EMPLOYMENT TRIBUNALS

Claimant: **Mrs. O.E Fatokun**

Respondent: **Flourishgate Care Services Limited**

Heard at: **East London Hearing Centre (CVP)**

On: **11-14 July 2023**

Before: **Employment Judge E. Misra KC**

Representation

Claimant: In person
Respondent: Mr. P. Collyer (advocate)

JUDGMENT having been sent to the parties on **3 August 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim presented to the Employment Tribunal on 10 May 2021 the Claimant pursues claims for unfair dismissal (s.103A Employment Rights Act 1996 or 'ERA'), breach of contract, unauthorised deductions of wages and holiday pay, as well as in respect of an allegation failure to provide her with a written statement of particulars. The Claimant withdrew her claim for wrongful dismissal (i.e., for a week's pay in respect of the notice she contended she should have been given when her employment was terminated).

2. An Early Conciliation ('EC') certificate was issued on 14 May 2021 by email, further to the Claimant contacting ACAS for the purpose of early conciliation on 8 April 2021.

3. At a Preliminary Hearing listed to manage this claim, on 24 January 2022, EJ Shore carefully elicited from the Claimant the basis of her complaints which were not all clear from the ET1 form and made directions as well as setting out the List of Issues which I have had to determine. I have paid close attention to the issues as defined and the further information which the Claimant was directed to and did provide after the Preliminary Hearing setting out her case which the Respondent needed to understand.

4. I received an agreed bundle of documents in two parts, a set of audio recordings which in the event neither party asked me to listen to, and witness statements from the following individuals:

   i. The Claimant: Ms Oluwatoyin Fatokun;

   ii. Mr. Williams Onanokpor who worked for the Respondent as a support worker and is the Claimant's partner;

   iii. Mr. Samuel Olaleye who is the co-director and owner of the Respondent;

   iv. Mr. Adeniyi Ola who is the company secretary of Flourishgate Living (a sister company to the Respondent) and was the dismissing officer and

   v. Mrs. Olulola Olaleye who the other director and owner of the Respondent and decided the Claimant's appeal against dismissal.

5. Additionally, during the course of the hearing I received a set of payslips for the Claimant and two clips of CCTV footage relating to an incident on 18 December 2020. I heard oral closing submissions from the Respondent and the Claimant who also provided written submissions which I received and read.

6. I am grateful to Mr. Collyer who represented the Respondent, and the Claimant who acted in person throughout, for their cooperative approach to this hearing which has concluded within its allocated time in no small part due to their approach. It has been consistent with the overriding objective and to be commended.

7. Having considered all of the evidence I found as follows.

8. The Respondent provides personal care and support to people with learning disabilities or mental health needs within a supported living service. In addition to its Head Office, it has three sites, two flats at 31 and 72 Huxley Road, and a house at 70 Rotwell Road which has flats which can house up to five residents. The Respondent is a relatively small employer in terms of size with under 20 workers or employees. It receives funding from the local authority which depends on the nature of the support needed by a service user, which may include a number of hours during which 1-2-1 support or supervision is needed. Unsurprisingly, the needs of different service users can vary, and they each have a care or support plan in place. The Respondent has no dedicated Human Resources function within the business but uses the services of an external employment law consultant when needed.

9. The Claimant was employed by the Respondent as a support worker and administrative assistant from 1 November 2019 to 6 February 2021 when she was dismissed without notice. The Respondent stated that the reason for her dismissal was gross misconduct constituted in the Claimant's actions during an incident at work on 18 December 2020 and a loss of trust and confidence in her as a result of this.

10. The Claimant knows Mr. Olaleye from church. She was looking for a job in 2019. He offered one to her as a support worker. Though the precise circumstances of the initial induction process are in dispute, in due course the Claimant felt able and competent to support vulnerable service users including by providing a sleep-in shift at times, and to undertake administrative tasks which were offered to her. The Claimant provided references to the Respondent when she applied for the job and did not dispute that they were genuine and appropriate references. She however subsequently formed the view that the Respondent had a lax approach to paperwork and record-keeping, including retaining proof that references had been taken up for staff.

11. The Claimant was issued with a contract of employment which set out that the date of commencement of continuous employment was 1 November 2019. The copy in the bundle was not signed by the Claimant and appears to have been issued on 4 November 2019. The Claimant did not challenge its authenticity or that it applied to her. I find that this contract complied with the requirement to provide particulars in s.1 ERA.

12. Amongst other things, the contract provided that the Claimant may be required to undertake additional or other duties as necessary to meet the needs of the company from time to time. It also stipulated that the Claimant must be checked by the Disclosure and Barring Service ('DBS'). This was because she would have to work with vulnerable adults and potentially also minors. The rate of pay was said to be £9.00 per hour and this was what is often referred to as a "zero hours contract" i.e., the Respondent was not obliged to offer her any hours at all in any given week. The Claimant worked variable hours throughout.

13. Payment of wages was to be made monthly in arrears on the 25th day of the month.

14. In terms of annual leave, the holiday year ran from 1 April to 31 March. The Claimant was entitled to statutory holiday pay (28 days a year) on a pro rata basis. Holiday pay was to be calculated according to the contract as an average of payment received over the 52 worked weeks preceding the holiday unless the Claimant had worked less than 52 weeks in which case an average of weeks worked would be used. On termination, holiday pay would be calculated in proportion to the full entitlement, according to the contract. This appeared to me to mirror the provisions of the Working Time Regulations. In any event, the Claimant pursued her claim under the Working Time Regulations and not as a breach of contract or wages claim.

15. The contract was silent on the right to suspend, or any pay due if the Claimant was suspended, but the Employee Handbook which was expressly incorporated into the contract of employment by reference, deals with the Respondent's disciplinary policy and procedure. The handbook provides that gross misconduct will normally result in summary dismissal and examples of this set out in the relevant section include assaulting another person and behaviour likely to bring the company into disrepute.

16. The handbook provides that where suspension is imposed, if necessary, pending a disciplinary allegation "you will receive your normal rate of pay".

17. The handbook also provides details of the charity Protect and strongly recommends that anyone wishing to make a protected disclosure or to 'blow the whistle' should raise it with a director in the first instance or if it cannot be dealt with in that way to call Protect.

18. Under 'safeguarding', the handbook says that abuse of vulnerable people does not have to be deliberate, malicious or planned and sometimes happens when people are trying to do their best but do not know the right thing to do.

19. In February 2020 the Respondent asked the Claimant to undertake some administrative work at a rate of £10 per hour. This was mainly data entry and payroll related tasks.

20. The Claimant says that she made a number of protected disclosures as set out in the List of Issues at 1.1.1.1 to 1.1.1.6. First of all, she says that, in June or July 2020, she raised concerns about food safety to her line manager, Ms. Rita Ayoola (Service Manager). She says that in June or July 2020 she raised medication errors with Mr. Olaleye. In August 2020 and again in October 2020 she contends that she raised an issue around understaffing with Mr. Olaleye. Finally, the Claimant says that in December 2020 or January 2021 she raised a concern about unsafe recruitment practices.

21. The ET1 contains sparse detail about these alleged disclosures. In accordance with EJ Shore's orders, the Claimant produced further and better particulars. I have taken those into account together with the Claimant's statement in considering how she puts her case on the making of qualifying and protected disclosures, in each case to her employer.

22. I find that in around June 2020 the Claimant told Ms. Ayoola that she had found some out of date food in a service user's fridge and this was a food safety issue. As per the details provided by the Claimant herself, Ms. Ayoola spoke to her and said she would look into it. The Claimant then sent a message to the staff WhatsApp group on 16 June 2020 with a reminder to observe good food hygiene and check expiry dates on items in the fridge. Nothing further appears to have occurred that gave rise to concerns of this nature on the Claimant's part, and I find that the matter was resolved. The Claimant was unable to provide any date as to when she says she raised this with Mr. Olayeye but he recalls she did so in around June 2020 and sent the picture of a rotting cucumber to him. He supported her message in the WhatsApp group which he saw as a very good example of behaving sensibly as an employee and he commended her actions when questioned about it.

23. The Claimant says she was tasked with carrying out a medication audit of all of the Respondent's schemes and discovered errors which she reported to Ms. Ayoola and Mr. Olaleye. There was no document trail in the bundle of such an audit or any details of any medication errors. The Claimant did not provide any specifics in evidence as to what the error was and how it had come about and how it related to a health and safety duty or breach. Mr. Olaleye had no recollection of this but did recall that he had found a medication error himself in 2020 which he had reported. I found that no

medication error had been reported to Mr. Olaleye relying in particular on the absence of any contemporaneous evidence at all to support this allegation.

24. On 16 August 2020, there were four service users in the care of the Claimant and her colleague Michael: IR, SF, DN and ZA. Michael took one service user, IR, for a walk. While he was out another service user, SF, had an epileptic seizure which required an ambulance to be called out. ZA tried to self-harm. Michael returned to Rotwell House and sought to assist the Claimant who had called paramedics and the police. During this time IR absconded. Mr. Olaleye was called and assisted in searching for IR during which time the Claimant was left with three service users. While this may not have been a typical or optimal situation, I do not find that this was a normal shift or typical of staffing practices. On the day, there was potential for harm to occur and indeed IR, a vulnerable person, absconded because Michael went to assist the Claimant and the doors were not alarmed again in the confusion and chaos.

25. In September 2020 the Claimant carried out an audit of personnel files and found that in some instances the Respondent did not have references on file. She told Mr. Olaleye about this. He was not surprised as he knew that there were references held on a computer which he was no longer able to access and therefore some would be missing. He was not concerned that there was a failure to take up references in the first place. He anticipated that the remedy was to seek copies of the references or if they could not be obtained to seek fresh references to regularise the records. That "audit" was still being carried out in December 2020. I did not accept it had started in June 2020.

26. The Claimant states in her further and better particulars that it was in October 2020 that she raised understaffing with Mr. Olaleye again in that Mr. Olaleye asked her to combine her administrative work with support work and the Claimant said that she could not carry out support work whilst simultaneously carrying out administrative tasks. This is supported by the message dated 24 October 2020 in which she said she could not combine support work with finalising the payroll. She was not made to do so, and Mr. Olaleye sent her a pleasant response saying that he would take up the payroll duties the next day to ensure it was done in time to pay staff and thanked her for raising the matter with him.

27. On 11 December 2020 a new resident arrived as Southwark Borough Council had asked Mr. Olaleye if the Respondent could take this teenager, AH, on an emergency basis. He had a complex history and needs and the Respondent had not accepted any child referrals before. A member of staff arrived late to work, and the Claimant was left with four service users (including AH) until 10pm. AH had been refusing to go to sleep which is why she contacted Mr. Olaleye to discuss his challenging behaviour. Mr. Olaleye sent details of AH to the Claimant which she did not access until the next day, but then printed and filed away in his folder. I find on a balance of probabilities that she did read the details albeit on 12 rather than 11 December 2020. The Claimant already knew that Mr. Olaleye lived ten minutes away and had previously said she could call for help if needed. There were no contemporaneous messages showing the Claimant had in

fact complained about understaffing on this day, and I find that though she may have been displeased she did not make a disclosure of information.

28. On 18 December 2020 an incident occurred. I have seen part of the incident recorded by CCTV in clips sent to me during the hearing. It would appear from those clips that AH came into the kitchen from a communal living area and threw a cup of water at the Claimant who was following him. According to statements of staff who were there, this followed on from AH using foul language ('B', 'F' and 'N' words) which the Claimant quite reasonably asked him to stop doing. The Claimant appeared to be pouring water into a cup immediately after the water was thrown at her when AH grabbed her (seemingly around her neck) and she then threw water at him. Staff members appear to have worked to free the Claimant from his grasp. The Claimant went to refill another cup of water and went into the communal living area; she then returned with an empty cup. This was consistent with and highly suggestive of the water being taken to use with intention. The CCTV does not show AH being restrained. Statements suggest he was, by another member of staff, briefly, before calming down and going to his room. While I do not need to make any findings, at least conclusive findings, as to what happened on 18 December, there was clearly evidence from which a person watching this CCTV and reviewing the relevant statements which were taken afterwards could reasonably conclude that the Claimant had been provoked, lost control of her actions and sought to retaliate in the heat of the moment. The CCTV has no audio.

29. An incident form was completed but did not refer to any water being thrown on AH.

30. On 28 December 2020 the Respondent ceased to provide the Claimant with administrative work.

31. On 29 December 2020, AH's mother sent an email to the Respondent following up on a complaint that the Claimant had thrown water on her son when he was restrained on the floor around the same time which she had recently called Mr. Olaleye about.

32. The incident was referred to the Local Authority Designated Officer (LADO) on 31 December 2020.

33. The Claimant was on holiday from 21 December to Christmas Day and subsequently provided a sick note from her GP certifying her absence until 11 January 2021 during which time she was paid SSP. The Claimant began looking for other work.

34. When the CQC inspected the Respondent on 24 January 2021 partly because of the 18 December 2020 incident, it did not find that it was understaffed or that any staffing rotas or arrangements had placed any users at risk. They also inspected medication records and did not find any cause for concern. The CQC considered that staff were recruited safely. However, for other reasons the Respondent was placed in special measures for six months. The CQC carried out another inspection on 2 November 2021 and deemed the overall rating for the service to be 'Good'.

35. Once LADO became involved matters rapidly escalated and the police also became involved. Mr. Olaleye provided his internal investigation report to LADO on 17 February 2021.

36. The Respondent initiated its disciplinary procedure. The Claimant was invited to an investigation meeting with Mr. Olaleye on 3 March 2021. As there was a case to answer the Claimant was then invited to attend a disciplinary hearing taken by Mr. Ola who had not part in the day to day running of the business. She was aware summary dismissal was a potential outcome.

37. Having heard from the Claimant, considered the evidence and seen the CCTV, Mr. Ola concluded that the Claimant had committed gross misconduct by assaulting AH and as there was, in his view, insufficient mitigation, the outcome that he determined upon was summary dismissal. The decision was communicated by way of letter and included reference to the fact that the Claimant had attended safeguarding training for both children and adults, which is not in dispute. After the hearing, Mr. Ola had checked with Mr. Olaleye what the Claimant's training log or record was so he could satisfy himself of the training she had as that was an important factor in his decision-making. Other than that, he did not refer to Mr. Olaleye and decided to dismiss the Claimant on the evidence before him. He knew nothing of the alleged protected disclosures and the Claimant did not refer to them at the disciplinary hearing, so he remained in ignorance of them. The decision was his.

38. The Claimant appealed the outcome. An appeal meeting was convened at which an external HR / employment consultant chaired the meeting and Mrs. Olaleye attended. She reviewed the CCTV footage as well and considered there were no grounds sufficient to uphold the appeal, so she dismissed it.

39. The Claimant indicated to the Respondent she was owed some wages and holiday pay. It remains unclear what exactly the basis for this is. At the Preliminary Hearing last year, the Claimant stated a figure she said she was owed for accrued but untaken leave and claimed £30 for a sleepover. At a very late stage in proceedings (during the final hearing), she said she was in fact owed for 3 hours of administrative work (£30). The Claimant should have raised this much sooner. Her Schedule of Loss at p.426 specifically refers to a sleepover as was also expressed to be the case at the PH last year. At no time since then did Claimant seek to amend her claim and the Respondent did not come to the hearing prepared to meet this completely different claim. I am mindful it is modest in sum, but I nonetheless decline to allow the amendment.

40. Turning to the law, I have reminded myself of the statutory language of s.43A and 43B(1) ERA which set out what a qualifying and protected disclosure must consist of and the mixed subjective and objective elements of the test. The Claimant relies on health and safety (s.43B(1)(d) ERA) in each case.

43B Disclosures qualifying for protection.

*(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, **[**F2 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.

41. I have revisited the well-known Court of Appeal decision in Kilraine v LB Wandsworth [2018] ICR 1850 as to what amounts to a disclosure of information within the statutory language. A disclosure needs to have sufficient factual content and specificity to be able to be deemed to be capable of showing one of the matters listed in section 43B(1) ERA.

42. It is clear in law that in order to have the requisite reasonable belief provided for in the statute, it is not necessary for the Claimant to be right or correct in what she believes: Babula v Waltham Forest College [2007] ICR 1026. However, the belief must be subjectively genuinely held and objectively reasonable: Chesterton Global Ltd v Nurmohamed [2018] ICR 731, CA. The Chesterton decision is also a clear reminder of the proper approach to be taken to the public interest element of the wording in s.43B(1) ERA.

43. Section 103A ERA provides that a dismissal is automatically unfair if the reason or principal reason is that the Claimant has made a protected disclosure. This a different legal test on causation to that applied to claims for detriment under section 47B ERA in which the different, well-known "material influence" or Fecitt test is applied.

44. In respect of the wages claim brought under s.23 ERA, I have reminded myself of s.13 ERA which provides the right not to suffer unauthorised deductions. Salary or overtime payments clearly fall within the meaning of wages in s.27.

45. There is also a claim for holiday pay and I have considered Regs 13-16 WTR 1998 in particular, as well as the applicable time limit contained in

Reg.30 subject to any extension given under the EC scheme. In all of the claims pursued the primary time limit is 3 months.

Unfair Dismissal

46. I am not satisfied that the Claimant meets the threshold as set out in Chesterton in respect of any of the alleged disclosures.

47. I am satisfied that the Claimant made a disclosure of information to her line manager and Mr. Olaleye in June 2020 to the effect that some service users had rotten or out of date food in their fridges, but I do not accept that the subjective or objective elements of the belief test are met in respect of a health and safety danger. It is not clear, for example, how out of date any food items were and that service users did not have the wherewithal not to eat them. There was no evidence anyone had become unwell. So, I am satisfied a disclosure was made but not that it was a qualifying and protected disclosure.

48. I am not satisfied that any disclosure of information about medication errors was made by the Claimant to Mr. Olaleye.

49. I am satisfied that on 16 August 2020, the Claimant did express concern about being one of two members of staff on duty but not that she referred or alluded to any health or safety concern. She has not met the subjective or objective elements of the belief test in my view having regard to the evidence given by her.

50. I find that in October 2020 no protected disclosure was made; there was a simple exchange about the Claimant's capacity to undertake payroll work alongside support work.

51. I am not satisfied that any disclosure of information about understaffing was made on 11 December 2020.

52. I do not accept that the Claimant made a protected disclosure about unsafe recruitment practices in December 2020. She carried out an audit which resulted in the fairly basic handwritten document at p.335 of the bundle which revealed there were missing references on the personnel files; not that staff references had never been taken. There was no suggestion that any member of staff was or appeared to be incompetent, dishonest, or unsuitable for their work.

53. This would be sufficient to dispose of this claim, but if I am wrong about these alleged disclosures then I also determine that the decision to dismiss was wholly the decision of Mr. Ola who was not influenced or directed by anyone else, that he was oblivious to the alleged disclosures and that he could not therefore have been motivated by them.

54. The disciplinary process was triggered because of the 18 December incident and Mr. Ola genuinely assessed the Claimant to have committed gross misconduct. He explained he thought she had lost control and wondered what could have happened if she retaliated in the heat of the moment with a knife rather than water. It is not for me to assess the fairness of the decision to dismiss, but I unhesitatingly conclude that the reason for

dismissal was nothing whatsoever to do with any disclosure made by the Claimant.

Breach of Contract

55. The wrongful dismissal claim was withdrawn and has been dismissed on withdrawal.

56. There was no legal obligation on the Respondent to give the Claimant notice of its decision not to offer her administrative work from 28 December 2020 and therefore there can be no breach in this regard.

Wages

57. The Claimant has not established she is entitled to any wages for a sleep-in shift and the payslips, and her evidence suggest that they have all been paid in February 2021. In any event such a claim would be out of time (the pay having allegedly been deducted in November 2020). It is not part of a series of deductions. There is no reason for me to extend time. Even if I had allowed an amendment to allow a completely new claim, this too would have been out of time and is likely to have failed on the evidence available to me.

58. The Claimant rightly pointed to the Employee Handbook which has contractual force. This provides her with the right to be paid at her normal rate during suspension. The Respondent argued that as this was a mutually agreed zero-hours contract there was no obligation to pay the Claimant hence no pay was ever due. The Claimant was unable to articulate how much she was owed in the hearing, but I noted the contents of the Schedule of Loss.

59. Neither party referred me to this, but I considered the decision of the Employment Appeal Tribunal in Rice Shack Ltd v Obi UKEAT/0240/17/DM, a decision of Mrs. Justice Eady. This concerned an employee on a zero hours' contract who was suspended without pay but found other work. The parties in that case had agreed that the claimant was entitled to be paid average earnings during the suspension despite being on a zero hours' contract. That was not therefore in issue, but it is instructive that the EAT did not suggest that this premise was in any way incorrect, emphasising instead that where the contract does not provide for suspension without pay then pay is required during a suspension.

60. The Respondent's Handbook at p.71 states that the normal rate of pay is due during suspension. This is perhaps clumsy wording for someone on a zero hours' contract, but nonetheless it is clear that what the contract does not envisage is no pay at all. I find that properly construed the contract provides for average earnings to be paid during suspension.

61. The Claimant was suspended in February 2021 but by this time she had taken some sick leave. Whilst the Respondent did not accept it was contractually obliged to pay the Claimant during suspension, it nevertheless did so (on average earnings).

62. The Claimant was unable by reference to her payslips or any other documents to demonstrate where she had experienced a shortfall of payment contractually due to her whilst suspended and having regard to p.417 and the sums paid I am unable to conclude there was a shortfall.

Holiday Pay

63. The Claimant was paid for annual leave in her pay in February 2021 and with her final pay in April 2021. She accepted in cross examination that she was paid £645.75 in February and £330.10 in April and that her entitlement was to 98.1 hours. She said that the issue was that the Respondent should have used an average of pay for weeks actually worked over the past 52 weeks and not simply taken the average across the whole 52 weeks.

64. The Respondent engaged its accountants to calculate average pay for the Claimant at p.417 of the bundle considering all of her earnings in the past 52 weeks and adjusting for any holiday pay already paid. I find this approach to be consistent with the contract and with the WTR and Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 (reference period 52 weeks from 6 April 2020). According to Reg. 16, ss. 221-224 ERA determine the approach to be taken to a week's pay.

65. Accordingly, no holiday pay is due to the Claimant under Reg. 16 or for accrued but untaken leave.

Particulars

66. The Claimant was issued with a contract of employment compliant with s.1-4 ERA and there was no breach by the Respondent in this regard.

Employment Judge E Misra KC
Date: 25 August 2023