EMPLOYMENT TRIBUNALS

Claimant: Ms L McDonald
v
Respondent: The Good Care Group London Limited

Heard at: London (South) (via CVP) **On:** 22-25 August 2023

Before: Employment Judge Fredericks-Bowyer
Tribunal Member Dengate
Tribunal Member Murphy

Appearances
For the claimant: In Person
For the respondent: Ms J Ferarrio (Counsel)

WRITTEN REASONS

1. These reasons are produced following the claimant's request. I gave oral judgment and reasons on the final day of the hearing in which all of the claims were dismissed. The decision was unanimous.

2. The panel of three were unanimous in their findings of the facts and conclusions.

3. This document sets out the reasons given at the hearing in written form and follows the process undertaken by the Panel when reaching its decision.

Background

4. The claimant brought claims for unfair dismissal, suffering detriment following the making of public interest disclosures (that being a chain of events leading to dismissal), and victimisation following protected acts (the alleged disclosures). All of her claims revolved around the protected disclosures she says she made, which she says led to the circumstances which made her unwell and signed off work, and which led to her dismissal.

5. The respondent denies that any protected disclosures were made, meaning there was no protected act following which victimisation could be suffered. It says that the claimant was dismissed due to long term incapacity. It notes that, at the time of the

dismissal, there was no prospect of the claimant returning to work in the known future and that, indeed, the claimant indicated that she did not wish to return to work.

6. The hearing took place over four days. The claimant represented herself in the hearing and gave evidence in support of her own claim. The respondent was represented by Ms Ferrario of Counsel. For the respondent, we heard evidence from: Ms Littlefield-Brown, Employee Relations Manager; Ms Bill, Director of Operations; and Ms Jones, Head of Oxford Aunts. Each witness gave a statement as evidence in chief and they were challenged on that evidence in cross examination. We also had access to a bundle of documents which ran to 484 pages. Page numbers in this document refer to the page numbers in that bundle.

7. It had become apparent by the end of the claim that the claimant was not prepared for the hearing. Her witness statement did not provide evidence which supported the issues in her claim. When she realised this deficiency, the claimant said that she almost did not do a witness statement because she found the process to have burned her out. She explained that she was intending to withdraw her claim but then chose at the very last minute to write a witness statement in order to continue. This is regrettable, as the hearing was the claimant's opportunity to present her claim and support it with evidence. The claimant was intent on completing the hearing.

8. Public interest disclosures, known as 'whistleblowing' claims, are difficult to run and prove. The legislation which gives protection for such disclosures is extremely prescriptive and a claimant must show that each of the stages are made out. This cannot be done if no evidence is offered, or no pleadings made, about any one or more of the crucial steps in the claim.

9. Many of the issues in the hearing revolve around the care of a particular client 'KD'. KD's name was disclosed to us during the public hearing, but for reasons of proportionality in respect of KD and their family's privacy, an anonymised initial is used instead of their name. If any person takes issue with this approach, they should write to the Employment Tribunal.

The issues

10. The list of issues was not in a settled or agreed format at the outset of the hearing. There was a list of issues which the respondent had prepared and to which the claimant had contributed in red italic. There was no particular divergence in relation to the issues, but the claimant's contribution indicated a wish for there to be greater detail.

11. During the hearing, the claimant confirmed that she did not consider the procedure or process used to dismiss her to be unfair, other than the headline position that the whole process was designed to mask the real reason for her dismissal. As a result, the list of issues we considered, to reflect the cases being run by each party at the hearing, is as set out below:-

    11.1. ***Detriment following public interest disclosure –***

11.1.1. *Has the claimant made a 'protected disclosure' for the purposes of section 43B Employment Rights Act 1996? The claimant relied on the following disclosures:-*

11.1.1.1. *On 18 July 2018, the claimant raised concerns to Ms Kerri-Ann Jones that a carer colleague was not taking care of a client ("KD"). Carer was dyeing her hair, no lunch prepared, client had come downstairs that morning on her own, medication left upstairs from undetermined date and carer had also lied in the daily care note, which was also incomplete.*

11.1.1.2. *On 23 January 2019, the claimant raised concerns with a client losing weight due to them being deprived of sweets by telephone to Ms Kerri-Ann Jones. Informed Kerri-Ann Jones that the client's rights under the Mental Capacity Act were being denied and to check the daily care logs, in particular 25 November 2018.*

11.1.1.3. *In the claimant's formal appeal letter 19 November 2019, the claimant wrote of her protected disclosure to Kerri-Ann Jones on 23 January 2019 via phone.*

11.1.1.4. *On 12 December 2019, in the claimant's disciplinary appeal meeting, the claimant raised concerns with a client having constipation and needing further care by telephone to Janet Bill, saying that this would not have been necessary if the care was done properly.*

11.1.2. Did the claimant make any "disclosure of information" for the purposes of section 43B(1) in respect of each alleged "qualifying disclosure"?

11.1.3. Which of the subcategories under section 43B(1) is it alleged each "qualifying disclosure" falls within? The claimant relies on the following:

11.1.3.1. *That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*

11.1.3.2. *That the health and safety of any individual has been, is being or is likely to be endangered.*

11.1.3.3. *That the information is tending to show any matter falling within any one of the proceeding paragraphs has been, is being or will be deliberately concealed.*

11.1.4. Did the claimant have a "reasonable belief" that each "qualifying disclosure" was made in the public interest?

11.1.5. Did the claimant have a "reasonable belief" that each "qualifying disclosure" shows that one of the subcategories in 43B(1) applies?

11.1.6. Was the claimant subjected to any detriment by any act, or any deliberate failure to act by the respondent on the ground that the claimant made the protected disclosure?

11.1.7. Did the respondent take all reasonable steps to prevent its employees from subjecting the claimant to any detriment in the circumstances of this case or from doing anything of that description?

11.1.8. Was the reason or principle reason for the claimant's dismissal that the claimant made a protected disclosure(s)?

11.2. ***Victimisation –***

11.2.1. *Has the claimant done a "protected act"?*

11.2.2. *Has the respondent subjected the claimant to a detriment because the claimant did a protected act?*

11.2.3. *Was the allegation made by the claimant false and made in bad faith?*

11.2.4. *Did the respondent take all reasonable steps to prevent its employees from subjecting the claimant to any detriment in the circumstances of this case or from doing anything of that description? The claimant says it failed in that she was –*

11.2.4.1. *put on an unwarranted improvement plan;*

11.2.4.2. *subject to personal retaliation to claimants grievance;*

11.2.4.3. *ostracised and undermined;*

11.2.4.4. *subject to a manager colluding with colleagues in retaliation to her grievance; and*

11.2.4.5. *put through investigation, grievance, disciplinary and dismissal.*

11.3. ***Unfair dismissal –***

11.3.1. *What is the reason for dismissal? The respondent asserts the claimant was dismissed on the grounds of long-term incapacity.*

11.3.2. *Did the respondent act reasonably in treating the claimant's ill health as a sufficient ground for dismissal?*

11.3.3. *Did the respondent follow a fair and reasonable procedure?*

11.3.4. *Did the decision to dismiss the claimant in the circumstances fall within a range of reasonable responses available to a reasonable employer?*

Relevant facts

12. The relevant facts as we find them on the balance of probabilities are follows. Where matters were discussed in the hearing which do not inform the issues in the case, we have not considered them because they do not give rise to the "relevant facts".

We resolve conflicts in the evidence at the point we encounter them and explain how we have done so below. In this case, the claimant did not present evidence about some of the parts of her claim which she would have needed to in order to succeed in those aspects. Where no evidence is presented, we cannot find facts which support those parts of the claim. We deal with the impact of any omissions in the evidence in our conclusions – we do not highlight omissions in this section.

The respondent and the claimant's management

13. The respondent is a care services provider which supplies care staff into clients' homes. The claimant began working for the respondent as a carer on 8 May 2013. She was a live-in carer, meaning that she worked on a rotational basis where she would live with a client in their home to provide care for several days or weeks at a time. When rotated out of providing care, another carer would go and live with the client and provide care for another period of several days or weeks. Throughout the time of the dispute, the claimant was providing care for the client KD.

14. From January 2018, the claimant was managed by Ms Jones. Ms Jones gave unchallenged evidence about the procedure for communication and working between the carers who shared care on a live in basis. For our purposes, we accept the following as a summary:-

    14.1. the carers handed over care directly and one would leave just after the other would arrive, but they would not necessarily communicate at other times;

    14.2. carers kept weekly reports, which were broad tables highlighting key issues or summaries over the course of the week; and

    14.3. carers also kept daily care notes, which were a detailed account of the care given to a client each day as well as the interactions which had taken place.

15. Ms Jones considered that she had a good working relationship with the claimant, but felt that the claimant's manner and sense of independence meant that she did not always get along with other carers. Ms Jones said that the claimant did not like to adapt her own style and would express *"extreme"* views about the respondent, complaining that she was paired with inexperienced carers deliberately. The claimant denies this, but it was clear to us that the claimant has a withering perspective about her former colleagues. Her contempt for the respondent was palpable throughout the hearing and she referred to the centre of her complaints, Ms Palmer, to be *"a very troubled and unstable person"*. Her complaints about the respondent date back to her induction some ten years ago.

The first alleged disclosure

16. In May 2018, Ms Palmer joined the respondent and was assigned to providing care for KD alongside the claimant. The parties agree that the claimant and Ms Palmer worked well together for a short space of time, but by July 2018 the claimant had developed concerns about Ms Palmer which she raised with the respondent. There is divergence between the parties about the nature of the concerns and the strength of which they were raised.

17. The claimant says that she spoke to Ms Jones on the telephone on 18 July 2018. In her words, she had numerous things to complain about in relation to Ms Palmer. In her evidence, the claimant explained that she felt Ms Palmer had a lack of care for Ms Palmer. She cited finding medication untaken upstairs, from unknown dates, and that inaccurate reports were written in the records. Under cross examination, the claimant gave additional oral evidence about Ms Palmer having dyed her hair and having no lunch prepared when the claimant arrived. This detail was then amended such that there was lunch preparation underway, but that the lunch was inadequate.

18. Ms Jones does not recall the conversation on 18 July 2018. This is not necessarily surprising given the time that had passed between then and now. For context, Ms Jones indicated that she would be supporting dozens of carers in the claimant's role at any one time, and those carers would frequently call to report issues with clients or colleagues. Ms Jones was clear that if any serious safeguarding matters were raised, or were pursued with any force, then she would have escalated them. She explained that there was a safeguarding policy and internal and external reporting which she had mobilised in the past when it was appropriate.

19. There is some assistance in the bundle about the conversation on or around this date. An e-mail chain between the claimant and Ms Jones is shown on pages 185 and 186. On 23 July 2018, Ms Jones e-mailed the claimant at 11:43. The relevant part of that e-mail is (page 185):-

> *"I am going to put together a handover checklist for Ali to follow to ensure all future handovers are completed to the required standard. I have attached a bit of a sample document so you can see the general idea but could you help me fill in the areas that you feel are lacking. From our conversation I know to add:*
>
> - *Bed linen washed and beds made*
> - *Bins emptied*
> - *Lunch for [KD] prepared for the day*
>
> *What other areas can I add which you feel need to be there?"*

20. The claimant replies at 15:28 on the same day and wishes to add (page 185):-

> *"General cleaning of stove top etc…*
>
> *Not usually handover stuff to be done, but put on shopping list when something runs out. Watch use by dates on food as well."*

21. Ms Jones follows up at 16:09 that day to thank the claimant and also added: *"I will also be speaking to her about the medication"*.

22. Considering the evidence of both witnesses, and giving particular weight to the contemporaneous written evidence which has not been subjected to a faded memory, we find the following facts about this exchange:-

    22.1. The claimant raised concerns or allegations about Ms Palmer in a phone call with Ms Jones;

22.2. Those concerns covered the state of handovers from Ms Palmer and in particular the claimant raised those matters which are the subject of the emails exchanged and outlined above;

22.3. Ms Jones did not consider that the concerns or allegations were presented in a way which required action any more significant than putting into place a handover plan to ease handovers;

22.4. Ms Jones would have escalated the issue if she considered that there were serious safeguarding disclosures being made; and

22.5. The claimant's primary focus when seeking to have her concerns addressed were to make the handover process easier for herself, which is why issues such as the shopping list were among the matters to be addressed.

The second alleged disclosure

23. The claimant says that she raised further concerns about KD's care by Ms Palmer during a telephone call on 23 January 2019. The claimant provided no evidence in chief about this allegation, but took the opportunity to say more about it when under cross examination. In essence, the claimant says that she asked Ms Jones to look at the entry Ms Palmer had made on 25 November 2018 and consider it as evidence that Ms Palmer's care was deficient. That entry (page 194) shows that Ms Palmer struggled with KD on that day in several material aspects, but in particular in relation to KD's eating and a medical issue.

24. Ms Jones did not recall that conversation, again citing the passage of time between the alleged events and now. She was taken to page 194 under cross examination and it was put to her that this page clearly showed concerning entries which needed addressing. Ms Jones did not agree. She said that the entry disclosed no concerns and that she did not necessarily agree that the behaviour described by Ms Palmer was out of character for KD, who had dementia.

25. We are satisfied on the balance of probabilities that the claimant did complain about Ms Palmer's care on 23 January 2019. The claimant can recall doing this, and Ms Jones could not deny those complaints were made – she just could not remember them. In our view, it is consistent with the claimant's behaviour and attitude towards Ms Palmer and KD that she would be frequently raising complaints about Ms Palmer. However, despite her best efforts, the claimant could not explain to us what in particular was 'wrong' with the entry made on page 194, other than her saying that KD would not have behaved like that under her care. We are not clear what inference we were being asked to draw if we were to accept that point, and it was clear to us that Ms Jones was similarly lost about what it is that the claimant says would have been interpreted from those entries when they were looked at on or around 23 January 2019.

26. In conclusion, we find as facts that the matters were raised in the way the claimant described, but that Ms Jones did not understand the matters to be made in a way which required action, and she did not take any action or appreciate that the claimant might have expected action to be taken about those points. This is consistent with

Ms Jones' evidence, and is not contradicted by the claimant's failure to provide clear evidence about what she meant to say – or any evidence about the reasons or motivation behind raising this particular complaint.

The claimant's disciplinary, grievance, performance improvement plan, and appeal

27. In February 2019, Ms Jones moved away from being the claimant's line manager and was replaced by Ms Wall. In April 2018, Ms Palmer left the respondent's employment. She was replaced as KD's part-carer by Ms Christmas. The claimant says and we accept that she was relieved by this change in staffing. On or around 19 May 2019, the claimant and Ms Christmas fell out and Ms Christmas reported that fall out to Ms Wall. The claimant says that the friction was triggered because Ms Christmas had not provide proper care to KD. She says that Ms Wall berated the claimant about how Ms Christmas had been treated.

28. On 29 May 2019, the claimant was told that Ms Christmas would not be returning to the placement and that she had put in a grievance about the claimant. Notes of the investigation into the grievance, which included talking to other colleagues who had worked with the claimant, were from page 272 to 278. All record instances of disagreement with the claimant and characterise the claimant as rigid and difficult to work with, thinking she knew KD best, and willing to act without medical advice. Ms Jones also sent an e-mail about her time working with the claimant (page 280). That summary corresponds to the views expressed in the hearing, and ends with the conclusion:-

> *"My feeling of Lorna is that she has an unprofessional relationship with the clients family and does not support her colleagues to create a stable care team for [KD]"*.

29. On 6 August 2019, the claimant was invited to a disciplinary process following the investigation the respondent carried out into alleged bullying and misconduct. On 22 August 2019, the claimant raised a grievance against Ms Wall for the way that she had spoken to the claimant. The disciplinary process was paused whilst the grievance was investigated. The grievance was partially upheld, with the respondent accepting that Ms Wall could adapt her communication style in the future. The claimant did not appeal the outcome of the grievance, and told us that she was exhausted by the process and had little faith in it. We accept that is how she felt, but this does not change the simple fact that the grievance process ended at this point because the claimant chose not to appeal within the deadline.

30. Having dealt with the claimant's grievance, the disciplinary process continued. The disciplinary meeting was rescheduled several times, but eventually took place on 4 November 2019. The claimant was invited to the meeting by letter dated 23 October 2019 (pages 368 to 369). The allegations against the claimant were expressed to be potential gross misconduct. There were five of them:-

    30.1. Allegations of bullying a colleague;
    30.2. Writing personal information in clients DCN;
    30.3. Writing opinions on people/conversation in DCN;
    30.4. Discussing issues with clients family; and
    30.5. Making negative comments about the care manager to other carers.

31. The claimant was sent the ten pieces of documentary evidence gathered in the course of the investigation, including all of the relevant meeting notes and summaries. The claimant's union representative prepared a detailed and thorough statement which responded to all of the allegations (page 372 to 381). The meeting took place on 4 November 2019.

32. On 12 November 2019, the claimant was informed that a performance improvement plan would be put in place for her and retained on her file (page 396). There was no concurrent explanation about the rationale for introducing that plan. The claimant requested the reasoning for the plan on 15 November 2019 (page 399). Ms Morgan for the respondent responded to say that the reasoning had been explained. Ms Morgan did not give evidence and, to be clear, we are not clear what the precise reasoning was for the performance improvement plan being introduced. We are, though, satisfied that this was the sanction the respondent thought appropriate in response to the quite serious allegations made against the claimant.

The third alleged disclosure

33. On 19 November 2019, the claimant wrote to appeal the outcome of both her grievance and disciplinary process. In her appeal letter, the claimant gave a summary of some of the issues and concerns she had about working at the respondent. She relies on the following paragraph as being her third public interest disclosure (page 404):-

> *"I have concerns for my client, who as had to, herself, endure treatment that caused so much stress that she was up and wandering in the night, opening and closing the curtains and refusing to eat her food. And how this was not caught by my ex care manager, Kerri-Anne Jones. I had to alert her to this after seeing the daily notes in January last year."*

34. To be clear, the third alleged disclosure is a written reference to the second alleged disclosure discussed above.

The fourth alleged disclosure

35. The respondent agreed to look into both aspects of the appeal and a meeting took place on 12 December 2019. Notes of that meeting were shown from page 415 to 417. The claimant says that she made her final protected disclosure in this meeting, with reference to KD's care and constipation. Ms Bill conducted that meeting for the respondent. Ms Bill can recall no mention of KD's care in relation to constipation at the meeting. The notes do not reflect that the claimant raised this concern and there is no evidence that the claimant sought to have the note corrected to include this concern. In the hearing, the claimant said that she was so exhausted by the respondent's processes by this point that she did not see the point in trying to get the meeting notes amended.

36. We are required to find as a fact on the balance of probabilities whether the claimant mentioned KD and constipation at this hearing. In our judgment, she did not mention these matters. We prefer the evidence of the respondent, which says she did not mention them, over the evidence of the claimant. This is because the notes of the meeting were taken contemporaneously and the claimant did not at the time flag

them as being inaccurate. This is despite, we find, the claimant successfully having matters included in notes on a previous occasion when she had written to correct the official record.

37. Over the course of the claimant's evidence, we also grew concerned that he recollection seemed to shift in respect of when things happened or what order they happened in. Throughout the evidence in the bundle, we also perceived a tendency for the claimant to interpret everything against her and she appeared to us in the hearing to have misconstrued key elements of the case along these lines. In short, we were hesitant to accept some of the broad claims the claimant made without supporting evidence from the bundle or the respondent witnesses. This fourth alleged disclosure is one of those broad claims. We find that the comments were not made.

38. The claimant's appeal against her disciplinary was successful in that the performance improvement plan was revoked, although it was replaced with a letter of concern. This was confirmed to the claimant by a letter from Ms Bill dated 17 December 2019 (page 418):-

> *"…the company has now taken a decision that the original disciplinary decision is hereby revoked against two counts of bullying a colleague and making negative comments about your care manager.*
>
> *During the appeal you did confirm that you wrote personal information in the clients care records, you wrote opinions on people in the client records and that you did discuss issues with the family. You agreed that this behaviour was not appropriate and breached professional boundaries.*
>
> *This means the formal performance improvement plan will be replaced with a letter of concern for the breach of professional boundaries and the allegation of bullying not upheld with be removed from your personnel file."*

The claimant's sickness and management

39. The claimant was absent through illness from 25 November 2019 (page 465). She was initially signed off with 'stress' until 24 December 2019. She was signed off for another month to 23 January 2020 (page 466), then for a month from 22 January 2020 to 21 February 2020 with 'anxiety and work related stress' (page 467), and for six weeks from 14 February 2020 to 26 March 2020 with 'stress-related problem' (page 468), for a month from 24 April 2020 to 23 May 2020 with 'stress-related problem', and finally from 23 May 2020 to 24 April 2020 (page 470).

40. On 11 February 2020, the claimant was transferred on to the long term sick process. This is in line with the respondent's policy. We find that the respondent followed its policy in respect of the claimant's sickness in every material way. The HR records for this and the contact at this time are at 421 to 422. These show that the respondent made contact with the claimant to check on her and her progress on: 2 December 2019; 11 December 2019; 18 December 2019; 24 December 2019; 2 January 2020; 9 January 2020; 16 January 2020; 20 January 2020; 22 January 2020; 30 January 2020; and 6 February 2020. All of those notes record that the claimant was unable

to return to work and there is no record of any discussions in that period which might lead to the claimant returning to work.

41. Ms Littlefield-Brown referred the claimant to occupational health on 5 March 2020 (pages 429 to 435). The report was returned on 11 March 2020 (pages 436 to 437). The report outlines that the claimant is suffering from work related stress, that she is meeting with a counsellor, and that she does not wish to take medication to support her recovery. It says that the claimant is unfit for work and that, crucially:

> *"The prognosis is guarded as Ms McDonald's return and continued attendance at work will depend on the successful resolution of the workplace issues that she feels were the cause of the absence. I am unable to predict the frequency or duration of any further absences related to this condition"* (page 436).

42. On 12 March 2020, the claimant was invited by letter (page 438 to 439) to a long term incapacity meeting. The letter outlined that the purpose of the meeting would include *"whether the termination of your employment on the grounds of long-term incapacity for work is appropriate"* (page 438).

43. The claimant met with Ms Jones on 19 March 2020 with notes taken by Ms Littlefield-Brown. Minutes were at page 440 to 442. Relevant facts we find from the meeting are:-

    43.1. The claimant was also suffering from the long terms effects from a viral infection at the time of the meeting;

    43.2. The claimant described having a hard time getting ready and feeling overwhelmed;

    43.3. The claimant had not yet started counselling and was not on medication, despite her GP suggesting them 'constantly';

    43.4. When asked whether the claimant wanted to return to the respondent, she said *"I can't think of anything at the moment. I've been thinking I could, you know, because I like it";*

    43.5. The claimant asked for some more time before a decision is made to see how counselling assists; and

    43.6. Ms Jones agreed to explore that.

44. On 31 March 2020, the claimant asked for Ms Jones to be replaced as the person overseeing the process (page 443). The claimant said that Ms Jones was not impartial because of their previous history, and because the claimant had mentioned Ms Jones in grievance and disciplinary processes. Ms Jones says that the meeting on 19 March was amicable and that, although her working relationship with the relationship had not always been easy, she did not consider there were any problems in the relationship. In any event, the respondent agreed to put another manager in charge of the process.

45. On 28 April 2020, the claimant made contact because she had not been paid statutory sick pay and the respondent informed her it was because her latest fit note had been received after the monthly payroll had closed.

The claimant's dismissal

46. On 6 May 2020, the claimant was invited by letter (page 457 and 458) to another incapacity meeting. The same purpose of the meeting was communicated as previously and the meeting then took place on 23 May 2020, two months after the previous meeting where the claimant had asked for more time to see how counselling assisted. The meeting was to be chaired by Ms Sadler, who did not give evidence. The notes of the meeting were at page 459 to 460. Relevant facts we find from the meeting are:-

    46.1. The claimant said she was off work with stress, anxiety and depression;

    46.2. When asked how she is feeling at the point of the meeting, the claimant said *"not too good. I am talking to a counsellor. Does not seem to help. Doing a calendar seems like blah";*

    46.3. The claimant said nothing had helped and she was not sure when she may be able to return to work;

    46.4. The claimant said that the work issues mentioned in the occupational health report could not be addressed and she did *"not see how it will work moving forward"*;

    46.5. The claimant said that she *"can do care work or live-in care anymore"*;

    46.6. When asked whether she could return to work for the respondent, the claimant said *"I feel cynical about it. Very down about it. I do not see it";*

    46.7. The claimant said she did not know if the respondent could do anything to help her return to work.

47. On 13 May 2020, the claimant was told by letter (page 461 to 462) that she was being dismissed on grounds of long-term incapacity to work. The letter referenced the previous meeting and said that the decision was taken because:-

    47.1. There is no date for the claimant's return;

    47.2. There were no other positions available at the respondent;

    47.3. The claimant did not feel she wished to return;

    47.4. The claimant did not wish to have the mediation advised by occupational health; and

    47.5. The decision was made despite taking into account the usual factors expected such as the nature of the role, the length of employment, sickness record, the prognosis, the respondent's needs, and adjustments which could be made.

48. In her evidence, the claimant admitted that she made the comments in the meeting outlined above to the effect that she did not want to return to the respondent, or have mediation, and that she could not envisage a return. The respondent was required to take those comments into account when concluding that the claimant had no reasonable prognosis of returning within a discernible time frame. Reflecting on that and the position of the respondent about the meeting and the dismissal, we accept that the respondent dismissed the claimant in response to her long term ill health and the comments she made in the second incapacity meeting. We do not consider, as a fact, that any of the previous history was taken into account when considering dismissal.

49. The claimant did not appeal her dismissal.

Relevant law

Detriment following public interest disclosure

50. *Section 43B Employment Rights Act 1996* sets out what a claimant must show if they are to gain the protection afforded by making a protected disclosure (where such disclosures then gain protection by virtue of being made to an employer). The section says:-

> *"43(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*
>
> *(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.*
>
> *(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.*

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

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

51. The word 'information' in *section 43B(1)* is crucial, and the expression of mere allegations or suspicions is not the passing of information which would gain protection (*Cavendish Munroe Professional Risks Services Ltd v Geduld [2010] IRLR 38 EAT*). Considering whether something is information or allegation is not always binary. A statement may contain both information and allegation and this will require analysis (*Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT*).

52. The information disclosed must also be in the public interest in the reasonable belief of the claimant making the disclosure, and so the information believed to be in the public interest must have wider public implications which affect more than just the claimant (*Chesterton Global Ltd and another v Nurmohamed [2015] UK EAT 355*).

53. Where a claimant relies on information which tends to show that there is, has been, or will be a breach of a legal obligation, they need to identify and evidence what legal obligation it is that it being affected (*Fincham v HM Prison Service [2002] UKEAT 925)*.

54. Making a disclosure which conforms with *section 43B* (where it is worker to employer in line with *section 43C*) affords protection. *Section 47B* confers the right of a worker not to suffer a detriment as a result of making a protected disclosure. A detriment is any negative *"act or deliberate failure to act by [an] employer done on the ground that the worker has made a protected disclosure"*.

55. The words 'on the ground that' are to be interpreted as being 'materially influenced' by the protected disclosure. It would be an error to conclude that the detriment was done because of the trivial influence of the protected act (*NHS Manchester v Fecitt and others [2011] EWCA Civ 1190*). The respondent bears the burden of showing, to the civil standard, that the thing which is claimed to be the detriment was done on other grounds, and not on the ground that the worker made a protected disclosure.

Victimisation

56. *Section 27 Equality Act 2010* defines harassment:-

"27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

57. Where a claimant is found to have made a protected disclosure, any detriment suffered as a result is also victimisation, as making a qualifying disclosure is also a protected act. The test for causation between the act and the victimisation is slightly different to that between the making of a protected disclosure and a detriment done on the ground that the protected disclosure was made. For a victimisation claim, there need only be a link between the protected act and the act of victimisation in the mind of the respondent (*St Helen's MBC v Derbyshire [2007] IRLR 540*).

58. Where a Tribunal makes a positive finding that the acts complained of as victimisation were done for some reason other than as acts of victimisation (such as a fair reason for dismissal), then the burden does not shift to the respondent to show that the acts were done for a non-discriminatory reason (*Martin v Devonshires Solicitors [2001] ICT 352 (EAT))*.

Unfair dismissal (and justification on grounds of long term incapacity)

59. The respondent bears the burden of showing that a dismissal was for a reason which is listed as 'potentially fair' at *section 98 Employment Rights Act 1996*. 'Capability' (ie. the capability of an employee to do their role) is one such potentially fair reason. Where the Tribunal finds that a dismissal is potentially fair, it should then judge the 'fairness' by considering whether in the circumstances the employer acted reasonably or unreasonably in treating the reason as being sufficient to dismiss the employee, in accordance with equity and the substantial merits of the case (*section 98(4) Employment Rights Act 1996*).

60. In long term ill health or incapacity cases, the employer only needs to show that the ill health renders them incapable of performing all contractual duties and that this is

a sufficient reason to dismiss (*Shook v Ealing London Borough Council [1986] ICR 314 EAT*). A crucial consideration is always whether or not circumstances have changed or are likely to change which means that there is a likelihood that the employee will be able to fulfil all of their contractual roles in the reasonably near future (*Post Office v Stones EAT 390/80; O'Brien v Bolton St Catherine's Academy [2017] ICR 737 CA*).

61. The employer is required to carry out a reasonable investigation when determining whether the employee is able to fulfil their role in the present or in the foreseeable future, and this will include an assessment of the medical position where there is a long term health issue (*East Lindsey District Council v Daubney [1977] ICR EAT; DB Schenker Rail (UK) Ltd v Doolan EAT 53/9*).

Conclusions

Detriment following public interest disclosure

62. In our view, none of the claimant's claimed public interest disclosures gained her protection under the Employment Rights Act 1996.

63. As outlined, the first alleged disclosure was centered around the claimant trying to make her job easier for herself. She did not present any argument or evidence indicating that she reasonably believed that the disclosures were in the public interest. Her and Ms Palmer worked with KD. There was no wider public involvement. Most importantly, we consider that this disclosure makes allegations rather than passes information. The claimant does not know for certain what care was provided by Ms Palmer when she was not there. The matters outlined in this alleged disclosure are suspicions, in our view. They are suspicions about what medication was or was not taken. This first alleged disclosure cannot therefore form the basis of a claim for detriment, because it does not qualify for protection under *section 47B*.

64. We accepted that the claimant made comments about Ms Palmer to Ms Jones in a telephone call, and invited Ms Jones to look at the notes from 25 November 2018 in an effort to highlight that Ms Palmer's care was deficient. In our view, though, there is again no evidence or argument indicating that this was done in the public interest. The claimant did not give evidence about the specific concerns raised or specific information disclosed, and we have not found any particular information was passed. The only matter the claimant did establish was that she referred to the entry of 25 November 2018, albeit in a way that Ms Jones said she did not understand and would not have understood at the time. In our judgment, this disclosure falls foul of the 'information or allegation' divide. The claimant was trying to say that Ms Palmer's entry was not reflective of KD's actual presentation, and so Ms Palmer's care or entries must be deficient. This is not information tending to show that a legal obligation (presumably the standard of care) was being breached. It is a suspicion that there is a deficiency. They are allegations only. They cannot therefore form the basis of a claim for detriment, because it does not qualify for protection under *section 47B*.

65. The third alleged disclosure claim fails for all the same reasons as the second one, as it is the same issue, except that this is also used only as an example in the advancing of further allegations about the respondent and its treatment of the

claimant herself. We do not see how this is raised in the public interest, but in any event there is no information disclosed. The claimant is complaining and in doing so she raises allegations against Ms Jones and the respondent. It cannot therefore form the basis of a claim for detriment, because it does not qualify for protection under *section 47B*.

66. We found as a fact that the claimed fourth disclosure did not happen at all. There can be no claim for detriment on the basis of a disclosure which did not happen.

67. None of the claimant's alleged disclosures gained protection. There can be no detriment as a result. Even if there had been disclosures which gained protection, we would not have found that any of the claimed detriments were done on the grounds of the disclosures. For the reasons outlined above and below, we consider the respondent acted for reasons entirely different to the complaints the claimant made, which she claimed afforded her protection.

Victimisation

68. In our judgment, the claimant did not make any disclosures which gained protection because they were protected public interest disclosures. There is no 'protected act' in relation to the disclosures alleged which could form the basis of a victimisation complaint.

69. This means that, although the respondent did put the claimant on a performance improvement plan, through a disciplinary, and then dismiss her (ie. all of the things relied upon as the victimisation), her victimisation claim cannot succeed. It is dismissed.

Unfair dismissal

70. We have found as a fact that the claimant was dismissed in response to the outcome of the long term absence procedure which began when the claimant satisfied the trigger points under the relevant policy. We also found that the respondent relied on the contents of the second incapacity meeting when deciding to dismiss the claimant, and in particular the information she gave in that meeting.

71. The claimant contends that she was dismissed because of the protected disclosures she said she made. Although we have found that no protected disclosures were in fact made, it may still be possible for the respondent to have dismissed her for being difficult and raising complaints which fall short of gaining protection. We have considered this.

72. Ultimately, we consider that there is overwhelming evidence showing that the respondent responded to the claimant's ill health only. The claimant was unwell. She was off work for six months and she said, effectively, that she could not return to work, could not see how to return to work, and was not sure she wanted to return to work. There is no evidence that any other issues were taken into account when deciding to dismiss the claimant. We consider that the reason for dismissal was the claimant's capability as a result of her illness. Capability is a potentially fair reason.

73. In our judgment, the respondent also conducted a reasonable investigation when determining the claimant's capability. It checked in on her. It commissioned an occupational health report and sought to address it with the claimant. It explored mediation to remove barriers to return. It asked the claimant about her medication after the report said she was not taking any. The respondent then asked the claimant what it could do to help her back to work. It allowed a further two months for the claimant to access treatment in an effort to determine if the counselling the claimant was receiving might give rise to a prospect of her returning. We do not see anything else the respondent could have done in this period to help it understand the claimant's position. We are satisfied that that investigation yielded results which made the respondent genuinely believe that the claimant was unable to work and that there was no appreciable prospect of her being able to return to work.

74. In our view, the claimant's comments in the second meeting are critical when determining whether or not the respondent was able to fairly dismiss her in those circumstances. The claimant did not wish to try to remove the barrier occupational health had identified as causing the work related stress. The claimant said that she did not think she could work in care anymore, and so admitted that on that basis she did not think she could ever return to her role at the respondent. The claimant made it clear that she would not be happy to return and that the same issues would arise (by implication with the same result of illness). The respondent should not be expected to continue to employ someone who has no prospect of being well enough to return to their role, and who openly admits that she does not wish to overcome barriers and does not actually want to return to the role. The respondent gave the claimant an extension to show improvement but there was none. The claimant considered alternative options but we are satisfied there were not any outside other care roles, which the claimant says she could not see herself doing. In those circumstances, we consider that the respondent acted reasonably in considering the claimant's long term ill health as being a sufficient reason to dismiss her.

75. Consequently, the claimant was not unfairly dismissed.

Disposal

76. The claimant was unsuccessful in all of her claims and so all of them are dismissed.

Employment Judge Fredericks-Bowyer

19 November 2023