



# EMPLOYMENT TRIBUNALS

**Claimant: Ms J Pelling**

**Respondent: The Complete Care Group Limited**

**Heard at: London South**

**On: 23 August 2023**

**Before: Employment Judge Rice-Birchall**

## **Representation**

Claimant: In person

Respondent: Mr Paul McWall, Director

# JUDGMENT

The claimant's claim that she was dismissed for making a protected disclosure fails and is dismissed.

# REASONS

## **Background**

1. The claimant was employed by the respondent, which runs care homes, as a community development worker. She commenced employment on 4 August 2021 and was dismissed on 26 November 2021. She commenced early conciliation on 22 December 2021 and it ended on 24 December 2021. She presented her claim on 14 January 2022. Her claim is that she was unfairly dismissed for making a protected disclosure on 25 November 2021. In her claim form the claimant states: "I had a whistleblowing meeting...to report [ZB] for physical abuse and lying on legal documentation".
2. On 26 January 2023, the Tribunal wrote to the respondent to state that, under rule 21 of the Employment Tribunal Rules of Procedure 2013,

because they had not entered a response, a judgment may be issued. The letter indicated that the respondent would be entitled to receive notice of any hearing but would only be able to participate in the hearing to the extent permitted by the judge who heard the case.

3. A further letter was sent on 26 January 2023 to state that EJ Khalil had reviewed the file but had decided that it was not appropriate to issue a judgment because further information regarding the claim was required.
4. The claim was listed for a hearing on 7 July 2023 by a letter dated 6 February 2023.
5. No response having been received, the legal officer wrote to the claimant on 25 May 2023 to ask her to confirm whether the hearing would be going ahead.
6. On 2 June 2023, two emails were received from the respondent, inter alia, asking for an ET3 form to complete and for log in details for the forthcoming hearing.
7. On 5 June 2023, the respondent wrote to request a postponement due to holidays.
8. On 6 June 2023, the claimant wrote to the Tribunal to say that the case management orders had not been complied with and to request a postponement.
9. On 15 June 2023, the legal officer wrote to the claimant and told them that the ET3 was out of time and that an application for it to be considered would need to be made.
10. On 16 June 2023 the respondent wrote again requesting copies of all relevant documents about the claim. The documents were sent the same day and the hearing postponed. The respondent was told that his extension of time application would be put before a judge.
11. On 20 June 2023, the claimant requested a default judgment.
12. Also on 20 June 2023, the Tribunal wrote to Mr McWall of the respondent to state that his request for an extension of time could not be considered unless a draft of the response was sent or an explanation of what it was not possible under rule 20 of the Employment Tribunal Rules.
13. The claimant repeated her request for a default judgment on 26 June 2023 and 30 June 2023.
14. On 1 July 2023 the respondent attached his "draft" ET3. No reasons were given for the delay and no application made for an extension of time.

15. On 3 July 2023, the AREJ wrote to the parties to postpone the hearing. The Tribunal stated that a rule 21 judgment was not appropriate due to reasons set out in the Tribunal's letter of 26 January 2023.
16. The hearing was relisted for 23 August 2023 when it came before this Tribunal.
17. The respondent appears to have re-submitted his ET3 with some evidence on 16 August 2023 and again asks for the hearing, by now scheduled for August 2023, to be postponed.
18. On 22 August 2023, the Tribunal wrote to confirm that the respondent's application to postpone the hearing was refused; that the claim had not yet had a response accepted; and that the respondent's email attaching a response was not accompanied by an application for it to be accepted out of time. It went on, "To the extent that the email was itself the application, the reasons stated are insufficient to grant an extension."
19. In the event, on the day of the hearing, the claimant attended without representation and Mr McWall appeared on behalf of the respondent. Mr McWall was distressed, having put oil in his eye. He repeated his request for a postponement to the clerk but this was rejected.
20. The Tribunal permitted the respondent to take part in the proceedings, which included being able to submit documents; ask questions of the claimant; give evidence and make submissions.

## **Issues**

### **Qualifying disclosure**

21. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:
  - a. What did the claimant say or write? When? To whom?
  - b. Did they disclose information?
  - c. Did they believe the disclosure of information was made in the public interest?
  - d. Was that belief reasonable?
  - e. Did they believe it tended to show that:
    - i. a criminal offence had been, was being or was likely to be committed;

- ii. a person had failed, was failing or was likely to fail to comply with any legal obligation;
  - iii. a miscarriage of justice had occurred, was occurring or was likely to occur;
  - iv. the health or safety of any individual had been, was being or was likely to be endangered;
  - v. the environment had been, was being or was likely to be damaged;
  - vi. information tending to show any of these things had been, was being or was likely to be deliberately concealed.
- f. Was that belief reasonable?
- g. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

### **Automatically unfair dismissal**

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

### **Evidence**

23. The claimant did not produce a witness statement for herself but did produce a witness statement from a colleague, Natalie Carroll, who was not present at the hearing. The Tribunal explained that witness evidence of a witness who was not present may be given less weight as the witness is not able to be cross examined.
24. The respondent submitted some documents which the Tribunal determined should be considered in the interests of justice as they were relevant. The claimant did not object to their inclusion. These were referred to as appendices A-E which were, respectively: a record of the claimant's pay between September 2020 and October 2021 (A); the claimant's payslip for September 2020 (B); a screen shot of What's App messages between the claimant and Mrs McWall between 20 and 25 November 2021 (C); meeting minutes of meeting between the claimant and Mrs McWall on 25 November 2021 (D); and what's app messages between 15 and 20 November 2021 between the claimant and Mrs McWall (E).

### **Findings of fact**

25. The claimant was employed by the respondent as Community Development worker from 4 August 2021 until her dismissal on 26 November 2021.

26. The respondent is a residential care establishment run by Mr and Mrs McWall who are both directors.
27. Over the relevant period (around October/November 2021) the respondent was very short staffed and had a number of issues with senior staff which needed to be resolved. The head of service was on long term sick.
28. On 2 November 2021, Mrs McWall issued a reminder on What's App to all staff about following procedure when not attending work.
29. The claimant stated that two employees in particular had been missing shifts and had not let the respondent know. This had happened a number of times over a short space of time but the employees were not, to the claimant's knowledge, reprimanded in any way.
30. However, Natalie Carroll noted in her witness statement that: "As Paul and Joanna tried to fix the issues left behind after AN was let go, a few staff were let go. I believe that this was necessary as the staff they had let go were having consistent sick leave or would not even call in sick and just take the day off often. Something needed to take place."
31. The Tribunal will set out its conclusion on this factual issue in its conclusions below.
32. The claimant did not have any disciplinary record.
33. The claimant did not attend work on 18 November 2023, as she was very upset with her manager, ZB, and her partner, who also worked for the respondent. The claimant had ended up in tears. This was the only shift the claimant had ever missed.
34. On 20 November 2021, Mrs McWall messaged the claimant to ask if she wanted to talk or "can we presume you have left St Annes?". Mrs McWall went on to say that if she didn't hear from the claimant she would send her a letter. It appeared that the claimant had been stating that she may leave her employment with the respondent, hence the comment about presuming she had left.
35. The claimant responded one minute later to state that she was at work and that she would like to speak with Mrs McWall.
36. Mrs McWall responded to ask the claimant to let her know when she was in work the following week. The claimant responded minutes later with the information but added, "I am very sorry I let St Anne's down with no warning".
37. Mrs McWall responded: "Okay, we can discuss in a meeting next week Jody! Have a good day at St Annes, are you going to the pantomime?"

38. And then, "But anyway I'll meet with you next week Jody, have a lovely weekend."
39. On 24 November 2021, the claimant texted Mrs McWall: "I'm really sorry to message you again but I am absolutely appalled and gobsmacked at the behaviour and blatant rudeness from staff in st annes now, in light of today's events may I request Natalie [Carroll] sit in as a senior on Friday's meeting?"
40. In fact, the claimant and Mrs McWall agreed to bring the meeting forward by a day and it took place on 25 November 2023. Prior to the meeting, Mrs McWall texted the claimant as follows: "It looks like we have two separate situations to deal with Jody, we can discuss both this afternoon, I need to speak to you and then on a separate note it seems you are upset about something that's happened."
41. The claimant attended a meeting on 25 November 2021 with Mrs McWall.
42. The first issue discussed was the claimant's absence on November 18. Mrs McWall said that she needed to find out the reason for the absence. The claimant said that she had been very upset with ZB and felt she couldn't attend work the next day.
43. Mrs McWall asked why the claimant could not have let them know, as she had a good relationship with a lot of the staff and it created a lot of problems just not showing up. She explained that it created a lot of pressure on the service if staff just don't show up.
44. The claimant apologised and said she should have told someone.
45. Mrs McWall explained that the claimant's behaviour was unacceptable and told her that she should have gone to her to discuss the issues. This led onto the second part of the meeting in which the claimant elaborated on ZB's alleged behaviour which had upset her. The claimant is noted as stating: "There is a lot of other issues that I want to talk to you about as there is a reason why I can't work with ZB and what I've seen her do before. I feel she has behaved unprofessionally".
46. The relevant allegations for the purposes of this case were that: ZB had lied about her phone being smashed by Jody and used EW (a resident) as the reason (what the claimant refers to as lying on legal documentation); ZB used a lighter to move one of the residents along by frightening him; and ZB pushes a sock into a resident's mouth to stop him from shouting.
47. In relation to the allegation about the lighter, Mrs McWall states: "Jody, any other information you have please let me know or anything else you remember, any other witnesses you may remember please let me know. You have my number so just message me with any information please as

it's really important we get as much information as possible." The claimant did not provide any further information.

48. In relation to the allegation about the sock, again Mrs McWall asked for further information but the claimant was unable to be specific and did not provide any further information about when it happened and so on..
49. During the course of the meeting it was noted that the claimant was nervous. Mrs McWall thanked the claimant for being brave. The claimant said that she didn't want to leave the respondent and that she loved working there. Mrs McWall replied that she would let her have a formal decision as soon as she could.
50. In response to Mrs McWall's request to supply any further details, the claimant did supply a witness statement regarding the phone.
51. On 26 November 2021, Mrs McWall called the claimant and dismissed her for missing a shift. She told the claimant that she was very sorry but because the claimant had missed a shift it was noted down as if she had walked out on a shift and so her hands were tied, there was nothing she could do, it was the respondent's policy for anyone who missed a shift and the claimant was not allowed back at work or back on premises.
52. The claimant asked for a dismissal letter which simply stated that the claimant's employment came to an end and gave no reasoning.
53. The respondent admitted that there had been issues with ZB about whom the claimant had complained.
54. The respondent alleged that there were many issues with the claimant, including how she spoke to people, but none of these were evidenced, other than in Mr McWall's oral evidence to the Tribunal, and even then he could not be specific, or addressed with the claimant.

## **Law**

### Section 103A ERA

55. A protected disclosure is a qualifying disclosure made in accordance with any of s43C-H ERA, typically to the claimant's employer.
56. Section 43B ERA states that a qualifying disclosure is: "...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, or is likely to be, deliberately concealed.”

57. In **Kilraine v London Borough of Wandsworth** [2018] IRLR 846 it was held that whatever is claimed to be a protected disclosure must contain sufficient information to qualify under the ERA 1996 s 43B(1). There is a spectrum to be applied and, although pure allegation is insufficient (**Cavendish Munro Professional Risks management Limited v Geduld** [2010] IRLR 38), a disclosure may contain sufficient information even if it also includes allegations. Ultimately, this will be a question of fact for the ET, which must take into account the context and background.
58. **Cavendish** also stated that it is not sufficient that the claimant has simply made allegations about the wrongdoer, especially where the whistleblowing occurs within the claimant’s own employment, as part of a dispute with his or her employer.
59. The example given in **Cavendish** is useful. The contrast was made there that if a nurse says to the management that 'the ward is filthy and there are sharps left about' that can be information, whereas if he or she simply says 'You are breaking health and safety law' that would be mere allegation. To this, the judgment adds that if the nurse made the latter remark *while pointing to sharps lying around*, that should be sufficient.
60. The claimant needs to have a reasonable belief that the disclosure is in the public interest and tends to show one of the six categories of “failure” set out in ERA 1996 section 43B. This is a subjective test and the claimant needs to have a reasonable belief in respect of each disclosure.
61. It is not for the Tribunal to itself to determine whether there is a public interest but of determining whether the claimant has had a reasonable belief in public interest.
62. Section 103A requires a finding that: “...the reason (or if more than one the principal reason) for the dismissal is that the employee has made a protected disclosure. This is a question of fact for the Tribunal.

## **Conclusions**

### Qualifying disclosure

63. The relevant allegations for the purposes of this case were that: ZB had lied about her phone being smashed by Jody and used a resident as the reason (the phone disclosure) when reporting the incident; ZB used a lighter to move one of the residents along by frightening him (the lighter disclosure); and ZB pushes a sock into a resident’s mouth to stop him from screaming (the sock disclosure).



64. These allegations were made to Mrs McWall at a meeting on 25 November 2021. No-one else was present at the time.
65. The minutes of that meeting were however available.
66. The three allegation was made in the context of numerous allegations against ZB which mostly related to her behaviour towards the claimant.

Did the claimant disclose information?

67. Applying Cavendish, these are all disclosures of information.
68. The Tribunal has considered the context in which the information was given, which was a meeting in which the claimant was complaining about ZB's behaviour generally, mostly in relation to the claimant herself, because the claimant was explaining why she could not work with ZB. Nonetheless, the Tribunal considers that there is sufficient by way of information as regards all three allegations. Even though the claimant was not able to provide dates for the sock and lighter disclosures, the information disclosed is specific as to what happened in each case.
69. As regards the phone disclosure, the claimant supplied a follow up written statement to the respondent explaini8ng precisely what had happened.

Did the claimant reasonably believe the disclosure of information was made in the public interest?

70. It should be noted that the claimant gave no evidence about the public interest and whether or not she believed her disclosures to be in the public interest.
71. The Tribunal considers that the claimant held a reasonable belief that the disclosures she made were true and that, in respect of each, there was some form of wrongdoing by ZB.
72. The Tribunal has considered that the respondent is a residential care establishment and is therefore, in the public interest, subject to high scrutiny and regulatory requirements over the treatment of its residents.
73. The Tribunal also considers that the nature of the wrongdoing, as regards the sock and lighter disclosures, would be expected to raise matters of public interest because the general welfare of those individuals needing residential care is of great and public importance.
74. In the case of the sock and lighter disclosures, ZB was the alleged wrong doer. She led a relatively prominent role within the respondent and could therefore have a significant impact on the lives of those in residential care within the respondent. It would be reasonable to believe that she could continue to have such an effect.

75. That the telephone disclosure would be in the public interest is less obvious. As it is not clear to the Tribunal how that disclosure is in the public interest, the phone disclosure fails at this hurdle.

76. The Tribunal therefore concludes that the claimant reasonably believed the sock and lighter disclosures to be in the public interest but not the phone disclosure.

Did the claimant believe it tended to show a relevant failure?

77. In respect of the telephone disclosure, the claimant relies on the following: a person had failed, was failing or was likely to fail to comply with any legal obligation.

78. In respect of the sock and lighter disclosures the claimant relies on the following: the health or safety of any individual had been, was being or was likely to be endangered.

79. The category of section 43B(1)(b), that a person has failed, or is failing, or is likely to fail to comply with a legal obligation ...' requires an actual or likely breach of the relevant obligation by the employer, in contrast to (1)(d), 'that the health or safety of any individual has been, is being or is likely to be endangered', where there only needs to be the fact or likelihood of that endangering, *not* any definable legal breach by the employer. Thus the health and safety protection is wider than the general protection.

80. Accordingly, as the claimant did not identify any particular failure to comply with a legal obligation, the telephone disclosure does not meet the bar of the claimant believing the disclosure tended to show a relevant failure. So, even if the claimant had a reasonable belief that the telephone disclosure was made in the public interest, it would fail at this hurdle.

81. On the contrary, the sock and lighter disclosures satisfy the broader category of the health and safety of an individual having been endangered. This is because treating person with significant care needs in the manner alleged would clearly endanger their health or safety.

82. The Tribunal finds that the claimant believed it tended to show that failure. Although the claimant did not in her evidence explain that belief, the Tribunal considers that the nature of the wrongdoer in the respondent, namely a person who is senior within the organisation, as stated above gives rise to such a belief.

83. As the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer, the respondent.

### Automatically unfair dismissal

84. The Tribunal concludes that the reason, or principal reason, for dismissal was the claimant's absence and that the disclosures were not a material factor in the decision to dismiss.
85. The fact that the dismissal was in time proximate to the protected disclosures being made is not in itself sufficient to conclude that the disclosures led to the dismissal.
86. That is particularly so in this case, in which the meeting to discuss the claimant's absence had already been in the diary. It was the claimant who wished also to discuss other matters, which turned out to include protected disclosures, which were added onto the original meeting (albeit that that meeting was then brought forward by a day).
87. The claimant appeared to know that there was a potential dismissal situation as she is recorded as saying, after making her protected disclosures, that she didn't want to leave the respondent and that she loved working there. Mrs McWall replied that she would let her have a formal decision as soon as she could.
88. Most significantly, Ms Carroll's statement, produced for the claimant, states: "As Paul and Joanna tried to fix the issues left behind after AN was let go, a few staff were let go. I believe that this was necessary as the staff they had let go were having consistent sick leave or would not even call in sick and just take the day off often. Something needed to take place."
89. This demonstrates that the respondent was taking a much more consistent and stringent approach to absence, as it was causing them significant problems.
90. That approach is further evidenced by the What's App exchange with staff members reminding them of the absence protocol on 2 November 2022.
91. The Tribunal does not therefore accept the claimant's evidence that other staff were just allowed to "get away" with just not turning up to work. It may be that that was the case prior to November 2, since when the respondent appeared to be taking a harder approach to such absences.
92. It is, of course, relevant that the claimant had less than two years' employment, which explains why the respondent would have dismissed the claimant without following a formal process.
93. Finally, the Tribunal concludes from the minutes of the meeting with the claimant that Mrs McWall was genuinely grateful to the claimant for highlighting the issues, referring to her as brave, and was requesting further information from her. It seems unlikely that a person would ask for further information if their main intention was to dismiss them because

they had raised those very issues. There were issues with the managers within the respondent which the respondent wanted to deal with.

94. For the reasons stated, the Tribunal does not consider that the reason for dismissal was the fact that the claimant made the protected disclosures. It further does not conclude that it was the principal reason for dismissal.

95. The claimant's claim of unfair dismissal fails and is dismissed.

Employment Judge **Rice-Birchall**

Date: 17 October 2023

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