EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss L Delagua	v	By Your Side Ltd

Heard at: Reading **On**: 19, 20 and 21 June 2023

Before: Employment Judge Hawksworth
Mr P Hough
Ms B Osborne

Appearances
For the claimant: representing herself
For the respondent: Mr S Joshi (counsel)

JUDGMENT

JUDGMENT having been sent to the parties on 27 June 2023 and reasons having been requested by the respondent on 6 July 2023 in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided.

REASONS

Claim, hearing and evidence

1. The claimant worked for the respondent as a care practitioner from 28 October 2021.

2. The claim form was presented on 28 April 2022 after Acas early conciliation from 10 March 2022 to 21 April 2022. The claimant claimed protected disclosure detriment and unauthorised deduction from wages while suspended. The respondent presented its response on 17 June 2022. The respondent defended the claim.

3. After the claimant presented her claim, she was dismissed by the respondent on 6 May 2022. On 20 March 2023, Employment Judge R Lewis gave the claimant permission to amend her claim to include a complaint of automatic unfair dismissal because of making protected disclosures.

4. There was a preliminary hearing for case management on 14 December 2022 at which the issues for the tribunal were identified.

5. The final hearing took place in person over three days from 19 June to 21 June 2023.

6. There was an agreed bundle of 234 pages which had been prepared by the respondent. In these reasons we refer to pages in that bundle by page number. We drew the parties' attention to a page in the bundle which was an email exchange between the claimant and the Acas conciliator. We explained that those discussions are without prejudice (page 164). The parties confirmed that this page had been intentionally included; the without prejudice privilege had been waived.

7. At the start of the hearing the claimant produced a small supplemental bundle of documents (33 pages), and a printout of a Facebook post. We allowed the respondent time to consider the claimant's late documents, and Mr Joshi confirmed that the respondent had no objection to these documents being relied on by the claimant. We added the Facebook post to the back of the supplemental bundle (pages 34 to 39). In these reasons, we refer to pages in the supplemental bundle as SB1, SB2 etc.

8. There were three recordings of meetings. We had a discussion with the parties about whether the tribunal was being asked to listen to the recordings. We suggested to the parties that they should try to agree transcripts of the recordings they wished to refer to, as this would be more efficient than playing the recordings. If this was not possible, they should try to agree which parts of the recordings they were suggesting should be played. The parties used the tribunal's reading time to agree highlighted sections of the claimant's transcripts of the recordings. These were added to the main bundle as pages 235 to 241. We are grateful for the parties co-operation with the tribunal and each other on this.

9. On 19 June 2023, after reading and dealing with the preliminary matters, we heard evidence from the claimant and, very briefly, from her partner. We then heard from the respondent's witness Ms Illiopoulos. She no longer works for the respondent and attended in compliance with a witness order. Ms Illiopoulos read and adopted the statement of the respondent's other witness, Mrs Parkins.

10. On the morning of 20 June we heard evidence from Mrs Parkins. We allowed Mr Joshi to ask additional questions about the documents in the supplemental bundle.

11. Shortly before lunch on 20 June an issue arose about the list of issues. For reasons given at the hearing, we allowed another alleged protected disclosure to be added to the list of alleged disclosures. We referred to the additional disclosure as disclosure h. It was an email sent on 8 March 2022 (page 93). In short, we allowed this because the additional alleged disclosure had been included in a list of disclosures the claimant prepared before the preliminary hearing in compliance with a tribunal order to specify

her alleged disclosures (page 38). Other than this disclosure, the list of disclosures in the case management order made at the preliminary hearing reflected the claimant's list. There did not appear to be any reason why this disclosure had been omitted from the list of issues; it seemed to have been a mistake. Having allowed this amendment to the list of issues, we allowed the recall of the claimant and Mrs Parkins to give evidence and answer questions relating to this additional alleged disclosure.

12. After the amendment to the list of issues and the recall of the claimant and Mrs Parkins, the respondent sought permission for late disclosure of a without prejudice email which was said to be relevant to the additional alleged disclosure. We explained the principles on without prejudice to the claimant. She took some time to think about it and decided that she did not object to the email being included in the evidence. She agreed to waive privilege in this document. We permitted the late disclosure, and then allowed the further recall of the claimant and Mrs Parkins to give evidence on this document. (In the event, our findings and conclusions meant that little turned on the inclusion of the additional disclosure or the without prejudice email.)

13. We gave judgment on liability with reasons at the hearing on 21 June 2023. In our reasons, we explained our findings of fact, a summary of the law and the conclusions we had reached. We arranged a date for the remedy hearing and made case management orders for that hearing.

14. After the liability hearing, on 6 July, the respondent requested written reasons. The judge apologises for the delay in providing these written reasons, and the consequent re-scheduling of the remedy hearing. The delay occurred because the judge was away from the tribunal at the time the request for written reasons was referred to her, and the request only came to her attention on 21 August 2023.

The Issues

15. The issues for the tribunal to decide were discussed at the preliminary hearing. Amendments were allowed on 20 March 2023 (to include a complaint of dismissal because of making protected disclosures) and on 20 June 2023 (to include another alleged disclosure).

16. The issues the tribunal will decide are therefore as follows (original numbering retained).

<u>Protected disclosure</u>

1. Did the Claimant make the following disclosure(s) of information?

h. on 08/03/2022 C emailed Sarah (manager/owner) about starting employment without any induction, shadowing, training and without a DBS.[1]

a. Whether on 18/03/2022, C told Maria (HR) and Elissa (another carer) "at the second investigation" meeting that she was working without a DBS clearance.

b. On 21/03/2022, C emailed Maria (HR) stating that R was breaching their disciplinary policy by not affording her 5 working days' notice of a disciplinary hearing and refusing to provide evidence.

c. On 24/03/2022, C emailed Sarah (Manager/Owner) stating that Maria (HR) was continuously illegally vaping in investigation meetings in contravention of company policy.

d. On 24/03/2022, C emailed Maria (HR) stating that she was working without a valid DBS clearance and that R was breaching their disciplinary policy.

e. On 30/3/2022, C emailed Sarah (owner/manager) stating that she was not working with a valid DBS clearance.

f. On 20/04/2022, C emailed Maria (HR) stating that she was not working with a valid DBS clearance and under interim COVID 19 guidance .

g. On 26/04/2022, during a disciplinary hearing, C stated that she was working without a valid DBS clearance.

2. If so, are [they] disclosures of information qualifying within the meaning of the ERA, sec 43B? Were they disclosures of information which, in the reasonable belief of the C, were made in the public interest and tended to show:

   (i) that R has failed, is failing or is likely to fail to comply with any legal obligation to which R is subject; and / or

   (ii) that the health and safety of an individual has been, is being or is likely to be endangered.

3. If such disclosures are qualifying, are they protected within the "3 tier" disclosure regime under ERA 96, sec 43C to 43G?

[Protected disclosure detriment]

4. Did C suffer the following detriments?

(i) Her suspension[2]

[1] Permission to add disclosure h, which was included in the claimant's original list of alleged disclosures, was given at the hearing on 20 June 2023.

(ii) Withholding of evidence in support of the disciplinary allegations

5. If such detriments are made out, were they materially influenced by any protected disclosures C made?

6. Were any protected disclosures not made in good faith?- ERA 96, sec 49(6A).

Unauthorised deductions

7. Was [C] suspended from service? The claimant will say that she was suspended from 21 February 2022- 6 May 2022.

8. If so, was she contractually entitled to pay in the sum of c.£4060?

[Protected disclosure dismissal[3]

9. Was the sole or principal reason for the claimant's dismissal that she had made one or more protected disclosure?]

Findings of fact

17. We make the following findings of fact about what happened. Where there is a dispute about what happened, we decide this on the balance of probabilities, that means by deciding what we think is most likely to have happened.

The start of the claimant's employment with the respondent

18. The respondent provides domiciliary care, including care to vulnerable adults. This is a regulated activity, and safeguarding is an important feature of the work. Employees working in adult care are required by law to have a Disclosure and Barring Service (DBS) check.

19. The claimant was recommended to the respondent by one of its supervisors who had worked with her in a previous adult care role at a care home. On 28 October 2021, while the claimant was waiting for an interview with the respondent, the respondent asked her to work an urgent night shift (a sleeping-in shift). At the time the claimant had not had a DBS check.

20. On 29 October 2021 the claimant had an interview with the respondent, and she worked a shift for them that night. She made her DBS application on 5 November 2021. She worked a night shift for the respondent the following night.

21. From 8 November 2021 the claimant began regular night shifts with the respondent, doing sleeping-in shifts with the same customer from 8.00pm to 8.00am from Monday to Thursday.

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[2] The claimant confirmed at the start of the liability hearing that she was not saying that her suspension was a detriment because of making protected disclosures.

[3] Permission to add the complaint of unfair dismissal because of making protected disclosures was given on 20 March 2023.

22. On 12 November 2021 the claimant was given her contract of employment and a USB stick with the respondent's staff handbook (page 65).

23. On 22 November 2021 the claimant received her DBS certificate. The working relationship went smoothly from there, and the claimant built up a good relationship with the customer.

The disciplinary investigation

24. On 21 February 2022 a colleague of the claimant's who was a carer for the same customer made some complaints about the claimant. She said that she had been told by the customer that the claimant's partner had visited the claimant in the customer's home at Christmas, having found the location of the claimant using a social media app (page 144).

25. The respondent invited the claimant to a first investigation meeting to discuss five allegations arising from the complaint (page 87). The meeting took place on 24 February 2022 (page 88). It was conducted by Maria Illiopoulos, HR and payroll administrator. Ms Illiopoulos had not carried out a disciplinary investigation before. Disciplinary procedures had usually been carried out by the respondent's managing director, Sarah Parkins, but Mrs Parkins had decided to train up Ms Illiopolous to conduct the initial parts of the process so that Mrs Parkins would be able to hear appeals.

26. The claimant was due to work for her regular customer on the night of 24 February, but she was told that she could not work there while the investigation was ongoing. At the meeting the claimant was told that she could not return to her regular shifts for the customer. She asked whether she 'would be put' somewhere else; there was some doubt about whether she could carry out shifts for other customers. The claimant and Ms Illiopoulos exchanged emails over the next few days in which the claimant asked, 'Am I suspended?' and received the reply, 'You have not been suspended' (page 90).

27. On 3 March 2022 the claimant asked again about when she would be allowed back to work, saying, 'I can't afford time off'. Mrs Parkins replied saying, 'We are meeting with the family on Tuesday then we can let you know'. There was no reference in either of these emails to the possibility of the claimant taking shifts elsewhere (page SB5).

28. On 8 March 2022 the respondent visited the customer at her home, with family members. The meeting was attended by Mrs Parkins, Ms Illiopoulos and the claimant's colleague who had made the complaints (page 96). The meeting was prompted by the customer and her family complaining that the customer's conversation had been passed on to the respondent and had led to a disciplinary investigation.

29. On the same day the claimant sent Mrs Parkins an email (alleged disclosure h). In that email she gave information about the fact that she had started working for the respondent before making an application for a DBS check. She said, 'In regards to me breaking the safeguarding and GDPR policy…it

turns out it is yourselves that have broken these.' She said that the purpose of DBS checks was to ensure that vulnerable adults are safe in their own homes. She went on to explain that she started work on 28 October 2021 and her DBS application was not submitted until 5 November 2021 (pages 38 and 93).

30. This email was referred to in the claimant's further particulars as a protected disclosure but omitted from list of protected disclosures in the list of issues. At the start of the hearing we allowed the amendment of the list of issues to include this alleged protected disclosure. We return in our conclusions to the question of whether the claimant's disclosures were qualifying and protected disclosures.

31. On 11 March 2022 the claimant was invited to a second investigation meeting (page 97). It took place on 18 March 2022. The claimant again raised the fact that she started working for the respondent before her DBS check (pages 98 and 102). This is alleged disclosure a.

<u>The invitation to the disciplinary hearing</u>

32. On 21 March 2022 the claimant was sent an invitation to a disciplinary hearing which was due to take place on 23 March 2022 (page 104). Two of the five allegations which were investigated were to be considered in the disciplinary hearing. These were described as 'allegations' and listed as:

    32.1 the claimant's partner attending a customer's home without permission; and

    32.2 breach of the GDPR, which we understand to relate to the fact that the claimant had location sharing activated on a social media app, and this meant that her partner could see her location and therefore know the address of customers.

33. There was no reference in this letter to gross misconduct. The other 3 allegations which were investigated were not pursued.

34. On 21 March 2022 the claimant sent an email to Ms Illiopoulos (disclosure b). The claimant said there had been a breach of the respondent's procedures. She said she should have five days' notice of the disciplinary hearing, as provided for in the respondent's disciplinary policy (page 108)

35. Also on 21 March 2022, the Acas early conciliation certificate was issued (the claimant had notified Acas on 10 March 2022).

36. On 29 March 2022 the disciplinary hearing was rescheduled to 4 April 2022 (page 118). There was a further change of date on 13 April 2022 when the hearing date was changed to 26 April 2022 (page 119). In these two invitation letters, the allegations were now described as allegations of potential gross misconduct.

37. With the second invitation letter, the respondent included copies of the minutes of the two investigation meetings, and minutes 'from the meeting held with the individual who raised the concerns'. We find that this last document

was a copy of the note of the meeting held at the customer's home (page 96), not the statement prepared by the claimant's colleague which set out the allegations against the claimant (page 144).

38. The claimant was not sent a copy of the statement by her colleague. We find as a fact that the reason for the failure to provide this statement was because the respondent made a mistake about it. Mrs Parkins intended that the statement by the claimant's colleague would be provided to the claimant, but the note of the home visit with the customer would not be. Ms Illiopoulos mistakenly sent the home visit note, not the statement of the colleague. This was an administrative error or misunderstanding between them, not something that happened because of the protected disclosures.

39. The second invitation letter also included a reference to CQC interim guidance on staffing during the covid-19 pandemic. The claimant understood that the respondent was saying that she had been employed under the interim guidance which applied during the pandemic. The claimant did not agree with that.

The lead up to the disciplinary hearing

40. On 24 March 2022 the claimant sent two emails. She emailed Mrs Parkins (disclosure c). In that email she raised concerns included about having started working before her DBS check. She also said that Ms Illiopoulos had been vaping during the investigation meetings and that this was gross misconduct according to the respondent's policy, and a criminal offence (page 114 to 115).

41. The claimant's second email of 24 March 2022 was sent to Ms Illiopoulos (disclosure d). In the second email, the claimant asked for records of the decision to employ her under the interim covid guidance and said the respondent was breaching its disciplinary policy (page SB13).

42. Mrs Parkins responded to the claimant on 25 March and 30 March 2022. She said the claimant was 'on the group and able to work'. She said it was only the package of care under investigation (in other words, the claimant's regular customer) that the claimant had been told she could not attend until the investigation was concluded (page 150, 149).

43. At around this time the claimant spoke to DBS. They said that if her DBS check had been carried out under the covid legislation, it would say that on the certificate, under the section which recorded the position applied for. That section on the claimant's certificate did not say this, it only said 'adult workforce care practitioner' (page SB 17).

44. After speaking to DBS, the claimant emailed Mrs Parkins on 30 March 2022. The email said she had spoken to DBS and they had told her that her certificate should say 'covid legislation' next to the job role, and it did not (disclosure e) (page 148).

45. Mrs Parkins spoke to CQC about the DBS point which the claimant had raised. CQC told Mrs Parkins that it took a pragmatic position in relation to recruitment pressures and that, although it was preferable that DBS clearance was applied for before work commenced, it accepted that was not always possible. CQC said that a delay of a few days was not something that it would progress (pages 155, 156).

46. On the morning of 1 April 2022 Acas emailed the claimant. They had been trying to get hold of the claimant to update her following a conversation with the respondent which we find is likely to have been a day or two before. The email said that the respondent regarded the issue as potentially only a minor matter which it was keen to resolve and have the claimant return to work. The respondent also said the claimant was not suspended (page 164). Mrs Parkins had been speaking to Acas on behalf of the respondent.

47. Mrs Parkins' staff list produced on 6 April 2022 no longer included the claimant (page SB20). In her evidence Mrs Parkins said she was the only person who edited the staff list. She did not know why the claimant's name was not on the list from 6 April.

48. On 20 April 2022 the claimant emailed Ms Illiopoulos (disclosure f) about the arrangements when she started working for the respondent. She said she was not working with a valid DBS clearance or under covid 19 interim guidance (page 121).

The disciplinary hearing and dismissal

49. The disciplinary hearing with Ms Illiopoulos took place on 26 April 2022. The claimant says that during the hearing she made another disclosure about the DBS clearance and the covid guidance (disclosure g). We find that it is more likely than not that the claimant referred to the issues with the DBS clearance and the covid guidance, as she had repeatedly raised these concerns in emails in the days before the hearing (page 139). Ms Illiopoulos told the claimant that she would send the decision after the hearing.

50. The claimant presented her employment tribunal claim on 28 April 2022. She brought complaints for whistleblowing detriment and unauthorised deduction from wages (she said she had been suspended and should have been paid while suspended).

51. On 6 May 2022 the claimant received the decision of the disciplinary hearing. The decision was that the claimant was dismissed (page 142).

52. The dismissal letter was signed by Ms Illiopoulos and referred to the decision as her decision. However, Ms Illiopoulos was very clear that it was Mrs Parkins' decision to dismiss the claimant. Mrs Parkins said the decision was made in consultation with her, and she had agreed that dismissal was the action the respondent should be taking. Ms Illiopoulos had not conducted a disciplinary hearing before. We accept Ms Illiopoulos' evidence that the decision to dismiss was taken by Mrs Parkins.

53. By the time of the disciplinary hearing, Mrs Parkins' view of the claimant's conduct had changed. She initially said it was a minor matter, but later saw it as something which justified dismissal. She said this was because of the claimant's lack of remorse and her attitude during the disciplinary process, as reported to her by Ms Illiopoulos. We return to the reason for dismissal in our conclusions below.

The law

Protected disclosure

54. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is:

    54.1 a 'qualifying disclosure' as defined by section 43B;

    54.2 which is made in accordance with one of six specified methods of disclosure set out in sections 43C to 43H.

55. Section 43B sets out what a qualifying disclosure is. Sub-sections 43B(1) and (5) say:

    "(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

    (a) that a criminal offence has been committed, is being committed or is likely to be committed,

    (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

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

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

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

    (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

    …

    (5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."

56. In summary, a qualifying disclosure is i) a disclosure of information that ii) in the reasonable belief of the worker making it, is made in the public interest and iii) (again, in the reasonable belief of the worker making it) tends to

show that one or more of six 'relevant failures' has occurred, is occurring or is likely to occur. Relevant failures include a failure to comply with a legal obligation, or danger to a person's health and safety.

57. Points ii) and iii) both have two elements: that the claimant has the required belief (as a matter of fact and on a subjective basis) and, if they do, that their belief is a reasonable belief to hold (on an objective basis).

58. A belief which is wrong still meets the requirements of section 43B, provided it is reasonably held (*Babula v Waltham Forest College* [2007] EWCA Civ 174, CA).

59. In *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979 the Court of Appeal considered the public interest element of the definition. It held that:

"where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker."

60. The court said that the question of whether a disclosure about a personal interest is also made in the public interest is one to be decided by considering all the circumstances of the case, but these might include:

"(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer…the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest."

61. A disclosure of information includes a disclosure of information of which the person receiving the information is already aware (section 43L(3)).

62. Section 43C says:

"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -

(a) to his employer…"

Protected disclosure detriment

63. Section 47B of the Employment Rights Act says:

"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

64. 'Detriment' is given a wide interpretation. It means doing something that a reasonable worker would consider to be to their detriment (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11).

65. The test for whether a detriment was done 'on the ground that' the worker has made a protected disclosure is explained in *Fecitt and others v NHS Manchester* [2012] IRLR 64, CA. What needs to be considered is whether the protected disclosure materially influenced (in the sense of being more than a trivial influence on) the employer's treatment of the worker.

Burden of proof in protected disclosure detriment

66. In a complaint of detriment, section 48(2) provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. This means that the burden shifts to the employer where the other elements of a complaint of detriment are shown by the claimant.

67. Unlike the operation of the burden of proof under the Equality Act 2010, a failure by the employer to show positively the reason for an act or failure to act does not mean that the complaint of whistleblowing detriment succeeds by default. It is a question of fact for the tribunal as to whether or not the act was done 'on the ground' that the claimant made a protected disclosure (*Ibekwe v Sussex Partnership NHS Trust* UKEAT/0072/14/MC).

Automatic unfair dismissal

68. Section 103A of the Employment Rights Act says:

"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."

69. A dismissal which is contrary to section 103A is 'automatically' unfair. The tribunal does not need to consider whether the dismissal was reasonable in the circumstances.

70. Where, as here, the claimant has less than two years' service, the burden is on the claimant to show, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason (*Smith v Hayle Town Council* 1978 ICR 996, CA).

71. The causation question for the tribunal in the complaint of automatic unfair dismissal is different to that in relation to the complaint of detriment. In the automatic unfair dismissal complaint, the tribunal must consider whether the

sole or principal reason for dismissal is that the employee made a protected disclosure (*Kuzel v Roche Products Ltd* [2008] ICR 799 and *Fecitt and others v NHS Manchester*).

Conclusions

72. We applied the legal principles to the facts as we found them, and reached the following conclusions.

Protected disclosures

73. In relation to each of the alleged protected disclosures, we need to consider:

    73.1 First, was there a disclosure of information?

    73.2 Secondly, did Ms Delagua believe that the information she disclosed tended to show that the respondent had failed to comply with a legal obligation or that health and safety had been endangered?

    73.3 If so, was that belief reasonable?

    73.4 The fourth question is whether Ms Delagua believed that the disclosure was made in the public interest.

    73.5 Again, if so, was that belief reasonable?

74. We have found that the following alleged protected disclosures by the claimant meet the required legal tests:

    74.1 Disclosure h: the email of 8 March 2022;
    74.2 Disclosure a: made verbally at the second investigation meeting on 18 March 2022;
    74.3 Disclosure d: the email of 24 March 2022 at 15.18;
    74.4 Disclosure e: the email of 30 March 2022;
    74.5 Disclosure f: the email of 20 April 2022; and
    74.6 Disclosure g: made verbally at the disciplinary hearing on 26 April 2022.

75. We found that on each of these occasions, the claimant disclosed information which she believed tended to show that there had been a breach of a legal obligation arising from her DBS application postdating the start of her employment.

76. It is not an essential part of a whistleblowing disclosure that there should actually have been a breach of a legal obligation: a claimant who believes there has been a breach but is wrong about that or misunderstand the legal obligation is still protected, provided their disclosure meets the other elements of section 43B. It is enough that the claimant reasonably believed there to have been a breach.

77. As to whether there was a disclosure of information which the claimant believed tended to show that there had been a relevant failure:

    77.1 In disclosure h, we found that the claimant disclosed information saying that there was a breach of safeguarding and GDPR and that DBS was important, so that vulnerable adults were safe in their own homes.

    77.2 In disclosure a, she referred to the fact that she had started working before her DBS and said that was not what CQC had told her was right.

    77.3 In disclosure d, again she referenced contacting CQC and said that there were a few things that ought to have left a paper trail.

    77.4 In disclosure e, she said, “DBS have informed me that it should be stated on my certificate that I was employed under Covid legislation which my DBS clearly does not”, suggesting that that the legal safeguarding duties had not been complied with.

    77.5 In disclosure f, she said “I have spoken to DBS and found out I was not employed under the Covid Guidance and I have full evidence of this”.

    77.6 In disclosure g, she referenced the DBS certificate, DBS delayed application and the Covid Guidance according to our findings.

78. Those were all disclosures of information which in the claimant’s belief tended to show there was a breach of a legal obligation in relation to the DBS certificate requirements, even if in fact there was not a breach. The claimant believed that the information she was disclosing tended to show that there had been a breach of a legal obligation in relation to safeguarding duties. In relation to the later disclosures, the information provided is looked at in the context of earlier disclosures and it would have been apparent from the claimant’s disclosures as a whole that she was also raising concerns about danger to health and safety. Therefore, the information disclosed by the claimant on these six occasions was information which she believed fell within sections 43B(1)(b) and (d) (breach of a legal obligation and danger to health and safety).

79. Given the nature of the work the claimant did, and the strict safeguarding duties and requirements which apply to that type of work, the claimant’s belief was reasonable.

80. We find that those six disclosures were also made by the claimant in the belief that it was in the public interest to do so. This is reflected in her acknowledgement that her disclosures raised issues about vulnerable adults and their safety in their own homes. That is a matter of public interest for the customers of the respondent, and ensuring the safety of vulnerable people is also a matter of wider public interest.

81. Again, given the nature of the issues the claimant was disclosing and the vulnerability of the respondent's customers, that belief was reasonable.

82. These six disclosures were therefore qualifying disclosures, and, as they were made to the claimant's employer, they were protected disclosures. We have concluded that these six disclosures meet the relevant legal tests and amount to protected disclosures.

83. That is not true of disclosures b and c. We did not find the allegation about the breach of the notice required by the disciplinary policy to be a protected disclosure. It was expressly about the breach of the respondent's own procedures, rather than the breach of a legal obligation.

84. Similarly, we do not find disclosure c to be a protected disclosure. That disclosure was about Ms Illiopoulos allegedly vaping during meetings. The claimant did not reasonably believe that information tended to show a breach of a legal obligation, that it was a health and safety matter, or that it was in the public interest to raise this. (Although disclosure c also referred to the claimant's DBS application, this was not the basis on which it was said to be a protected disclosure.)

Detriment on the ground of protected disclosures

85. Having found that six disclosures made by the claimant were protected disclosures, we go on to consider whether Ms Delagua was subjected to detrimental treatment because of making protected disclosures. We need to consider whether one or more protected disclosure materially influenced an act (or deliberate failure to act) by the respondent.

86. There were two acts of detrimental treatment said in the list of issues to have been done because of these disclosures.

87. The first is suspension. We clarified with Ms Delagua at the start of the hearing that by 'suspension', she meant being told on 24 February 2022 that she could not carry out her usual shift for her regular customer. At the start of the hearing, she confirmed that she was not relying on this as a detriment done because of protected disclosures. In any event, as that act happened before all of the claimant's disclosures, it cannot have been done on the ground of any protected disclosure.

88. The second act of detrimental treatment that Ms Delagua says was done on the ground of protected disclosures was the withholding of evidence in support of the disciplinary allegations. This refers to the failure to provide the claimant with a copy of the statement recording the allegations made against her by her colleague (page 144).

89. We have found that this took place, in the sense that the claimant was not provided with a copy of this statement in the course of the disciplinary procedure. However, we are satisfied that this was not a deliberate failure done on the grounds of any of the claimant's protected disclosures. The respondent's failure to provide the statement was not materially influenced

by any of the claimant's protected disclosures. It was an administrative error or misunderstanding between the respondent's managers. We are satisfied that the same procedure would have been followed in respect of the documents on pages 96 and 144 whether or not Ms Delagua had made protected disclosures.

90. For these reasons the complaint of detriment because of protected disclosures fails.

Protected disclosure dismissal

91. That brings us to the complaint of dismissal because of making protected disclosures.

92. We have to apply a different test here, as I explained at the start of the hearing. We are not looking at whether the disclosures materially influenced the respondent's decision to dismiss the claimant. Rather, we have to decide whether the sole or principal reason for the claimant's dismissal was that she had made one or more protected disclosure.

93. Mrs Parkins said the reason for the claimant's dismissal was her conduct in allowing her partner into a customer's home, and in not disabling location sharing on her social media app, leaving her work location visible to her partner. But it was clear from the evidence that Mrs Parkin did not initially regard that conduct as so serious that Ms Delagua could not continue to work for them:

    93.1 the respondent said the claimant could work for other customers and could take any available work except shifts for her regular customer;

    93.2 Mrs Parkins told Acas some time before 1 April 2022 that the claimant's conduct was potentially only a minor matter and the respondent was keen to have her return to work;

    93.3 there was no specific reference to gross misconduct in the first invitation letter sent on 24 March 2022, but the allegations were of gross misconduct in the letters of 1 and 13 April 2022;

    93.4 by 6 April 2023 (nearly 3 weeks before the disciplinary hearing) Mrs Parkins' staff list no longer included the claimant and she could not explain why, suggesting that she had made the decision by then that the claimant would be dismissed.

94. We have concluded that Mrs Parkin's view of the claimant's conduct changed during the period between 24 March 2022 and 1 April 2022. Before 24 March, Mrs Parkins thought the conduct was potentially minor and regarded the claimant as a member of staff. After 1 April, the claimant's conduct was being described as 'gross misconduct' and after 6 April she was no longer on the staff list.

95. Mrs Parkins said that it was the claimant's lack of remorse and attitude during the process that led her to see her conduct as more serious. That must have been based on the communications with the claimant, as there was no meeting with the claimant during this time. The communications included two protected disclosures. In one of those disclosures, (disclosure e, made on the evening of 30 March 2022) the claimant told Mrs Parkins that she had contacted DBS, resulting in Mrs Parkins deciding to contact CQC the following day.

96. We have decided that it was the claimant's repeated disclosures and in particular disclosure e, in which the claimant said she had contacted DBS, which were the principal reason for the decision to dismiss the claimant. It was the protected disclosures which led Mrs Parkins to revise her view of the appropriate outcome of the disciplinary process, leading to her decision that the claimant should be dismissed.

97. We conclude therefore that the dismissal therefore was automatically unfair because the principal reason for the dismissal was the claimant's series of protected disclosures and disclosure e in particular.

Unauthorised deduction from wages

98. The claimant also makes a complaint of unauthorised deduction from wages in relation to her pay while under investigation.

99. We found that the claimant was not suspended. The respondent told her that she was not suspended. There was a lack of clarity in the respondent's communications as to whether the claimant would be able to work shifts for other customers. Mrs Parkins said that she would let the claimant know after the meeting with the family, but did not come back to her on this.

100. We have considered what was properly payable to the claimant, and whether she has been paid less than that. The claimant's contract had no guaranteed hours. There was no obligation on the respondent to provide the claimant with work. Even if she had been formally suspended, the respondent's disciplinary policy, referred to in the claimant's contract, permitted suspension without pay.

101. We have decided that for these reasons, while the claimant was under investigation (and even if the claimant had formally been suspended) she had no contractual guarantee of work or pay. Although it might have been better if the respondent had been clearer with the claimant that she could do other work for them, the failure to do so did not give rise to a contractual entitlement to work or to pay. Therefore, there has been no unauthorised deduction from the claimant's wages in respect of the period when she was unable to work for her regular client.

102. A separate hearing has been arranged to consider what order should be made in respect of remedy (compensation) in respect of the unfair dismissal.

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Employment Judge Hawksworth

Date: 30 August 2023

Sent to the parties on: 31 August 2023

For the Tribunal Office