Case Number: 3322817/2021

EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs Samara Pearce	**v**	Porthaven Care Homes No3 Limited

Heard at:	Reading	**On:** 19, 20 June & 23 August 2023
Before:	District Tribunal Judge Shields (sitting as an Employment Judge) Ms H Edwards Mr A Kapur	

Appearances
For the Claimant: In person
For the Respondent: Mr S Irving (Solicitor)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant was not subjected to detriment on the ground of having made a protected disclosure. Her complaint under section 47B of the Employment Rights Act 1996 fails and is dismissed.
2. The claimant was not dismissed by reason of having made a protected disclosure. Her complaint under section 103A of the Employment Rights Act 1996 fails and is dismissed.
3. The respondent did not fail to make reasonable adjustments for the claimant. The complaint under sections 20 and 21 of the Equality Act 2010 fails and is dismissed.
4. The respondent did not make unauthorised deductions from the claimant's wages. The complaint under section 13 of the Employment Rights Act 1996 fails and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a carer from 1 June 2020 until 19 October 2021.
2. Early conciliation started on 27 September 2021 and ended on 7 November 2021. The ACAS certificate was issued on 7 November 2021. The claim form was presented on 12 November 2021. The claimant brought complaints of whistleblowing detriment and automatic unfair dismissal, disability discrimination (a failure to make reasonable adjustments) and unauthorised deduction from wages.
3. The response was presented on 21 December 2021. The respondent defended the claim.

Claims and Issues

4. The claimant is making the following complaints:
    4.1.1. protected disclosure ('whistleblowing') detriment;
    4.1.2. automatic unfair dismissal because of whistleblowing;
    4.1.3. disability discrimination – failure to make reasonable adjustments;
    4.1.4. unauthorised deduction from wages - arrears of pay.
5. The claimant referred to constructive dismissal in her claim form. In discussions at the Case Management Hearing, she said that she tried to give notice of resignation which she considered to be a constructive dismissal, but the respondent would not accept her resignation. The claimant accepts that her role with the respondent came to an end on 19 October 2021 when the respondent dismissed her.
6. The automatic unfair dismissal complaint is based on the actual dismissal. The claimant's attempted resignation is part of the background to the issues in the whistleblowing detriment complaint.

7. On 9th January 2023, the respondent had admitted that the claimant had a disability and that was PTSD (not complex PTSD). Before the start of the hearing, the respondent was asked whether the respondent admitted that this was known throughout the employment and they confirmed that it was. This removed paragraph 4 of the original statement of issues as section 6 of the Equality Act 2010 was admitted. The Tribunal had to decide the following issues, as set out below:

8. **Protected disclosure (Employment Rights Act 1996 section 43B)**

8.1. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

8.1.1. What did the claimant say or write? When? To whom? The claimant says she made a disclosure on this occasion:

8.1.1.1. On 21 July 2021 the claimant sent an email to Lance Herbert, Rachel Joyce and Carla Kell about a resident being overdosed on medication.

8.1.2. Did she disclose information?

8.1.3. Did she believe the disclosure of information was made in the public interest?

8.1.4. Was that belief reasonable?

8.1.5. Did she believe it tended to show that:

8.1.5.1. the health or safety of any individual had been, was being or was likely to be endangered?

8.1.6. Was that belief reasonable?

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

9. **Detriment (Employment Rights Act 1996 section 48)**

9.1. Did the respondent do the following things, as alleged by the claimant?

9.1.1. Rachel Joyce cancelled 4 shifts which the claimant had been allocated on roster for the next 2 weeks after her whistleblowing disclosure;

9.1.2. Rachel Joyce and Nicky Eggleton did not allocate the claimant any shifts for the following 10 weeks after that;

9.1.3. Carla Kell told the claimant that her employee status had been removed and asked the claimant to sign a zero hours contract;

9.1.4. Carla Kell (and the management team) failed to offer the claimant the higher hourly rate normally offered to staff on zero hours contracts.

9.2. By doing so, did it subject the claimant to detriment?

9.3. If so, was it done on the ground that she made a protected disclosure?

10. **Automatic unfair dismissal because of whistleblowing disclosure (Employment Rights Act 1996 section 103A)**

10.1. The respondent dismissed the claimant on 19 October 2021.

10.2. 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.

11. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

11.1. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

11.2. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

11.2.1. its working hours arrangement.

11.3. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was sometimes unable to work full shifts because of her mental health?

11.4. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

11.5. What steps could have been taken to avoid the disadvantage? The claimant says a short work hours arrangement which allowed her flexibility in case she was affected by complex PTSD symptoms was in place from 4 May 2021 until 21 July 2021, and that it would have been reasonable to have allowed the short work hours arrangement to continue.

11.6. Was it reasonable for the respondent to continue the short work hours arrangement?

11.7. Did the respondent fail to take that step?

12. **Unauthorised deductions from wages**

12.1. Was the claimant entitled under the terms of her contract to be paid for a minimum of 12 hours a week irrespective of the hours she worked?

12.2. If so, did the respondent make unauthorised deductions from the claimant's wages by failing to pay the claimant at all for the period 5 August 2021 to 19 October 2021?

12.3. If so, how much was deducted?

13. **Remedy for Protected Disclosure Detriment**

13.1. What financial losses has the detrimental treatment caused the claimant?

13.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?

13.3. What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

13.4. Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

13.5. Is it just and equitable to award the claimant other compensation?

13.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

13.7. Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

13.8. Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

14. **Remedy for automatic unfair dismissal**

14.1. Does the claimant wish to be reinstated to their previous employment?

14.2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

14.3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

14.4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

14.5. What should the terms of the re-engagement order be?

14.6. If there is a compensatory award, how much should it be? The Tribunal will decide:

14.6.1. What financial losses has the dismissal caused the claimant?

14.6.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?

14.6.3. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?

14.6.4. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

14.6.5. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

14.6.6. Does the statutory cap apply?

14.7. What basic award is payable to the claimant, if any?

14.8. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

15. **Remedy for discrimination**

15.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

15.2. What financial losses has the discrimination caused the claimant?

15.3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?

15.4. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

15.5. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

15.6. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

15.7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

15.8. Should interest be awarded? How much?

Hearing procedure, documents and evidence

16. The final hearing took place, in person, at Reading Employment Tribunal.
17. The Claimant produced a witness statement consisting of 139 paragraphs.
18. The respondent had three witnesses: Ms Joyce, Ms Eggleton and Ms Kell. Their statements consisted of 42 paragraphs, 25 paragraphs and 63 paragraphs respectively.
19. The witness statements were "taken as read" meaning that these were read by the Tribunal before the hearing started and were the basis of the evidence for each witness.
20. At the outset of the hearing, the Tribunal considered reasonable adjustment to the hearing in order to accommodate the claimant's health conditions. These had also been discussed between the parties prior to the hearing. The Tribunal panel discussed the Equal Treatment Bench Book and the Employment Tribunals Presidential Guidance - Vulnerable Parties and witnesses in Employment Tribunal Proceedings (2020) before the hearing.
21. The parties were both aware of the issues and wished to make reasonable adjustments to the hearing. It was agreed, following discussion and input from both Parties, that the Tribunal would take regular breaks, have a slower pace and allow clear, uninterrupted time for the claimant to respond and review documents upon which she was being asked or was asking questions upon. Reminders of the reasonable adjustments in place were provided to Mr Irving, the claimant and the witnesses during the hearing on both days to ensure that the reasonable adjustments were adhered to.
22. It was noted by the Tribunal that the respondent's witness, Ms Kell, also required reasonable adjustments during the hearing and when providing her evidence. This was noted and agreed by the Tribunal and both Parties.
23. The timetable on page 55 of the bundle was reviewed at the start of the hearing. The Tribunal informed the Parties that day three had not been listed before the panel and

that a third day would need to be booked for them. The hearing went ahead today because otherwise it would have been postponed. It was in both Parties interests that whilst taking into account fully the reasonable adjustments required by the claimant and a witness, we would need to try and adhere to the timetable as much as possible. The Tribunal would inform them of the timetable as they progressed through the evidence to try and keep them on track.

24. At the start of the hearing, the claimant produced 11 pages of documents that she had asked to be in the bundle but they had not been included. The parties agreed to reduce the number of new documents to go into the bundle between themselves. There were three new documents not previously included in the bundle that were inserted into the bundle before the hearing. These were supplied by the Respondent to the Tribunal, via email.
25. The claimant was cross examined by Mr Irving on day one and for thirty minutes on day two.
26. The respondent's witnesses were cross examined by the claimant on day two.
27. Mr Irving provided his closing statement on day two.
28. After a break, the claimant provided her closing statement on day two. Reasonable adjustments were considered at this point as to whether to ask the claimant to submit her closing statement in writing. We invited the Parties to make representations on that adjustment. It was noted that the claimant herself rejected the opportunity to provide a written closing statements. Considering and balancing all the factors involved: the possible delay to the Tribunal outcome, the fact the claimant did not want to provide written representations, the closing statement had been described at the end of day one to the claimant, the Respondent had already delivered their closing statement, and the need to place the Parties on an equal footing, the Tribunal did not ask the claimant to put a detailed closing statement in writing to us.
29. There was insufficient time within the two days allocated for the hearing for the Tribunal to make our decision and deliver judgment, and so we reserved judgment. The judge apologises to the parties for the delay in the promulgation of this reserved

judgment, this reflects the general pressure of work in the employment tribunals and pre-booked annual leave.

30. The third day of the hearing for the Tribunal panel was listed for 23 August 2023 and therefore I have sought to promulgate the written reasons as soon as possible after 23 August 2023.

Findings of fact

31. We make the following findings of fact about what happened. We have not included here everything that we heard about during the hearing. Our findings focus on aspects of the evidence which we found most helpful in determining the issues set out above. Where there is a dispute about what happened, we consider the evidence we have heard and the documents we have read, and we decide what we think is most likely to have happened. Page reference numbers are to the relevant page in the tribunal bundle.

Contract of Employment and terms of employment changes

32. The claimant was interviewed for the role of carer at the respondent on 20th May 2020. A record of the interview is at page 94 of the bundle. Her application for the role is on page 98 and on page 105, the claimant states she has a disability under the Equality Act 2010. The nature of her disability is stated by the claimant to be dyslexia.
33. The respondent wrote to the claimant and offered her the appointment of care assistant. The offer letter is dated 21st of May 2020 and is on page 111. The claimant completed the Employee medical information form and stated that she would like to discuss with management that she has PSD. The form was signed on 28th May 2020 and is at page 112 of the bundle.
34. The respondent noted that they had completed a risk assessment on 8th June 2020 but that following the claimant's disclosure of dyslexia and post traumatic stress disorder a new risk assessment needed to be completed. On 2nd July 2020, a new risk assessment form was completed that included post traumatic stress disorder and

dyslexia. Concentrating on the post traumatic stress disorder, the control measures stated to be in place under the risk assessment were that the claimant would share any triggers for her post traumatic stress disorder and use annual leave when needed. The further action that was required is that she would seek relevant support from external professionals if required.

35. The risk assessment was reviewed and countersigned on 21st July 2021 by Carla Kell.
36. The job description of the claimant's role is set out on pages 123-125. Her statement of employment particulars starts on page 126 of the bundle. It states that her working hours are 36 hours per week with her normal hours of work from 8:00 AM to 8:00 PM and as required between Monday and Sunday as per the roster. Her salary was £9.50 per hour. For any shifts of 10 hours or more, her paid hours will include a 30 minute break and for any shifts of six hours or more she was entitled to a 20 minute paid break. The contract contains a clause relating to the relevant grievance procedure. The contract of employment was signed and dated by the claimant on 8th June 2020.
37. On 3rd September 2020, the claimant emails the respondent and states that her husband is head of Southwest Trains maintenance and his role takes priority over her role. Her husband had been placed on nights in the coming week and therefore she could not complete her rostered shifts on the Monday, Tuesday and Wednesday nights. Further, on 10th September 2020 the claimant provides her further availability for night work. Then, on 15th September 2020 the claimant asks to favour night shifts and asking to perhaps discuss with the respondent becoming part time as she was finding the 12 hour day shifts hard to recover from. The emails are at pages 137-140 (also pages 230-233) and were accepted by the Tribunal that the claimant was altering her day shifts to night shifts and that this was at her request. The reasons were because her husband shifts took priority over hers and because she was finding the long 12 hour day shifts difficult to recover from.
38. On 22 September 2020, Carla Kell called the claimant to discuss her shift pattern. The details of the call are contained in the follow up email at page 146. Carla Kell stated that as the claimant needed to work around her husband's shifts, Carla advised that she would be better to move to a bank contract that would provide the flexibility around

her child care. The suggestion was that once the claimant 's husband knew in advance what his shift pattern was, the claimant could then e-mail Nicky Eggleton with the shifts that the claimant could cover. The e-mail further stated that Nicky Eggleton was unable to change the contracted staff shift patterns on a regular basis. (page 146).

39. The claimant's response was that she would prefer to be part time as the uncertainty of being a bank worker worried her. (Page 146)
40. The claimant was then absent from work for a period of time.
41. A meeting between the claimant and Carla Kell with Nicky Eggleton took place on 15th October 2020 (the notes are on page 148-149). The Tribunal found that the contemporaneous notes were accurate and that the respondent was seeking to discuss with the claimant a firm basis to the shift pattern worked by her.
42. The reason provided by the claimant for the variation to her shifts was due to "health and her husband's work". Her husband's job pressures were shared with the respondent. The claimant had already explained to the respondent that she was finding the 12 hour shift pattern difficult to recover from but the respondent's understanding was that the claimant had issues with regard to her daughter and that it was her daughter's health that was of primary concern to the claimant and why she needed to be at home when her husband was working.
43. The respondent's representative at the meeting, Carla Kell, is trained and experienced in mental health issues and the Tribunal accepted that the claimant's mental health was not raised at this meeting as the issue on why the 12 hour shift pattern could not be completed by the claimant. Carla Kell's understanding, which was accepted by the Tribunal, was that if the claimant had raised her mental health as an issue then Carla Kell would have dealt with it.
44. The tribunal accepted that the reason the claimant could not maintain a commitment to the original contractual hours was that her shift pattern had to be compatible with her husband's work commitments and shifts; they took priority over hers. The claimant did not want to leave her daughter at home alone due to serious personal matters relating to her daughter. These matters were explained by the claimant during her

cross examination but are confidential and do not require repeating within these written reasons.

45. In turn, the respondent set out their expectations for shift coverage. They discussed a bank contract and a permanent contract. The respondent was clear that it required full shifts to be worked and that once the shifts were agreed, they were unable to keep swapping them. The agreement reached on 15 October 2020 was that the claimant would remain under a contract with the respondent and that she would e-mail Nicky Eggleton with the shifts that she could offer and that this would be in a clear and transparent manner. The shifts to be offered were to be 12 hour shifts.
46. The respondent produced a new contract of employment and this is evidenced on page 150 to 152 of the bundle. The contract incorrectly refers to a new probationary period and the employment commencing on 17th October 2020. This was a template contract of employment that was produced without making the appropriate adjustments on these points. The Tribunal found that neither party considered that the claimant was starting her probationary period or continuity of employment again.
47. The contract at page 150 is accurate with regard to the standard working week of the claimant being 12 hours (one shift). She had asked for 12 hours and she received 12 hours. She knew that she would be working for 12 hours per a week and that she was meant to be contracted for 12 working hours per week.
48. The claimant stated that she never received this contract of employment. The respondent states that they definitely sent the contract. On balance, the tribunal decided that the claimant did receive the contract of employment. There was no reason for the respondent not to send the claimant the contract after the meeting on 15 October 2020. There had been a promise to send the contract and the tribunal found that if it had not been received by the claimant, she would have raised this with them.
49. The claimant passed her probationary period that commenced at the start of her original employment contract and this was confirmed by the respondent on 30 November 2020 (page 144, 154-156). In this probationary review record, she was described as a night carer.

50. On page 153, a staff supervision record, the claimant is stated as saying that "all concerns have been solved". The tribunal also found on that basis, as at 8 November 2020, if the promised contract of 12 hours had not been sent to the claimant on or before that date, she would have mentioned that a contract had not been received following the respondent's promise to send it.
51. Therefore as at 30 November 2020, the claimant is contracted to work for 12 hours on one night shift as an employee.
52. On 11 January 2021, the respondent notified Public Health England that it had a covid infection in the residential home.

First whistleblowing complaint

53. The Respondent received contact from an Inspection Manager from the Care Quality Commission (CQC) on 19 January 2021 (page 176). The case was closed on 27 January 2021. One of the outcomes of the whistleblowing complaint was the appointment of a night manager. The respondent was not penalised by the CQC. The evidence accepted by the tribunal was that the respondent took the matters seriously and followed the required processes.
54. Following the closure of the whistleblowing complaint by the CQC, the respondent met with the night staff. The claimant did not raise any concerns herself. Other night employees submitted concerns about the registered general nurse (page 180). The team's feedback and concerns contributed to the investigation. This was apparent from the documentation included within the bundle from pages 169-180. The respondent reminded all staff of the whistle blowing policy and who to contact in the event of a concern. They were provided with a copy of a letter dated 19 May 2020 and the whistleblowing policy as part of the follow up to the whistle blowing complaint. (page 172-175)
55. The tribunal concluded that the respondent took the complaint seriously and did not try to cover up or conceal the public interest disclosure made by an anonymous person to the CQC. The documents indicated a fair procedure was followed to

conclude the issues. The tribunal accepted that by recirculating the letter and whistle blowing policy to all employees this indicated the respondent's approach to whistle blowing was to encourage and inform staff to follow the respondent's procedures if they had any concerns.

56. The claimant stated that the whistle blowing disclosure indicated that the respondent's care home was understaffed. The tribunal concluded that the claimant was not in a position to determine staffing issues at the respondent's care home. It did not follow that if there was a need for additional staff she would automatically step in to fulfil those needs. Such decision are for the respondent to make as to its own resourcing.
57. Between April to 4 May 2021, the tribunal bundle included references to a pay issue that arose from the changes to the shifts requested by the claimant. The sum of £124.75 was paid to the claimant (page 194). Further there was an issue over a COVID consent form. The claimant signed the consent form having met with the new Night Manager that had been appointed. The tribunal considered these issues were unconnected with the claimant's complaint to the tribunal.
58. The CQC carried out an unplanned inspection on 9 April 2021. These documents are contained on pages 185 to 186. This was unconnected with the claimant's complaint to the tribunal.

<u>The claimant's resignation on 4 May 2021</u>

59. On 4 May 2021, the claimant resigned from her employment. A copy of the resignation e-mail is at page 193 of the bundle. The claimant had found another job which was closer to her home and had shorter working hours. She was to work on a Saturday and Sunday night in her new role. The reason provided for the resignation was that her daughter was suffering with her mental health and this was causing a strain on all aspects of the claimant 's life including work. The claimant considered she had to be at home whenever her husband was not. The claimant did not want to have a second job due to the impact on taxation. There was no direct mention of the claimant's mental health.

60. The claimant offered to work on a bank contract for the occasional weekday when her husband was not working. She further offered to volunteer for a few hours once a week during the day. The claimant stated that if she could not work on a bank basis or volunteer then she would have to give her notice to the respondent.
61. On the same day, Nicky Eggleton responded to the claimant and stated that it was a shame to hear of the claimant's issues and asked if she would consider doing shorter hours at the respondent. The claimant responded on the same date and said she would be happy to do shorter hours and she would offer some dates and provide more details and then come in for a chat with Nicky Eggleton.
62. On 5 May 2021, Nicky Eggleton met with the claimant to discuss her resignation and the possibility of shifts. A contemporaneous note was made and this noted that the claimant was having personal issues with her daughter and had been unable to fulfil her shifts recently. The note stated that the option of being a bank worker rather than contracted hours was agreed with the claimant as the best alternative due to her personal issues. The respondent's administrator was asked to draw up a new contract for the claimant to be on the bank staff.
63. The tribunal accepted that having a bank worker was helpful to the business because they did not lose a trained individual and they had an individual they could call on in terms of flexibility in fulfilling shifts.
64. The tribunal concluded that in the resignation and the subsequent meeting there was no mention of the claimant's own mental health or dyslexia. Further, the tribunal found that the respondent essentially agreed with the request put forward by the claimant in her resignation e-mail of 4 May 2021. The evidence did not show that the claimant had been pushed onto a bank worker contract by the respondent. It showed that the issue was driven by the claimant herself because of her personal circumstances.
65. A purported bank worker letter was drawn up by the Administrator at the respondent's care home and was contained on page 200 of the bundle. The letter was left at reception in a named envelope for the claimant. The letter left the reception on the 3 June 2021 and a note of its collection was made and was included on page 203 of the bundle. The respondent states that a note was made on their system that it was

collected and page 203 supports that collection. There is no reason to consider that a third party took the letter. The tribunal concluded that the claimant did collect the letter on 3rd June 2021.

66. The contract amendment letter provided to the claimant on page 200 was a very confusing letter. It provided the claimant with a zero hours employment contract but it also stated that her role and contracted hours of work remained the same, that is that she was a carer and worked for 12 hours per a week which is one shift. Further, that her hourly rate of pay in all other terms and conditions of her contract remained the same.
67. Essentially, the tribunal found that the claimant remained an employee of the respondent.
68. The letter of 26 May 2021 was supposed to be a bank worker contract. That is what had been agreed at the meeting on 5 May 2021. It was not a bank worker contract. This was an administrative error.
69. This was not the respondent's intention however; they drafted the letter. It was not their intention, but the wording of the letter provided the claimant with her respective statutory rights as an employee but on a zero hours obligation.
70. The claimant did not return the letter, signed, to the respondent.
71. The reality of the situation with the contract between the parties was that the Respondent thought that the claimant was now on a bank worker agreement.
72. However, in practice the position remained the same as per the previous contractual arrangement of 17 October 20202. The claimant would offer the 12 hour shift and the respondent would confirm if it was added to the rota.
73. This issue of contractual hours exists long before any alleged protected disclosure and is a continuing issue between the parties. The tribunal found that the reason for the continuing issue was the reliability of the claimant with regard to her shifts due to her husband's shift patterns and her daughter's mental health. The respondent's evidence, accepted by the tribunal, is that throughout the employment of the claimant, whilst there were no issues with the care provided by the claimant, there were issues with her reliability with regard to being able to fulfil her shift pattern. They did not state

she was unreliable in that she did not fail to turn up for shifts, she always provided notice to change her shifts but she did change her shift availability frequently. The respondent's evidence, accepted by the tribunal, was that they required a reliable shift pattern from their carers in order to be able to efficiently run the business and rota.

74. Further, whilst the tribunal accepts that the claimant would have been personally impacted by her daughter's mental health, she did not raise her own mental health and her PTSD diagnosis as a reason for not being able to reliably complete her 12 hour allocated night shifts. Predominantly, the reason for her inability to complete the allocated night shifts were that her husband's shifts would change which impacted on her ability to complete the night shift for the respondent because she needed to be at home overnight, if her husband was not at home.

11 June 2021 to 30 June 2021

75. On 11 June 2021, the claimant approached Rachel Joyce and complained that the kitchenettes and fridges were dirty. Rachel Joyce assured her that they would be cleaned and she would deal with it with the night team. The claimant was asked to delete the picture that she had taken of the kitchenettes and fridge. The claimant also raised the fact that she had seen the next rota and her name was not on it.
76. Following this exchange and on the same date, Rachel Joyce emailed the claimant to confirm that the next month's rota had not yet been completed for bank staff because there was a recruitment drive for contracted hours employees and they must fulfil those contracted hours first (page 210). The respondent's position being that she was on bank hours. Rachel Joyce also asked to complete a risk assessment with the claimant with respect to the second job held by the claimant in order to assess any impact on her role at the respondent. The tribunal considered that a risk assessment performed by the respondent with regard to the claimant and her second job was a valid request.

77. The claimant did not carry out any shifts for the respondent between 11 June 2021 until 16th July 2021, before the email of 21 July 2021 (the alleged whistleblowing disclosure email).
78. The claimant responds to the respondent's e-mail of 11 June 2021, on 18 June 2021. She states in the e-mail that she did not want a bank contract but that this was the best way to classify it for Nicky Eggleton because the claimant cannot work set hours but wanted to work two nights a week. She acknowledged that she was working 12 hours a week for the respondent. She thought she was working under a bank contract even though she did not want that arrangement. She said she had agreed to work 2 nights a week at the meeting on 5th May 2021 as evidenced by the rota between May and June. However, the tribunal found that the previous arrangement had been that the claimant would offer a 12 hour shift and the respondent would confirm if it was added to the rota.
79. Rachel Joyce responds explaining the respondent's commitment to risk assessments and inviting the claimant to a meeting to discuss the feelings raised by her. There is then a delay whilst the claimant's daughter is unwell and the meeting takes place on 30 June 2021. Again, this issue of contractual hours exists before any alleged protected disclosure.
80. A contemporaneous note of the meeting on 30 June 2021 is on page 228 of the bundle.
81. The tribunal accepted the contents of the minuted note and found that the agreement at the meeting was that moving forward the claimant would complete any night shifts from 8:00 PM to 8:00 AM, a full 12 hour shift. The claimant would advise of her shift availability and a response in writing would be provided regarding her bookings.
82. The respondent's position is that this was essentially a bank agreement. Although referred to as such in the note, this was the same position as has been agreed in October 2020 and May 2021.
83. The claimant's position was that this was a 12 hour fixed shift contract per week.
84. The facts are that it is not a bank worker agreement but it is a zero hours employment contract. The Tribunal finds that the claimant would complete any night shifts from

8:00 PM to 8:00 AM, a full 12 hour shift. The claimant would advise of her shift availability and a response in writing would be provided regarding her bookings. This was the final contractual position before the alleged whistleblowing disclosure and pre-dates any disclosure.

85. The Tribunal preferred the evidence of the respondent. Based on the history of the contractual discussions held previously between the claimant and the respondent, and based on the email evidence in the bundle, there was no offer from the respondent of a fixed 12 hour contract per week. There was evidence of the very muddled contractual arrangement of the claimant being on a zero hours contract whilst remaining with employee status.
86. Also on 30th June 2021, the claimant was asked if she had any other concerns and she advised that she did not and that she was happy with the outcome. It was agreed that a risk assessment would be carried out between the parties. An e-mail following up on the risk assessment and the COVID arrangements was also evidenced in the bundle at page 229.
87. The tribunal found that the reason that the agreement of a 12 hour shift was required was that the claimant had not been completing 12 hour shifts due to changes in her personal circumstances and that this had caused some frustration from other staff members, in particular, because the busiest time with residents was generally from 4:00 AM onwards, when residents needed to be breakfasted and dressed. These short shifts had been offered by the claimant because of her husband's shift patterns and due to her needing to be at home with her daughter due to her daughter's mental health. The respondent accepted the shorter shifts due to the needs of the business and the resident's needs at that given time.
88. The claimant did not challenge the accuracy of the respondent's note of the meeting of 30 June 2021 in her cross-examination of the respondent's witnesses.

<u>Safeguarding concern</u>

89. On 18 June 2021, the respondent self-reported a safeguarding concern where a resident had been provided with the wrong medication by the nurse on duty. This was self reported by the nurse and the respondent. This was at pages 214-218 of the bundle. The respondent did not hold back in self-reporting the matter. This was unconnected with the Claimant's case before the tribunal.

1 July 2021 to 16 July 2021

90. On 8th July 2021, the respondent, via Carla Kell, emailed the claimant and stated that they were completing the rota for the next four weeks and wanted to make sure that she was allocated some work, from 8:00 PM to 8:00 AM. She was waiting to hear back from the claimant (page 282). This was in line with the previous contractual agreement as agreed on 30 June 2021.
91. On 11th July 2021, the claimant stated that she could only do four or six days a month of 12 hour shifts. She also supplied days when she could do shorter shifts in case of an emergency. She supplied three months from August to October accurately but stated that the November onward states may be unpredictable. On 12th July 2021, she was asked to confirm the times of shorter shifts that she was offering and what hours that might be. On 13th July 2021, she was asked if she was free to work on shorter shifts for 14th and 16th July 2021. This was evidence from the respondent that shorter shifts were simply booked in as and when required due to resident's needs. The respondents then emailed on 14 July 2021 placing the claimant on two shorter shifts for 16th July 2021 and 20th July 2021.
92. On July 15 2021, the claimant was confirmed for 12 hour shifts for 29th July, 30th July, 5th August and 6th August 2021. The claimant replied (page 279) stating that she could complete these 12 hour shifts and that she could complete the shorter shifts of July 16th and 20th July 2021. (Pages 278-282) Neither party are disagreeing with the other. 12-hour shifts were confirmed and placed in the diary. The claimant confirms she can do these 12 hour shifts and re-offers the shorter shifts, if required. There is an email on page 238 which formed part of a Subject Access Disclosure request from the

Claimant to the respondent. This refers to shorter shifts for the claimant being placed on to the rota for 16 July and 20 July. However, there is no email from the respondent to the claimant confirming the shorter shifts have been notified to the claimant. The claimant did work shorter shifts on 16 and 20 July 2021.

<u>The alleged whistleblowing disclosure: 21 July to 10 August 2021</u>

93. On 21 July 2021, the claimant emailed Carla Kell, Nicky Eggleton and Rachel Joyce stating that her husband's rota had changed and that she could not work "all next week effecting my shifts". She asked, "Would you like these shifts cancelled?"
94. The claimant went on to raise an issue that a person she was working on her previous shift had been given incorrect information in relation to contact with someone with COVID.
95. She further went on to refer to a resident, D, complaining about his medication. She stated that she considered he had been overdosed and that it had been covered up as she could not see an accident report on the matter. She alleged emotional abuse not just medication abuse of the resident. She detailed that there was a "massive discrepancy between his day and night medication and this is not the first time there have been issues with him being given the wrong medication". She alleged that the overdose had been covered up. She stated this was a breach (but did not specify exactly what it was a breach of).
96. Rachel Joyce contacted the claimant on 22nd July 2021 (page 276-7). This was at 11am the following day. She thanked her for making the respondent aware of the changes in her circumstances with regard to the shifts. Rachel Joyce confirmed that they would cancel her shifts but towards the dates getting closer if they required assistance from her with a split shift then they would get back in touch with her for her availability. This is evidence that shorter shifts were added in where resident's needs required them and the respondent needed the extra help, rather than shorter shifts being rostered in advance as the 12 hour shifts were.

97. The respondent cancelled all four shifts for 29th July, 30th July, 5th August and 6th August 2021 (page 275). This was accepted by the tribunal as a genuine mistake by Rachel Joyce with no causal connection with the disclosure made by the claimant. It was possible to interpret the email from the claimant in this way as she did not specify which shifts were "next week".
98. The tribunal accepted the evidence of the respondent that this was a genuine misunderstanding. Neither the claimant nor the respondent specified the exact dates of the shifts to be cancelled. The tribunal found that the cancellation was confirmed by Rachel Joyce on 22nd July 2021 and that all four shifts were incorrectly cancelled on that date.
99. The claimant meant only to cancel the shifts of 29th July and 30th July 2021. (The claimant stated in her email of 25 July 2021 that the next two shifts were cancelled but did not expressly state or emphasise that she thought an error had been made in cancelling all four shifts.)
100. Rachel Joyce reassured the claimant with regard to any covid isolation matters raised. She went on to state that the resident was receiving mental health input as part of his recognised support. It was emphasised that all relevant notifications always made by the respondent and that they remain open and transparent but in this case there were no notifiable occurrences. The next steps suggested was for the claimant to discuss any findings or concerns whilst she was on a shift with a senior member of the team either Rachel Joyce, Nicky Eggleton or Carla Kell. It was emphasised that because the claimant is often off site for lengths of time it was essential that she asked appropriate questions and would not become frustrating by emailing back and forth. She was invited to come in for a meeting. Page 277.
101. Carla Kell asked Rachel Joyce to carry out an investigation into the issues raised by the claimant. A note of a conversation with the resident on the morning of 22nd July 2021 is contained within the bundle. The tribunal did not consider that the claimant's emphasis of her complaint being given as incorrect dosage of medication and the reference to wrong medication was a crucial factor in determining the claimant's claims. Medication given at the incorrect time or dosage is still the wrong

medication. Rachel Joyce concluded that there was no evidence of an overdose of the resident's medication. There had been a medication error with a disposal and this was identified and dealt with on 23rd June 2021 (page 305). The investigation report of Rachel Joyce is at page 284 of the bundle. There is a further written report summarising the issues on page 285 which is a contemporaneous record of Rachel Joyce's investigation outcome.

102. On page 274 of the bundle, the claimant wrote to Carla Kell, Nicky Eggleton and Rachel Joyce with further details in relation to the resident, D and her allegations. This was an email dated 25 July 2021.

103. On receipt of the second e-mail dated 25th July 2021, Nicky Eggleton completed a second investigation which included the additional details raised by the claimant on 25th July 2021. The tribunal found that she did complete a review of the investigation of Rachel Joyce but also went beyond that. As a nurse, she was trained in medication and dosing. She looked at the medication how it was ordered and the inventory (pages 293-305. She did not discover any overdose administered to resident D. The outcome is signed on page 284 by Nicky Eggleton and countersigned by Carla Kell. The discrepancy of 23 June 2021 was included within that investigation and the conclusion reached as stated on page 284. The resident had not been incorrectly or overdosed with his medication that required a CQC or safeguarding referral. No further action was needed.

104. The Tribunal accepted that the respondent had previously contacted the CQC regarding medication issues and that on receipt of such issues, they followed an open investigation process.

105. There had been two internal investigation processes carried out by the respondent which the Tribunal accepted as having been completed and reported back to the claimant.

106. On concluding her investigation, Rachel Joyce wrote to the claimant and the e-mail is at page 273 of the bundle. Rachel Joyce addressed the issue of the COVID topic with reference to a staff member. She briefly summarised her investigation response to the claimant's allegation. She confirmed that the overdose had not occurred. It was

emphasised that there were data issues surrounding any evidence collected by the claimant. She further emphasised that the respondent remained open and transparent to all issues that were raised. This email to the claimant followed both Rachel Joyce's and Nicky Eggleton's investigations and conclusions.

107. The Tribunal accepted the evidence of Carla Kell that the claimant was not on a shift when the alleged medication overdose was supposed to have taken place and that she was relying on a comment made by a resident. This was checked by Carla Kell on 5 August 2021 and reviewed again by her on 6 September 2021. The notes of that are on page 285.

108. The claimant accepted in her own oral evidence that she did not have access to the medication system, was not formerly trained in providing medication nor had any involvement with any resident's medication. She was relying on the conversation she had with the resident, D.

109. The claimant did not email again with regard to the outcome of the investigation or about her emails of 21 July 2021 and 25 July 2021.

110. The shifts of 29th and 30th July 2021 were cancelled in accordance with the claimant's wishes.

111. On 5 August 2021, the claimant did not attend her shift. She did not attend the shift on 6th August 2021. She knew that they had been cancelled. She had been notified by the respondent.

112. In an email from the claimant, she asked if the respondent had attempted to call her. She also referred to her removal from the rota and said she felt it was personal. Rachel Joyce responded by email in just over three hours later and had reviewed the thread of emails. She said there had been a misunderstanding and that her interpretation was that her shifts had changed across all availability. She had asked Carla Kell for a second opinion as to whether it could be perceived in that way too. Carla Kell had agreed with her that it was possible to read it the way she had. She apologised for the error. She asked for the claimant's availability.

113. On 9th August 2021, the claimant emailed the head office of the respondent. This e-mail is on page 640 of the bundle. She does not refer to the e-mail from Rachel

Joyce of 5th August 2021. She alleges detrimental treatment due to whistleblowing. She states that two shifts had been removed from the rota without her knowledge. She does not refer to the fact that she had received an apology for the error and an explanation. She states that she has not been offered any work but she does not refer to the fact that she had been asked for her availability and her response was pending. She states that she worked a minimum of one day a week for nearly fifteen months. She does not refer to the fact that there were previous periods where she had not provided such work to the respondent, for example, June 2021.

114. On 10th August 2021, the claimant stated that she did not fully understand how her words could be misunderstood or incorrectly interpreted. She set out the elements that she was relying upon. She stated that her availability had not changed and that the future fourth, fifth and six months that she had offered were still predicted dates in terms of her availability. However, once again, the claimant adds in a proviso that her husband is returning to work on the Monday and will double check then.

115. Rachel Joyce responded to this e-mail and apologised for the error again.

Covid outbreak from 8th August 2021 to 6th September 2021

116. On 8th August 2021, residents at the respondent's home tested positive for covid symptoms. On 10th August 2021, the respondent notified the CQC that covid was present at the home.

117. On 11 August 2021, Carla Kell asked again for the claimant's availability for September. She stated that it would be great to get the claimant back onto regular shifts on the rota with regular supervisions so that she did not need to send any further emails of concern.

118. The claimant responded on 12th August 2021 informing Carla Kelly that she could do any night shift between 23rd to 27th of August 2021 and 30th August to 1 September 2021. Carla Kell responded on 13th August 2021 confirming that she had shared the dates with her colleagues and they will look at the rota and be in touch.

119. The tribunal accepted the respondent's evidence that, from 8th August 2021 until 6th September 2021, the home was focused on business continuity, keeping residents and staff safe. We accepted that the respondent needed a stable commitment and workforce during this period of time. The staff team upstairs was set up for staff to come in each day. The claimant had a second job (as far as the respondent was aware) and therefore was at a higher risk than other members of staff. The staffing requirements were to keep the staffing as stable as possible and members of staff who were not usually caring for residents were also scheduled to take care of residents as a carer. Some staff were staying at the home, eating and sleeping on site in order to keep residents safe. Staff were assigned strictly to areas of work to stop any cross infection.

120. It was acknowledged that the claimant did not telephone the home during this time to ask for further shifts. Contact between the claimant and respondent was by e-mail only.

121. The claimant did highlight to the tribunal that she did not receive the text message from the respondent with regard to the residential care home having covid. The claimant states that she received the text message via a colleague but would not confirm who sent her the message. The respondent's position was that the claimant was not taken off any communication channels and that the claimant sometimes had difficulties with her mobile phone. The tribunal decided it preferred the evidence of the respondent. There are at least two occasions when the Claimant herself refers to having mobile phone issues and many emails referencing mobile issues between the parties. The claimant received text messages before and after 8 August 2021 from the respondent and therefore the tribunal accepted the explanation put forward by the respondent. She was on the Coolcare system. This was later confirmed and is contained in the bundle at page 340. No changes had been made to the Coolcare system.

122. The claimant was informed by her colleague on 8th August 2021 that COVID was in the home. The claimant does not refer to COVID at anytime in her emails from 8 August 2021.

123. On 20th August 2021 the claimant emails Carla Kell, Nicky Eggleton and Rachel Joyce. She enquired when she would be getting shifts. She refers to working a minimum of four shifts a month every month and states that her shifts have been removed since her whistle blowing email. The tribunal found that the claimant had not worked 1 shifts a week for each month, since June 2021. There was a period when she had not worked as she was looking after her daughter.

124. On 20th August 2021, the claimant stated that she had completed four online training classes in July 2021 but had managed to lock herself out of her account and asked for her details. These were provided to her on 23rd August 2021.

125. In the early hours of 21st August 2021, around 2AM, the claimant took the unusual step of entering the residential care home. She entered unannounced by the back door in order to take a photograph of the rota on the board. There were notices on all the doors related to the fact that the care home had covid. The claimant knew the care home had cases of covid because even if she had not received the text message, via the Coolcare system, her colleague had informed her. She entered the home in any event. She had not registered any lateral flow test before attending.

126. The tribunal concluded that the claimant attended at the care home in order to prove that she should have been asked to be on the rota, that the care home was under staffed and that she was required. It was acknowledged by the claimant and the respondent's witnesses that the claimant scared the Team Leader on duty.

127. The tribunal preferred the respondent's evidence that, according to their position, the claimant was on a zero hours contract and that shifts were to be offered to her based on her availability. They incorrectly refer to it as a bank contract but we have already made findings of fact above on that point.

128. The member of staff on duty did say to the claimant that she had not seen the claimant for a while and did not realise that she still worked there.

129. The claimant emailed the respondent on 21 August 2021, page 336. The tribunal considered that this email was trying to assert that the claimant innocently went into the home not knowing that they had a covid infection. The tribunal considered this was disingenuous given that her colleague had informed her of the infection and given

the fact that there were Covid notices on every entrance door. The tribunal considered that the claimant suspected that the respondent did not want her and she was trying to catch them out.

130. On 24 August 2021, the claimant exercised her right to request a data subject access on information held by the respondent. The tribunal has no jurisdiction over the request.

131. On 24 August 2021, Carla Kell asked the claimant to attend a meeting and arranged this for the week commencing 6 September 2021, she stated the respondent's position that the claimant had not been fired, she was a "bank" carer for nights, the home was closed due to covid and the claimant has no active shifts at the present time.

132. The isolation period at the care home was to continue until 27th August 2021 at the earliest.

133. The claimant responds to Carla Kell stating that it was a long time to wait for the meeting. She refers to being given shifts the week of 24 August 2021 but there is no evidence that supports that contention.

134. The last email referencing shifts from Carla Kell was an email of 13th August 2021 confirming that she had shared the dates with her colleagues and they will look at the rota and be in touch.

135. The claimant refers to a guarantee of 48 hours a month, that she has no written contract, that she is not paid bank staff wages and that she was not allowed a second job. The tribunal refers to the above findings in this regard as to what was correct at this time.

136. Page 402 of the bundle details why the claimant was suspended from her elearning account. The account was suspended because the elearning had not been completed with the deadlines set. The account was suspended so that it would not affect the compliance statistics of the Residential Care home. The claimant was offered assistance to complete the elearning. Her account was active as at 3 September 2021. She was not removed from the system.

6th September to 8th October 2021

137. On 6th September 2021, Carla Kell met with the claimant. The contemporaneous notes of the meeting are on page 404-405 of the bundle. The notes show that Carla Kell explained the difference between a bank contract and a contract of employment. The claimant set out that she asked for a 12 hour fixed contract. Carla explained that she could not offer a 12 hour fixed contract without Head Office approval which she would seek. Carla Kell explained that the claimant could not commit to a set day per week due to her husband's shifts and the personal circumstances within her family. The respondent might not require the claimant on the only day she could work and therefore this was the reason on why a bank contract was the best way forward. The notes refer to the claimant providing an update on her personal situation they do not refer to her dyslexia or PTSD.

138. Further, the notes confirmed that although the claimant had resigned from the hotel role at the end of August 2021, the respondent had carried out a risk assessment and there was not a concern with the claimant working two jobs. There was a discussion on the tone of emails between the claimant and Rachel Joyce. The Claimant was asked to check her Coolcare access because the respondent was aware that the claimant 's phone had been playing up recently. They discussed the fire risks of the claimant letting herself into the home without using her fob and it was clarified that any gossip within the home does not mean that such gossip was either from the management team or true. Finally, Carla Kell stated to the claimant that the respondent had investigated her e-mail of 21st of July 2021 twice. Although the claimant did not agree with the outcome the claimant was reassured by Carla Kell that the allegations were taken seriously. The meeting took one hour and 15 minutes. The notes are counter signed by Carla Kell and Claire Newbold who was the minute taker.

139. On 7th September 2021, the claimant emailed Carla Kell. She offers to provide short shifts during busy times that overlap with the day and night staff meaning that she could still make a 12 hour commitment a week. She further asked why she had not been offered work for seven weeks.

140. Carla Kell responded on the same date and stated that she had been in contact with the Head Office regarding a 12 hour contract and once she knows the response they would move forward with the rota. Carla Kell stated that the claimant could send through 12 hour shifts details but referred to the discussion the day before that full 12 hour shifts were required not short shifts. On the same date, the claimant said that she would send her availability for 12 hour shifts as soon as possible and again asked why she had not been offered work for seven weeks.

141. A short while later, Carla Kell responded to state that she had heard back from the Head Office and they have advised that the claimant transfer to a bank contract in order to provide the flexibility around her husband's shift pattern. Carla Kell was not able to offer a fixed 12 hour per week contract when the claimant was not able to offer a set number of shifts each week. A copy of the bank contract was supplied. The claimant was asked to let Carla know by the end of the day in order for the bank contract to be put in place. The accrued annual leave entitlement would then be paid to the claimant. The difference being that bank staff receive annual leave as a shift premium. The claimant was asked if she could log on to Coolcare yet and with regard to the seven weeks prior to the 7th of September, Carla refers to a breakdown of communication between the claimant and the respondent as the reason for the failure to provide any shifts in the last seven weeks. Carla sent a chasing e-mail later on the September 7th 2021 and left a message on the claimants answer phone in case she had not received the last e-mail.

142. The claimant explained on 8 September 2021 that she had had a migraine and had not been able to respond. She asked for more time to check whether or not she had greater availability rather than being placed on a bank contract. She further enquired why short shifts would not be viable. Carla responded on the 8th September 2021 stating that she would need to put a pause point in to the current employment because the annual leave entitlement was still being calculated but the claimant was not working any shifts. For the last seven weeks when the claimant had not been working her annual leave entitlement was still accruing. She further explained that short shifts

were not something they could offer staff on a contract because it was only as and when there was a resident need and is not guaranteed.

143. The oral evidence of the respondent's witnesses supported the basis of shift patterns being for 12 hours and that stability of shifts offered and accepted by an employee was key to the stable running of the business. There were occasional shorter shifts but these were added in as required by the resident's needs. They were not usually rostered shifts in advance.

144. The claimant responds to Carla Kell on 8th September 2021 enquiring that she has not been receiving an increase on holiday with regard to bank pay and she has not had an increase on the Coolcare system in terms of her annual leave. The respondent had already confirmed that her annual leave was accruing during this period of time. An offer of availability for shifts was made along with a claim for unpaid wages related to training. The claimant went on to ask for payment for the two shifts on the 5th and 6th of August that she stated were cancelled without notice. She further asked for payment of one shift a week for the further six weeks which she claimed she had not been allowed to work. She asked why she had not been provided with an offer of shifts between the 23rd of August and 1st of September.

145. Carla Kell attempts to contact the claimant by telephone to arrange a meeting. On 9th September 2021, Carla and the claimant are able to speak on the telephone. The evidence of Carla Kell is that the claimant agreed to a bank contract being the best contract for her current circumstances. Following the telephone call, two copies of the bank contract and other paperwork are provided to the claimant. In the covering e-mail, Carla Kell states that it is great that the respondent and the claimant had been able to move forward and it will be good to get her back on the rota. The respondent refers to updating Coolcare until then looking at annual leave which had not been taken but had accrued. Carla Kell also confirmed that the bank rate of pay stays the same but every time the claimant would have worked a shift she would accrue annual leave. That annual leave is then booked in the same format as she had previously booked. This confirms that the Bank rate of pay was the same as an employee rate of pay.

146. On 9th September 2021, the claimant raises a grievance with Lance Herbert at Head Office and the grievance was passed to the Regional Director. She states it was ignored. It was not ignored. The claimant asked for it to be dealt with confidentially, She asked for payment of the cancelled shifts and a further 6 shift payments due to detrimental treatment. The request was denied. On the basis the claimant asked for confidentiality, the respondent responded by stating that the shifts had not been worked and therefore payment would not be made. Regarding the contractual issues and shift allocation, they stated that if she could not confirm her roster in advance then the only contract they could offer was a Bank contract which would afford her the flexibility she required. The claimant did not mention her disability to the Head Office.
147. On 16th September 2021, the claimant enquires when the contract was sent out as it still hadn't arrived. She further asked if she was being offered for any shifts that week and referred to the rota.
148. On 20th September 2021, the trainer emailed the claimant and set out the outstanding e-learning that the claimant needed to complete.
149. On 21st September 2021, Carla Kell responds to the claimant to state that she had been on leave but had spoken with the administrator and that the letter and contract was being posted on the 21st September 2021.
150. On 28th September 2021, Carla Kell chases the claimant for a response to an acceptance of the bank contract. No response to the e-mail is received. On September 30th 2021, Carla Kell chases the claimant asking whether the contract has been received and if it's been returned she will keep an eye out for it.
151. On 1st October 2021, the claimant states that she is financially worse off with the contract offered and is not happy to sign it. She enquired if she had stopped being an employee and she enquired about her pension.
152. Carla Kell responded by e-mail on the same date and this is at page 420 of the bundle. She referred to the meeting that took place on 6 September 2021, the claimant had confirmed at the meeting that she was unable to commit to a 12 hour shift pattern due to her husband's shift work pattern. The tribunal finds above that the claimant actually stated that her reason for being unable to commit to a 12 hour shift pattern

was due to her husband's shift pattern and personal circumstances. The respondent refers to the claimant remaining an employee of the respondent and pension contributions only being paid when being actively working. Carla Kell requests a response from the claimant after the weekend. The claimant asked why she was considered bank staff until October 2021 but still considered an employee and having her pension paid. Carla Kell states that they have been working with the claimant since May to resolve the issues but there were only two contracts on offer and that she requires a decision before Monday. The claimant responds by stating that she is resigning under constructive dismissal and adds that she was being sacked because she is taking less than a week to understand her position on the contract.

153. Carla Kell asks her to consider her decision and reminds the claimant that the current employment contract she was working under no longer suits her personal circumstances. The deadline for responding is extended to the 8th of October 2021. This e-mail is on page 418 of the bundle.

11th October 2021 to 1st November 2021

154. The claimant did not respond by 8th October 2021 to the respondent.

155. On page 431 of the bundle, Carla Kell writes to the claimant stating that she is absent with our authorisation or certification. She refers to unauthorised absence being considered gross misconduct and could result in the claimant's dismissal. The claimant responds on 11th of October 2021 inviting the respondent to rewrite their letter. On 12th October 2021, Carla Kell sets out the company's position. The options provided were that she continue to work a 12 hour shift pattern (but commits to working to it once she has offered the date) or she signs the bank contract of which she had been supplied with a copy or she resigns from her post.

156. On 19th October 2021, the respondent sends the claimant a letter which is at page 432 of the bundle. The letter terminates the employment of the claimant due to a failure to commit to either of the two contracts, the current contract for which the respondent

states the claimant said it no longer meets her personal circumstances)a 12 hour shift pattern) or the bank contract offered.

157. On 1st November 2021, the claimant responds to an e-mail from Carla Kell referring to her PTSD. The respondent states that this was the first time since the beginning of her employment that the claimant refers to her PTSD. This position was accepted by the tribunal. The case was a document heavy case with many emails between the parties but at no time between the start of employment and 1st November 2021, is there reference to the claimant's PTSD, or the mental health of the claimant.

158. The tribunal found that although the home had received a number of anonymous whistle blowing referrals to the CQC and there had been an unannounced visit by the CQC, the respondent had been investigated by the CQC and no action had been taken. The notifications index and investigation reports were included by the respondent within the bundle. The oral evidence provided by the respondent's witnesses in this regard was accepted.

Law

Protected disclosure

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

33.1 a 'qualifying disclosure' (a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' set out in section 43B has occurred, is occurring or is likely to occur).

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

160. The relevant failures include information that there has been a criminal offence committed, a failure to comply with a legal obligation, or that a person's health and safety has been endangered. It further includes information tending to show any matter has been or is likely to be deliberately concealed.

161. Section 43C says:

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

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person."

162. Section 43F allows for disclosures to prescribed persons. Police forces (or chief constables of police) are not prescribed persons under this section.

Protected disclosure detriment

163. 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."

164. The test for whether a detriment was done 'on the ground that' the worker has made a protected disclosure is set out 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) the employer's treatment of the worker.

Burden of proof in protected disclosure detriment

165. 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 where all of the other elements of a complaint of detriment are proved by the claimant, then the burden of proof will shift to the respondent to show that the detriment was not done on the ground that the claimant had made a protected disclosure.

Automatic unfair dismissal

166. Section 103A of the Employment Rights Act provides that the dismissal of an employee is unfair where the reason (or, if there is more than one reason, the principal reason) for the dismissal is that the employee made a protected disclosure. The question for the tribunal is therefore whether the sole or principal reason for dismissal is that the employee made a protected disclosure (*Fecitt and others v NHS Manchester*).

167. 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.

Failure to make reasonable adjustments

168. The Equality Act 2010 imposes a duty on employers to make reasonable adjustments for disabled employees. The duty comprises three requirements, in this case, the first requirement is relevant. This is set out in sub-section 20(3):

"(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

169. Under section 21, a failure to comply with the duty to make reasonable adjustments amounts to unlawful discrimination.

170. Paragraph 20 of schedule 8 of the Equality Act says that an employer, A, is not subject to a duty to make reasonable adjustments:

"if A does not know, and could not reasonably be expected to know –

…

(b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

171. The EHRC Code of Practice describes the duty to make reasonable adjustments as:

'a cornerstone of the Act which requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled'.

<u>Unauthorised deductions from wages</u>

172. Under section 13 of the Employment Rights Act 1996, the basic right is that an employer must not make any deduction from wages unless:

"(1) a. the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or

(1) b. the worker has previously signified in writing his agreement or consent to the making of the deduction

…

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the workers wages on that occasion."

Conclusions

173. We have applied these legal principles to the facts as we have found them, to reach our decisions on the issues for determination by us. We have approached the issues in the following order: protected disclosure detriment and dismissal, failure to make reasonable adjustments and unauthorised deductions from wages.

Protected disclosure

174. The Tribunal found that the claimant did write to the respondent on 21st July 2021. She sent an email to Lance Herbert, Rachel Joyce and Carla Kell with regard to a resident being overdosed on medication. She disclosed specific information in relation to the resident as found above in the findings of fact.

175. The disclosure was made in the public interest because if the respondent had failed to notify the CQC of such issues or deal with the matter appropriately by following its own procedures this might affect the health and safety of vulnerable adults.

176. The evidence is that the claimant held that belief reasonably based on a conversation with the resident.

177. The disclosure intended to show that the health or safety of an individual, in this case the resident, had been endangered and the claimant considered that it was being covered up. Additionally, it further would fall to be a disclosure for failing to comply with any legal obligation to which the respondent was subject to.

178. She made the disclosure to her employer.

179. The disclosure in writing met the requirements of sections 43B of the Employment Rights Act 1996.

180. Therefore, the disclosure was a protected disclosure.

Protected disclosure detriment

181. The four detriments alleged by the claimant are detailed within this section of the conclusions. The claimant did not claim that the respondent's failure to address a grievance dated 9th September 2021 was a detriment. The Tribunal focused their findings on the four detriments raised by the claimant.

181.1.1. Rachel Joyce cancelled 4 shifts which the claimant had been allocated on roster for the next 2 weeks after her whistleblowing disclosure;

181.1.2. Rachel Joyce and Nicky Eggleton did not allocate the claimant any shifts for the following 10 weeks after that;

181.1.3. Carla Kell told the claimant that her employee status had been removed and asked the claimant to sign a zero hours contract;

181.1.4. Carla Kell (and the management team) failed to offer the claimant the higher hourly rate normally offered to staff on zero hours contracts.

182. We have to consider, in relation to each of these acts:

182.1.1. whether the act took place as alleged;

182.1.2. if it did, whether the act was a detriment; and

182.1.3. if it was, whether it was done on the ground that the claimant had made a protected disclosure.

183. The test for whether any detriment was 'on the ground of' a protected disclosure is whether a protected disclosure materially influenced the respondent's treatment of the claimant.

184. Firstly, the claimant herself cancelled two out of the four shifts that were claimed as a detriment. Therefore, the claimant cannot claim that all four shifts were cancelled. The act that is potentially detrimental could only be that two shifts were cancelled.

185. Two shifts being cancelled would place the claimant at a detriment as she would not be earning a wage from those shifts.

186. Regarding the two shifts of 5th and 6th August 2023, the Tribunal concluded that based on the findings of facts above, Rachel Joyce misunderstood the email from the claimant on 21st July 2021. She cancelled all four shifts incorrectly when only the first two were to be cancelled. The tribunal found that the two shifts being cancelled were not materially influenced by the Claimant's protected disclosure. We have not found that this occurred as alleged by the claimant. Rachel Joyce was not cancelling the shift because in the same email the claimant raises a protected disclosure. Rachel Joyce made a genuine error based on the wording of the claimant's email and Rachel Joyce's mis-reading of the words "all next week effecting my shifts." The allegation fails on its facts.

187. The respondent was able to discharge the burden of proof and show that any detriment was not done on the ground that the claimant had made a protected disclosure with regard to this allegation.

188. Rachel Joyce and Nicky Eggleton did not allocate the claimant any shifts for the following 10 weeks after the disclosure is the alleged detriment. It is correct that there were no shifts allocated to the claimant from 7th August 2021 onwards.

189. The Tribunal found that the shifts between 21 July 2021 and 5th August 2021 had been arranged but that the claimant cancelled two shifts due to her husband's work shift pattern and her personal circumstances and the respondent made a mistake with the remaining two shifts booked up to 6th August 2021.

190. The Tribunal found that between 7th August and 6th September 2021, the reason the claimant was not provided with a shift was due to the fact that the home had residents with covid. They used staff who had no second jobs and strictly kept staff working on only the floor allocated and with minimal or no contact with outside of the home in order to restrict the virus as much as possible. The chose to use staff who were consistently reliable. The tribunal has found that the claimant was not reliable in consistently working the shifts she had offered to the respondent. She offered dates and then withdrew them.The home prioritized those who could consistently offer dates

and attend in order to minimise the covid threat. The home reopened on 6th September 2021.

191. Between 6th September and the termination date, the reason that the claimant was not provided with shifts is that the focus was on the parties establishing the correct basis on which the claimant was going to supply her services to the respondent. The respondent was consistently stating that it wanted her to provide 12 hour shifts or go onto a bank contract. The claimant continued to offer part shifts alongside her offer of 12 hour shifts. The failure of Rachel Joyce and Nicky Eggleton to allocate shifts to the claimant in this period was due to the contractual discussions. They were not materially influenced by the protected disclosure.

192. The respondent was able to discharge the burden of proof and show that any detriment was not done on the ground that the claimant had made a protected disclosure with regard to this allegation.

193. Carla Kell did not tell the claimant her employee status had been removed. This act did not take place as alleged. The findings of fact of the Tribunal do show that there was a misunderstanding of the contractual position with regard to the claimant following the meeting on 5th May 2021. The letter stating a zero hours contract was not in fact a zero hours contract as the rest of the letter confirms. The zero hours contractual letter had been drafted incorrectly and did not reflect the reality of the employment relationship between the parties. This also took place in May 2021 and before any protected disclosure.

194. It was clear to the claimant that she remained an employee, as she was before her protected disclosure. She was accruing holiday entitlement and pension (on any pay received).

195. Carla Kell was clear as to the options available to the claimant: a 12 hour shift pattern or a bank worker agreement. As the act did not take place as alleged, then it was no capable of being a detriment. The offer of the bank worker agreement was one of the options which was open to the claimant to accept.

196. The Tribunal found that the offer of a bank worker agreement would not have provided the claimant with a higher hourly rate. This was clearly explained to the

claimant. On this basis there was no act that took place as alleged and therefore could not be a detriment act against the claimant.

197. For these reasons, we have not found the claimant to have been subjected to any detriment on the ground of having made a protected disclosure. The claimant's complaint of protected disclosure detriment under section 48 of the Employment Rights Act 1996 fails.

Automatic unfair dismissal

198. The respondent did dismiss the claimant on 19 October 2021.

199. The principal reason for dismissal was that the claimant could not commit to either a contract of employment with a 12 hour shift or a bank worker agreement.

200. It was not that the claimant made her protected disclosure on 21 July 2021. We have not found the claimant to have been subjected to any detriment on the ground of a protected disclosure. The contractual discussions that took place between the parties were not connected with the protected disclosure. The respondent was seeking stability and a firm basis on which to produce a monthly rota. The claimant could not offer this stability and when she did offer a 12 hour shift there was always a proviso or conditionality to it. The respondent provided every opportunity to discuss the options and reasons for the request. The termination of employment was due to the fact that the claimant could not commit to either a contract of employment with a 12 hour shift or a bank worker agreement.

201. The claimant cannot be regarded as automatically unfairly dismissed in these circumstances. Her claim under section 103A of the Employment Rights Act 1996 fails.

Failure to make reasonable adjustments

202. The claimant has been found to have been disabled at the material time. The respondent was aware of the disability from the commencement of her employment.

203. The respondent did have a working hours arrangement that was a provision criterion or practise. The respondent requires a rostered 12 hour shift pattern.

204. The claimant was not able to work a 12 hour shift pattern. However, the tribunal found that she was unable to work the full shift pattern not because of her mental health. The reason that the claimant could not work the 12 hour shift pattern was due to her husband's shifts and her personal circumstances involving her daughter's needs. The reason was not because of the claimant's mental health. Therefore, the provision, criterion and practise did not put the claimant at a substantial disadvantage compared to someone without the claimant's disability because the reason she was unable to work the full shifts was not because of her disability. She was not placed at a substantial disadvantage.

205. Therefore, the tribunal concluded that the respondent did not fail to comply with its duty to make reasonable adjustments for a disabled employee.

206. For these reasons, the claimant's complaint of a failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 fails.

Unauthorised deductions from wages

207. The claimant was not entitled under the terms of her contract of employment to be paid for a minimum of 12 hours a week irrespective of the hours she worked. The claimant did not have that expectation. The claimant did not work for the respondent during part of June 2021. At no time did she e-mail the respondent and ask why a minimum shift payment of 12 hours per week had not been paid to her. The claimant promptly raised enquiries with her employer if she were not satisfied with an element of her employment and therefore the tribunal finds that if a minimum of 12 hours a week payment was to be made to her then she would have set this expectation out in writing well before 21st of July 2021. The first occasion this is raised by the claimant is 8th of September 2021.

208. On this basis the tribunal finds that the respondent did not make any unauthorised deductions from the claimant's wages by failing to pay her for the period 5th August 2021 to 19 August 2021.

209. The complaint of an unauthorised deductions from wages under section 13 of the Employment Rights Act 1996 fails.

District Tribunal Judge Shields

Date: 5 November 2023

Sent to the parties on: 6 November 2023

For the Tribunals Office