermine our view. The extent of the Claimant's culpability was lower than Mr Olasunkanmi's. But even if that is wrong, the treatment of Mr Olasunkanmi is but one piece of evidence in a much bigger picture.)

<u>Unfair dismissal</u>

181. As interposed in our findings of fact we have found that the Claimant made several PIDs as averred in the list of issues.

182. For the reasons set out immediately above we find that the principal reason for the Claimant's dismissal was that he had made PIDs. The dismissal was therefore automatically unfair contrary to s.94 and 103A Employment Rights Act 1996.

183. We have been able make a definitive finding of fact as to the reasons for the dismissal and thus have not needed to resort to the burden of proof.

184. In case it is necessary to say something about the burden of proof, we say this. The Claimant has positively asserted that making PIDs was the reason for his dismissal. There is ample evidence of this to satisfy the requirement for evidence referred to at paragraph 57 of *Kuzel*. Having considered all of the evidence, we do not accept that the principal reason for dismissal is the one the Respondent urges. Rather, we reject that case and find it was the making of PIDs.

185. If we were wrong about the reason for dismissal and in fact the principal reason was conduct, we would in any event find the dismissal unfair applying the s.98 Employment Rights Act 1996 test (to which the range of reasonable responses test applies). Not least because:

185.1. The Claimant was not warned in advance of the disciplinary hearing that led to his dismissal that the hearing was a disciplinary hearing and that a possible outcome of the meeting was dismissal. In fact he was expressly misled (albeit by accident) to believe it was a mere investigation hearing;
185.2. Mr Jan was not permitted to attend the disciplinary hearing and give evidence notwithstanding that it was explained that he had relevant evidence to give and did not agree with the notes of his investigation meeting. His evidence was potentially very important and tended to shift blame away from the Claimant to Ms Beard;
185.3. The appeal outcome was predetermined and the appeal was given very short shrift. Indeed, at the appeal hearing Mr Taylor did tell the Claimant that he was guilty and did so in a way that communicated the reality that he had already made up his mind the appeal would be dismissed.

Polkey

186. We do not think that there is any basis to make a *Polkey* reduction. The period of loss for which the Claimant claims a compensatory award is limited to 1.3 months. We do not think that there is any prospect at all that, absent the unfairness (in the reason for the dismissal and/or the procedure for the dismissal) the Respondent could and would have fairly dismissed the Claimant in that timeframe.

Contribution

187. In our view there was an element of blameworthy conduct on the Claimant's part that did contribute to the reason for his dismissal.

187.1. In relation to JH, it is our view and finding that the Claimant should have recorded more of the detail of his interactions with the Police Officers on

the A&I report than he did. Not the officers names, but the details of his conversations with them as later came out in the investigation/disciplinary process. Further, the Claimant should have done more to make sure that the home manager was indeed aware of the incident. It carried on through the night and even if Mr Olasunkanmi told him that he had contacted Mrs Fisher, he left relatively early and the situation developed significantly after he left. A call to Mrs Fisher to make sure she was aware / to advise of developments was in order;

187.2. In relation to the incident with PB, between the Claimant and Ms Beard an A&I report should have been completed. That is so even on the Claimant's version of events. They both had early knowledge of the incident. They were both involved in attending the aftermath of it (albeit Ms Beard first). They were both culpable in not agreeing between them who would complete a report, or at the least the Claimant should have checked if Ms Beard had done/would do one;

187.3. In relation to JH, the Claimant should have completed an A&I report. However, his failure to do so is mitigated by the fact that the injury was recorded in the daily care records and in his handover sheet. This is absolutely not a case in which the Claimant was trying to conceal an injury. It is simply a matter of not completing the right form. That is not trivial but it is nowhere near as serious as hiding an injury.

188. We have regard to the whole picture and put all of this in its rightful context. We take the view that it would be just and equitable to reduce the basic and compensatory awards by 30%.

Direct race discrimination

189. We have made findings about the reasons for the dismissal above. The reasons did not include race. We repeat those reasons and the reasoning here but add some further remarks to explain why we do not think the decision to dismiss was an act of race discrimination.

190. We accept that the decision makers were Mr Khan and Mr Taylor. It is their mental processes that matter when determining whether any part of the reason for dismissal. Strictly the list of issues refers only to the dismissal itself (Mr Khan's domain) and not to the appeal (Mr Taylor's domain). However, the parties presentation of the case covered both so it seems sensible to deal with both (albeit that there could only be actual liability in relation to the dismissal given the list of issues).

191. Having considered all of the evidence, we do not think that race played any role in their decision making. They thought the Claimant was a troublemaker, but not because of his race, but rather because of his many complaints.

192. Neither Mr Khan nor Mr Taylor worked at the Home and neither were responsible for the state of affairs we have described in which there was an in-group and out-group that broke down roughly but not entirely on racial lines.

193. We also note that no complaint of race discrimination by *them* personally was

really developed to any degree in the evidence or submissions. The Claimant's focus in that regard was essentially on Mrs Fisher and then on the fact that he had *reported* race discrimination in the Home to Mr Khan and Mr Taylor. In our view, having stood back from all the evidence and considered what inference should be drawn think that when taking the decisions that they did, their mental processes were clear of all considerations of race.

194. In case it is necessary to consider this through the lens of the burden of proof we do so:

194.1. There is a wide body of material from which it can and should be inferred that the reason for the dismissal was not entirely as stated by the Respondent. There is evidence of the Claimant being treated more harshly than others of a different race in situations which are at the least sufficiently similar for an evidential comparison to be made, and there is a sufficiently concerning race relations background (the in-group/out-group split which is roughly though not precisely on racial lines) in the Home to shift the burden of proof.

194.2. At this stage there is no burden on the Claimant and it passes to the Respondent. However, it remains for the tribunal to find what the true reason for the dismissal was if it is able to do so – and it is. Once it is accepted that the decision makers were Mr Singh and Mr Taylor (and we do accept that), the case for race discrimination is greatly weakened. We find that the main reason for dismissal the that the Claimant had made PIDs/protected acts, while the remaining reason was shortcomings in reporting.

<u>Victimisation</u>

195. As interposed in our findings of fact, the Claimant did a number of protected acts.

196. For the reasons set out above when considering the significance of the Claimant's PIDs, the protected acts were a material part of the reason for dismissal. No precision is necessary as to the relative causative potency of the various complaints that comprise the list of PIDs and protected acts. However, we are sure that the protected acts were a material part of the reason for the dismissal and that the most causatively potent of all the complaints was the group grievance of 24 August 2020 and this was both a PID and a protected act. This generated a significant management response and ultimately Ms Seabrook's reflection that the Claimant was destructive.

<u>Harassment related to race.</u>

197. As per our findings of fact the Claimant was subjected to the unwanted conduct complained of. It is obvious that the conduct created an environment that was, having regard to what is objectively reasonable and all the circumstances of the case, hostile. This was not simply a matter of the Claimant's perception though that is how he perceived it.

198. However, the conduct was not related to race in any way. It was simply the

case that Mr Taylor and Ms Rushton believed the Claimant had confidential documents in his possession relating to residents that he should not. They were of the view the Claimant should give them back before he left. They acted in the way that they did in order to pressure the Claimant into giving them back.

199. The Claimant believes that they treated him in this way because of his race and that they would not have been so bold as to do the same to a white British person. We do not accept that. The Claimant was, and was known to be, a confident and formidable character who stood up for himself and others. He was known to make reference to legal rights and to have an ability to research them (e.g. the guidance he provided the Respondent on the right to be accompanied). There was no possibility of him responding in a meek fashion when challenged nor would that have been anticipated.

200. If it is necessary to consider the burden of proof:

200.1. We do not think that there is evidence from which absent an explanation we could be satisfied that the conduct was related to race.
200.2. Even if the burden shifts, we accept the Respondent's explanation that the interactions relating to documents at the appeal meeting had nothing to do with race. They were simply about trying to get documents off of the Claimant.

_____

Employment Judge Dyal

_____

Date 13 July 2023