



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Jenkins

Respondents: Mr Mark Sutton (1) Mr Geoffrey James Sutton (2)

Heard at: Plymouth (Video platform hearing) **On: Monday 6, Tuesday 7 and Wednesday 8 November 2023**

Before: Employment Judge A Matthews

Members: Mrs R Barrett & Ms R A Clarke

Representation:
Claimant: In Person
Respondent: Mr A Williams - Solicitor/Consultant

UNANIMOUS RESERVED JUDGMENT

1. By consent, all claims against Mr Geoffrey James Sutton in these proceedings are dismissed on withdrawal.
2. Mrs Jenkins was an employee of Mr Mark Sutton (the “Respondent” or “Mr Sutton”) by reference to section 230 of the Employment Rights Act 1996.
3. Mrs Jenkins’ claims against the Respondent, that Mrs Jenkins was subjected to a detriment by reference to both sections 47B and 44 of the Employment Rights Act 1996 are well-founded. The Respondent is ordered to pay Mrs Jenkins £1,100 in this respect.
4. Mrs Jenkins’ claims that Mrs Jenkins was wrongfully and unfairly constructively dismissed by the Respondent by reference to sections 100 and/or 103A of the Employment Rights Act 1996 are dismissed.
5. Mrs Jenkins’ claim under Regulation 30(1) of the Working Time Regulations 1998, that the Respondent has failed to pay Mrs Jenkins an amount due under regulation 14(2) of those Regulations (holiday pay) is well founded. The

Respondent is ordered to pay Mrs Jenkins £675 in this respect. Any amount which the Respondent lawfully deducts from this sum by way of income tax, national insurance contributions or otherwise shall be treated to that extent as in payment of this order. In the absence of evidence to substantiate the lawfulness and amount of such a deduction, the gross amount specified (£675) shall be due under this Judgment to Mrs Jenkins.

REASONS

INTRODUCTION

1. Mrs Sally Jenkins says that Mrs Jenkins was an employee and/or a “worker” of Mr Sutton’s within the meaning of section 230 of the Employment Rights Act 1996 (the “ERA”). Mrs Jenkins’ status as an employee and/or a worker is a prerequisite of Mrs Jenkins being able to pursue Mrs Jenkins’ claims.
2. Mrs Jenkins says that Mrs Jenkins was subjected to unlawful detriment because of making a protected disclosure (sections 43A, 43B(1)(d), 43C and 47B of the ERA). Mrs Jenkins also says that Mrs Jenkins was subjected to unlawful detriment because Mrs Jenkins brought health and safety concerns to Mr Sutton’s attention by reference to section 44(1)(c) of the ERA.
3. Mrs Jenkins also says that Mrs Jenkins was constructively unfairly dismissed because of making a protected disclosure by reference to section 103A ERA and/or in the circumstances set out in section 100(1)(c) of the ERA. Within this is a claim of wrongful dismissal, essentially for notice pay.
4. Mrs Jenkins claims holiday pay.
5. Mr Sutton defends the claims. Mr Sutton says that Mrs Jenkins was neither an employee nor a worker of Mr Sutton’s. Further, Mrs Jenkins made no protected disclosures, nor did Mrs Jenkins raise any health and safety concerns by reference to section 44 of the ERA. Mr Sutton defends the claims of unfair constructive and wrongful dismissal. If Mrs Jenkins was an employee or worker, Mr Sutton accepts that Mrs Jenkins is due holiday pay.
6. We heard evidence from Mrs Jenkins supported by a written statement. In support of Mrs Jenkins, we heard from Ms Lynne Lloyd (Home Care Worker). Mr Sutton gave evidence supported by a written statement. Two statements supporting Mr Sutton were produced. These were from Ms Jane and Mr Simon Wheten and Ms Janet Kirkham, respectively. None of these three people appeared. Accordingly, we read their statements but accorded them no determinative evidential weight.

There were two bundles of documentation produced by Mr Sutton and Mrs Jenkins respectively. References in this Judgment to pages are to pages in Mr Sutton's bundle unless the reference includes the suffix "A". If the suffix "A" is used, the reference is to the page in the bundle supplied by Mrs Jenkins. Mrs Jenkins produced a schedule of loss.

7. Judgment was reserved to allow proper deliberation.
8. Preliminary matters
9. There was a question about the capacity of the Second Respondent in these proceedings. In case management on 3 August 2023, Mr Sutton was ordered to provide medical evidence on the subject. Having seen that evidence, this Tribunal was satisfied that the Second Respondent did not have capacity to conduct this litigation. Mr Sutton was, therefore, appointed as the Second Respondent's Litigation Friend in exercise of the power set out in rule 29 of the Employment Tribunals Rules of Procedure 2013. As such, however, Mr Sutton's role was confined to noting that Mrs Jenkins withdrew her claims against the Second Respondent.

10. FACTS

11. Mrs Jenkins, who lives in London, has 32 years of caregiving experience and holds an NVQ in care. Mrs Jenkins is assertive and forthright.
12. Mr Sutton lives near Camelford in North Cornwall. Mr Sutton originally trained and worked as a Community Psychiatric Nurse, subsequently pursuing a different career path. At all relevant times, Mr Sutton lived in a cabin to the rear of his cottage. The cottage was occupied by Mr Sutton's father, the Second Respondent in these proceedings. Mr Sutton's father had been diagnosed with Dementia. At all relevant times, Mr Sutton arranged for his father to have care support at the cottage. This was provided by a team of carers including a carer who had primary responsibility and "lived in" at the cottage.
13. In the late summer of 2022, there was a vacancy for the live in carer's job. There was an exchange of emails on the subject between Mr Sutton and Mrs Jenkins at the end of August 2022 (85-86). On 22 August 2022 Mrs Jenkins signed a contract engaging Mrs Jenkins to provide care for Mr Sutton's father (the "Contract" - 77-82).
14. The Contract can be referred to for its full effect. From the perspective of legal analysis, it is unsatisfactory in several respects. It included these provisions:
 - It was headed "Contract for Services"

- The engaging party was expressed to be Mr Sutton's father or, if signed on his behalf, the representative who signed it. Mr Sutton signed the Contract on his father's behalf and was, therefore, the engaging party. Mr Sutton is also expressed to be a party to the Contract in any event. In short, the Contract was between Mr Sutton and Mrs Jenkins. Whilst there are provisions in the Contract that contradict this, it reflected the underlying arrangement.
- The Contract commencement date was 19 September 2022.
- The services to be provided were to be specified in a "Client Guide". We have seen no written "Client Guide".
- Mrs Jenkins was engaged under the Contract as Mr Sutton's father's "Personal Assistant". As such, Mrs Jenkins' obligation was "*to provide personal care and support services*". The Contract was terminable by 4 weeks' notice by either party (clauses 2.1 - 78 and 9 - 79). There was no fixed term for the Contract. Nevertheless, it goes on to refer to further assignments and there being no obligation on either side to offer or accept them.
- The obligations on Mrs Jenkins as the Personal Assistant are further developed in Clause 3 (78). Mrs Jenkins was to provide the services subject to a right of delegation "*to such suitably and experienced personnel as he or she may from time to time deem appropriate if he/she is unable at any time to perform his/her services due to circumstances beyond his or her control. The delegation will be subject to the Clients or Representatives approval.*" In short, Mrs Jenkins "right" to provide the services through a third party was exercisable only in specific circumstances and it was unconditionally controlled by Mr Sutton. It seems that, in practice, Mr Sutton arranged cover for Mrs Jenkins through the care team when needed (see Jenkins WS 73).
- The fee payable was £150 per 24-hour period (clause 4 - 78). Payment was made against monthly invoices, although Mrs Jenkins had expressed a preference for weekly payments. Before sending in the first invoice, Mrs Jenkins was to provide a tax reference. Presumably the expectation was that this would be a reference showing HMRC's agreement to tax Mrs Jenkins on a self-employed basis. We assume this was provided. Expenses incurred

with specific prior approval were to be reimbursed (clause 6 - 78).

- There is a declaration of intent by the parties that Mrs Jenkins be self-employed (clause 10 - 80). There is a further clause providing that Mrs Jenkins was not an employee by virtue of the Contract and that it created no “*mutuality of obligation*” (clause 14 - 80).
- Mrs Jenkins was required to carry public liability insurance in respect of any liability arising from the Contract (clause 11 - 80).

15. Mrs Jenkins, as a matter of law, asserts that the true relationship created by the Contract and the surrounding circumstances was one of employment. We have no doubt, however, that at the time both sides intended it to be one of self-employment.

16. It seems that, outside the Contract, the agreement was that Mrs Jenkins would work 12 weeks on and 2 weeks off (WS 8). Mrs Jenkins used her own car to transport Mr Sutton’s father as necessary and was reimbursed at a rate of 45 pence per mile.

17. In practice, Mr Sutton exercised various controls over the way Mrs Jenkins performed her duties. Indeed, this was a source of dispute between the two because Mrs Jenkins was used to a greater degree of autonomy. Mrs Jenkins was required to keep a diary. Mr Sutton’s father’s room and common parts of the cottage were monitored by CCTV.

18. Mrs Jenkins met Mr Sutton and his wife, Mrs Becky Sutton, at the address in Camelford to take up the role on 19 September 2022.

19. This was Mrs Jenkins’ first visit to the address. Things were not as Mrs Jenkins had expected. Mrs Jenkins was aware that Mr Sutton’s plan was to move his father from the cottage to a mobile home on the same site. When Mrs Jenkins saw the mobile home in question, Mrs Jenkins was unhappy with it. In the event, Mrs Jenkins never moved into the mobile home. However, as we shall record, this dissatisfaction would eventually lead Mrs Jenkins to resign after some 2 months in the job. As Mrs Jenkins puts it (WS 13): “*I felt I had relocated some 300 miles on false pretences.*”

20. Mrs Jenkins told us that it was on this occasion, on 19 September 2022, that Mrs Jenkins raised several issues that came up as they looked around the property. These can be categorised into three.

21. First, the locking arrangements for the cottage. In Mrs Jenkins' view, these were of concern. For example (there were other concerns), they included locking one door from the outside. Mrs Jenkins reports that, when Mrs Jenkins raised this with Mr Sutton he replied: *"That's how we do it around here."* (WS 28).
22. This was linked to the second issue. It was necessary, by using the locking arrangements, to ensure that Mr Sutton's father could not leave the cottage unnoticed by a carer. In Mrs Jenkins' view, this raised Deprivation of Liberty Safeguards issues ("DoLS"), which required local authority oversight. Mr Sutton believed this issue (and the locking issue referred to above) to be adequately covered. (This is best seen in Mr Sutton's email to Mrs Jenkins on the later date of 13 November 2022 - 99.)
23. The third issue was that Mrs Jenkins noticed that the cottage had a 2-ring electric hob for cooking. (In her statement, Mrs Jenkins wrongly refers to this as *"a 2 ring worktop camping stove"* – WS 18). Mrs Jenkins thought this to be a danger for Mr Sutton's father and raised it with Mr Sutton. Mr Sutton told Mrs Jenkins that he intended to fit a cooker, although it is not clear if he was referring to the mobile home.
24. Mrs Jenkins' evidence is that Mrs Jenkins reiterated all her concerns to Mr Sutton on 26 September 2022 (WS 38-39). It may have been on this occasion that Mr Sutton made the *"that's tough that's how we do it around here"* remark (see Jenkins WS 40). In addition, on this occasion Mrs Jenkins raised the issue of a leaky sink that Mrs Jenkins had reported to Mrs Becky Sutton in Mr Sutton's absence (90). This was flooding the kitchen floor. Mrs Jenkins was tackling this with tea towels but was concerned that these caused a slip hazard for Mr Sutton's father. Mrs Jenkins says that, when Mrs Jenkins raised the issues, Mr Sutton *"left without addressing any issues, shaking his head"* (WS 42d).
25. Whilst Mrs Jenkins told us the issues (apart from the leaky sink) were first raised with Mr Sutton on 19 September 2022, Mr Sutton's evidence was that he did not think they were. It is common ground, however, that all the issues (including the leaky sink) were raised at some point, that Mrs Jenkins often used the phrase "health and safety" and that, on the subject of the locking arrangements, Mr Sutton did make a remark to the effect that it was tough but that was how they did it around there. On the balance of probability, all these issues were raised on or before 26 September 2022. They were periodically revisited thereafter.
26. Whilst Mrs Jenkins says these issues were raised on 26 September 2022, the only mention of them in an exchange of emails between Mrs Jenkins and Mr Sutton that afternoon (92-93 and 90) is of the sink (90). The emails reflected the disagreement over the planned move from the

cottage to the mobile home. In a text message on that day to Ms Lloyd (a co-carer for Mr Sutton's father and Mrs Jenkins' confidante - see Jenkins WS 62), Mrs Jenkins commented "*I need to chat with you mark wasn't very nice this AM he's is not applicable*" (later corrected to "*approachable*") (93). In her evidence on the email exchanges Mrs Jenkins comments (WS 48): [Mr Sutton's] "*response to my email appeared polite in writing, but in person he conveyed a controlling and belittling demeanour. When I voiced concerns, he dismissed them shaking his head and disregarding my perspective, this behaviour created a challenging and dismissive atmosphere.*"

27. Having observed the parties, we suspect this was, to some extent, a matter of perspective. It seems clear to us that they did not see eye to eye. There may have been a personality clash.
28. On 6 October 2022 Mr Sutton told Mrs Jenkins that he wanted to use air tags to keep track of his father. Mrs Jenkins, however, saw this as a move to keep her under surveillance. Together with Mrs Jenkins view that the CCTV coverage in the cottage was monitoring Mrs Jenkins, this led to a developing feeling that Mr Sutton was trying to control Mrs Jenkins, which Mrs Jenkins, herself, describes as paranoia (WS 65).
29. If not before, it seems that by 10 October 2022 Mr Sutton was thinking about dispensing with Mrs Jenkins' services as the full-time carer, in favour of Ms Lloyd (see the WhatsApp at 126 timed at 10:47:13).
30. By the end of October 2022, Mr Sutton's father's behaviour was becoming more challenging on occasion (see 97 and 146). On 9 November 2022 there was an incident, as can be seen from the communications from Ms Lloyd and Ms Kirkham at 5A-6A. Episodes of this sort were, no doubt, causing both the carers and Mr Sutton additional stress. The caring team put some of the blame on Mr Sutton on the basis that Mr Sutton was not putting the right care framework in place.
31. As a result of the incident on 9 November 2022, Ms Lloyd had asked for a meeting between Mr Sutton, Mrs Jenkins and herself to discuss a plan of action. In a message timed at 20.03.06 on 9 November 2022 (121) on the care group WhatsApp, Mr Sutton wrote:

"Hi all – Im so grateful for the teams support with Dad ... I will spend some time next week reviewing Dads care plan in order to consider everybodys needs in light of some recent changes in behaviour"

32. On 11 November 2022 Mrs Jenkins sent Mr Sutton her input on the subject (9A). It included:

"I cannot see the caravan working at all" "My suggestion to you would be put him in a home for 2 weeks and get the cottage sorted." "I don't want to come across as rude and the truth always hurts but I must be 100pet cent straight with you. You are creating safeguarding issues here."

33. On 12 November 2022 timed at 1536, Mrs Jenkins sent Mr Sutton an email. It read (99):

"I have decided that moving into the caravan is going to be too difficult, so I would like to give you 4 weeks notice now. I will of course work until 19th Dec 2022 if you wish, as long as there is no movement to the caravan during that time.

You do need to apply to have Dols in place for your dad and while its not so bad only nights at the cottage, the doors will need permanently locking at the caravan. Should your father injure me and a report of any kind had to be made or he got injured and it was said he was held against his will I myself could be prosecuted, I don't want to put myself in that position Mark I value my job and my DBS. His aggression is getting worse at times and I really don't want to feel the pressure of having to go through this.

I'm really sorry Mark I know your trying your best and you have worked so hard but this is a lot more complicated. When I have worked in other houses Dols certificate is in place and I feel its paramount you do it here.

Kind regards

Sally"

34. Sometime afterwards on 12 November, Mr Sutton sent Ms Lloyd a message (13A):

"Just a heads up ... I had a couple of long winded emails from sally recently and then this evening as I got back another to say she was giving us her notice to finish 19th (not a great surprise) – my concern is that she has a way of using terms, phrases and concepts of care with approaches that can sound very persuasive and suggest she is very knowledgeable – but regrettably much of it is out of context, ill-informed and misdirected legalism which I would have to put her right about if she had wanted to continue anyway – so perhaps just as well!"

35. On 13 November 2022 Mr Sutton acknowledged receipt of Mrs Jenkins' resignation (99). Mr Sutton responded to the points raised by Mrs Jenkins in a considered way, starting his response with a thank you:

"It is clear that Dad has benefited from a more enriching and structured routine during your time with us which is very much valued and acknowledged, thank you."

36. The state of mind that Mrs Jenkins was in by this time can be seen in Mrs Jenkins' WhatsApp voice note to Ms Lloyd timed at 0933 on 16 November 2022 (15-160). Mrs Jenkins antipathy towards Mr Sutton is clear.

37. The meeting, anticipated in Mr Sutton's WhatsApp message on 9 November 2022, took place on 17 November. Apart from Ms Lloyd's reflection on this in a later note to Mr Sutton (which we come to below) we have no contemporaneous record of what took place. We know that Mr Sutton, Mrs Jenkins, Ms Lloyd and Ms Kirkham attended at the start of the meeting. It seems that Mr Sutton confirmed that Mrs Jenkins was leaving, expressing gratitude for the work Mrs Jenkins had done. From that moment, Mrs Jenkins felt that the meeting became negative from her point of view (WS 83). Feeling belittled, Mrs Jenkins walked out. We are not sure at what stage into the 1 hour 20 minute meeting (see below) this took place, but it was probably shortly after the start. This is supported by Ms Lloyd's evidence (WS 19). Mr Sutton's evidence about the meeting is at WS 35-41. Unsurprisingly it reflects a different perspective.

38. The stage was now set for what happened during the evening of 18 November 2022, when Mr Sutton went over to the cottage to see Mrs Jenkins and Mr Sutton's father. There is a string of WhatsApp messages that confirms the timeframe and some of the exchanges between Mrs Jenkins and Mr Sutton (123 - 18/11/2022 - 13:00:01 to 20:46:31). Mrs Jenkins' WhatsApp voice notes to Ms Lloyd timed at 17:44 and 18:19 (160-161) are also instructive. As an example, Mrs Jenkins refers to Mr Sutton as a *"controlled fucking freak"*. Of more concern, perhaps, is that Mrs Jenkins refers to Mr Sutton's father in derogatory terms, describing him as a *"fucking prick"*. Even if allowance is made for the stress of the job and the heat of the moment, it does look as though there was a question over Mrs Jenkins' fitness to be doing the job by this stage. Looking at Mrs Jenkins' (WS 84-88) and Mr Sutton's (WS 50-57) respective accounts of events, what happened seems tolerably clear. In short, Mrs Jenkins was incandescent about what had happened at the meeting the previous day and was going to make the visit as uncomfortable as possible for Mr Sutton. The upshot was that Mrs Jenkins lost her temper and shouted at Mr Sutton.

39. Shortly afterwards Mrs Jenkins packed her belongings and left, having first taken the time to speak to Ms Lloyd and send an email to Mr Sutton timed at 1950 (100). It read:

“Due to your controlling disgusting behaviour towards me once again ! I have no alternative to leave with immediate effect, this behaviour was witness in front of 2 other people. This is now breach of contract for bullying, you removed my right to be a self employed person through your full control of me, I will now be seeking damages at an employment tribunal as an agency worker Due to the full control you had over me. My next step will be ACAS.”

40. For good measure, on 19 November 2022 Mrs Jenkins contacted social services and Mr Sutton’s father’s GP to report, as Mrs Jenkins saw them, Mr Sutton’s wrongdoings (see 104 - “Safeguarding”).
41. On 20 November 2020 Mrs Jenkins sent Mr Sutton a lengthy email setting out her perspective (103-104). This can be referred to for its full content. It was sent well after Mrs Jenkins’ resignation on 12 November. However, we note that concerns over health and safety figured little in its content.
42. We turn back to some further perspective on the meeting that had taken place on 17 November 2022. Ms Loyd had written to Mr Sutton on the subject on 19 November (101-102). The letter included this:

“I have been reflecting after our staff meeting and Sally’s sudden departure.

During our meeting on Thursday,

You started by saying how amazed and happy you were with your dad’s progress since Sally has been caring for your father, in the next sentence you said you didn’t believe that the amount of routine was necessary! Very conflicting and would have made anyone feel worthless (giving and taking away)

When Sally was pleased to share she had been seen on the camera in his bedroom that he had been having 8 or 9 hours sleep you dismissed it even when you had access to the same information I asked you 2 more times why you have conflicting evidence and you wouldn’t explain why as if you didn’t need to, undermining all of us.

We went onto discussing your father’s moods and outbursts of anger, Sally tried to explain that your dad’s pants are too

tight which makes his testicle very uncomfortable which in turn because he can't verbally tell you his problem he can lash out, you wouldn't listen and changed the subject, very frustrating when you are dismissed again."

"We expected a plan of action with regards to the safety of the carer and a plan to safeguard your father in the community, after an hour and 20mins nothing was discussed."

43. Looking at the background evidence, there is no question that Ms Lloyd was partisan. In essence, Ms Lloyd agreed with Mrs Jenkins' views and subsequently left the care team on 23 November 2022. Nevertheless, this is how Ms Lloyd saw the interactions between Mr Sutton and Mrs Jenkins on 17 November. Notwithstanding Ms Lloyd's partisanship, Ms Lloyd's is a third-party observation on the interaction between Mr Sutton and Mrs Jenkins, written shortly after the meeting. It is probably a fair representation of what happened.

44. Mr Sutton's first reaction to Ms Lloyds' letter can be seen in a WhatsApp message to Ms Lloyd timed at 18:59:33 on 20 November 2022 (128). Perhaps Mr Sutton was taking the line of least resistance:

"I got ur email and agree with much of what you feel actually – id value talking with you whenever suits in order to navigate solutions thankyou for your frank honesty it is appreciated"

45. On 23 November 2022 Mr Sutton again replied to Ms Lloyd (13A). Whilst conciliatory, Mr Sutton (who cannot, by this time, have been well disposed towards Mrs Jenkins) included this:

"int s also true that sadly, I have come across legalistic and manipulative characters several times in my life and I should have listened to alarm bells ringing in my head about sally from very early days."

46. This comment, together with that made by Mr Sutton to Ms Lloyd on 12 November 2022 (see paragraph 34 above) is in sharp contrast to Mr Sutton's evidence that he did not make any derogatory comments about Mrs Jenkins (WS 49 – On this subject see also the WhatsApp from Mr Sutton to Ms Lloyd timed at 10:06:59 on 5 December 2022 [128], by which time Mr Sutton had discovered that Ms Lloyd had copied to Mrs Jenkins messages from Mr Sutton to Ms Lloyd).

APPLICABLE LAW

47. Employee and/or worker

48. Section 230 of the ERA, so far as it is relevant, provides as follows:

“230 Employees, workers etc

(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)-

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker’s contract shall be construed accordingly.”

49. Although a fluid and developing area of law, the basic principles in relation to the status of “employee” are well established. There must be a contract. If there is a contract, broadly speaking it cannot be a contract of employment unless the “irreducible minimum” exists. This comprises an obligation to do work personally, mutuality of obligation and control to a sufficient degree. In relation to the obligation to undertake work personally, where it is asserted that a document does not describe the true relationship between the parties, it is for the tribunal to decide what the true relationship is. The tribunal will look to the reality of the arrangements between the parties. So, for example, a written term purporting to permit the use of a substitute does not preclude the conclusion that a contract of employment exists when, in practice, the right was illusory or not exercised. In relation to control, it is not necessary for the work to be carried out under an employer’s actual supervision and control where the working is remote, but the employee must be ultimately subject to the employer’s orders and directions. If the “irreducible minimum” exists it is necessary to stand back and look at the whole picture.

50. As far as the status of worker is concerned, the legal position is also fluid but the basics well established. If an individual is working under a contract of employment, the individual is a worker as well as an employee. If the individual is not working under a contract of employment but under any other contract to do or perform work personally, the individual may be a worker. A genuine right of substitution will normally mean there is no obligation of personal

service and, therefore, there can be no worker status. However, a right of substitution only with the consent of the other party to the contract is not inconsistent with personal performance.

51. Protected disclosure (“whistleblowing”) and “health and safety” detriment

52. Section 43A of the ERA provides:

“43A Meaning of “protected disclosure”

In this Act a “protected disclosure” means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.”

53. Section 43B of the ERA, so far as it is relevant, provides:

“43B Disclosures qualifying for protection

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

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

54. Section 43C of the ERA, so far as it is relevant, provides:

“43C Disclosure to employer or other responsible person

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

(a) to his employer,”

55. Section 47B of the ERA, so far as it is relevant, provides:

“47B Protected disclosures

(1) 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.”

56. Section 48 of the ERA, so far as it is relevant, provides:

“48 Complaints to employment tribunals”

“(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B”

“(2) On a complaint under subsection”.... “(1(A)”....“it is for the employer to show the ground on which any act, or deliberate failure to act, was done.”

57. Section 49 of the ERA, so far as it is relevant provides:

“49 Remedies

(1) Where an employment tribunal finds a complaint under section 48” “(1A)” “well-founded, the tribunal-

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.”

“(2)” “The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances of the case having regard to-

(a) the infringement to which the complaint relates, and

(b) any loss which is attributable to the act or failure to act which infringed the complainant’s right.”

58. Section 44 of the ERA, so far as it is relevant, provides as follows:

“44 Health and safety cases

(1) An employee has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that-”

“(c) being an employee at a place where-

(i) there was no such representative or safety committee,”

he brought to his employer’s attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,”

59. Unfair constructive dismissal - protected disclosure and health and safety

60. Section 108 of the ERA, so far as it is relevant, provides as follows:

“108 Qualifying period of employment

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.”

“(3) Subsection (1) does not apply if-”

“(c) subsection (1) of section 100 (read with subsections (2) and (3) of that section) applies,”

“(ff) section 103A applies,”

61. Section 100 of the ERA, so far as it is relevant, provides:

“100 Health and safety cases

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that-”

“being an employee at a place where-

(i) there was no such representative or safety committee,”

he brought to his employer’s attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety,”

62. Section 103A of the ERA provides:

“103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.”

63. Section 94 of the ERA provides an employee with a right not to be unfairly dismissed by his or her employer. For this right to arise there must be a dismissal.

64. Section 95(1) of the ERA, so far as it is relevant, provides:

“95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if”

“(c) the employee terminates the contract under which he is employed (whether with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

65. The general principles relating to unfair constructive dismissal are well understood. An employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The breach may be actual or anticipatory. The employee in these circumstances is entitled to leave without notice or

to give notice, but the conduct in either case must be sufficiently serious to entitle him or her to leave at once. The employee must act promptly in response to the employer's actions (and not for some other reason, although the employer's actions need not be the sole cause) or he risks waiving the breach and affirming the contract.

66. It is clearly established that there is implied in contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. Where a claim is founded on a breach of this implied term, the tribunal's function is to look at the employer's conduct as a whole and determine, objectively, if it is such that the employee cannot be expected to put up with it.
67. The burden of proving a breach of contract sufficient to support a finding of unfair constructive dismissal is on the claimant.
68. We were referred to *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 1968 1 AER, *Autoclenz Ltd v Belcher* 2011 ICR 1157 and *Cornwall C C v Prater* 2006 EWCA Civ. 102.

CONCLUSIONS

69. Was Mrs Jenkins an employee of Mr Sutton's and/or was Mrs Jenkins a worker?
70. This is a case in which the parties sought to categorise a relationship as one of self-employment to secure the fiscal and other benefits this can bring. On examination, however, as a matter of law, Mrs Jenkins was an employee of Mr Sutton's.
71. Applying the tests, the starting point is that there was a contract. It was the Contract.
72. *Did the Contract, in the context of what happened in practice, reflect the irreducible minimum? The irreducible minimum is an obligation to do work personally, mutuality of obligation and control to a sufficient degree.*
73. Mr Sutton's case is that there was no requirement for Mrs Jenkins to work personally. In particular, there was a right of substitution. That was not the case. The substitution provisions in the Contract were not only limited in scope but subject to Mr Sutton's veto (see paragraph 14

above). The practical requirement was for Mrs Jenkins to do the work personally.

74. Mutuality of obligation in this context can be seen as an obligation on Mr Sutton to provide work and a corresponding obligation on Mrs Jenkins to accept and perform it. The Contract specified the work ("*to provide personal care and support services*") and Mrs Jenkins was required to do it.
75. As far as control was concerned, Mrs Jenkins had the expertise and it was for her to decide how to provide the personal care and support services on a minute by minute basis. In effect, however, this was no more than the freedom to exercise the skill and judgement deployed by a production worker in an industrial setting. Much was controlled by Mr Sutton. For example, Mr Sutton decided on the controversial locking arrangements. Mr Sutton monitored the CCTV, decided that his father should use air tags and that his father should move to a caravan. In practice, Mrs Jenkins had to work specified hours and do what Mrs Jenkins was told to do (albeit grudgingly on occasion).
76. In conclusion, in the Tribunal's view the "irreducible minimum" is made out in the contractual arrangements between the parties when viewed in the context of what happened on the ground.
77. That being the case, the Tribunal must stand back and look at the picture as a whole. This is a "sanity check". There are factors that point towards the relationship being that of a contract for services (rather than a contract of service). That is how the Contract names itself. Payment was made against monthly invoice. The Contract has a declaration of intent to the effect that there is no intention to create an employment relationship. Mrs Jenkins was required to carry public liability insurance. In the Tribunal's view, however, this was no more than window dressing. In no sense can it be said that Mrs Jenkins was in business on her own account.
78. The reality was that the arrangement between the parties was somewhat ineffectually dressed up to look like Mrs Jenkins was self-employed when, on the tests applied and in context, Mrs Jenkins was an employee.
79. As Mrs Jenkins was an employee of Mr Sutton, it follows that Mrs Jenkins was also a worker.
80. The claim that Mrs Jenkins was subjected to detriment done on the ground that Mrs Jenkins had made a protected disclosure (sections 43A, 43B(1)(d), 43C and 47B ERA).

81. Was there a disclosure of information which, in Mrs Jenkins' reasonable belief was made in the public interest and tended to show that the health and safety of any individual had been, was being or was likely to be endangered?
82. On our findings there were such disclosures. Exactly what words were used and on what date is not clear. However, no later than 26 September 2022 Mrs Woods had raised the issues concerning locking arrangements, DoLS, the two-ring stove and the leaky sink, all in the context of Mr Sutton's father's and/or Mrs Jenkins' safety. Our detailed findings on this are in paragraphs 20-25 above. We see no evidence to support a conclusion that Mrs Jenkins did not both reasonably believe them and reasonably believe them to be in the public interest.
83. These were qualifying disclosures within the meaning of section 43B ERA and they were made to the employer.
84. We must next consider whether Mrs Jenkins was subjected to detriment by any act or failure to act by Mr Sutton. A detriment exists if a reasonable worker would or might take the view that the treatment in question was in all the circumstances to his or her disadvantage. The reasonable worker's view must be objectively reasonable.
85. Whilst we think it can be inferred that, as time went by, Mr Sutton was increasingly less well disposed towards Mrs Jenkins because Mrs Jenkins kept on raising issues with him, that is not the same as pinpointing detriment. What can be pinpointed is that Mrs Jenkins felt belittled at the meeting on 17 November 2022 and Ms Lloyd recorded her view that Mr Sutton had undermined all the carers at the meeting and been dismissive of Mrs Jenkins (see paragraphs 37 and 42 above). We also have Mr Sutton's expressions of his views about Mrs Jenkins, albeit after Mrs Jenkins had resigned (see paragraphs 34 and 45-46 above).
86. We conclude that Mr Sutton's behaviour towards Mrs Jenkins at the meeting on 17 November 2022 would be objectively viewed by a reasonable worker as, in all the circumstances, to Mrs Jenkins' disadvantage and that detriment is made out. The same can be said about the three occasions on which Mr Sutton made critical remarks to Ms Lloyd about Mrs Jenkins (see the preceding paragraph).
87. We move on to the question of whether that detriment, or any of it, was done on the ground that Mrs Jenkins had made the protected disclosures we have identified. The test to be applied here is, what consciously or subconsciously motivated Mr Sutton to subject Mrs Jenkins to the detriment. It is not necessary for the detriment to be

solely because of the protected act but it must be an influence that is more than trivial.

88. Mr Sutton's belittling and undermining conduct towards Mrs Jenkins at the meeting on 17 November 2022 was undoubtedly influenced by several factors. Mrs Jenkins had resigned. Mrs Jenkins had raised at least as many matters with Mr Sutton that were not protected disclosures as were protected disclosures. There was a personality clash. Mrs Jenkins manner left much to be desired. Nevertheless, taking all this into account, we are bound to conclude that the detriment was influenced, consciously or sub-consciously by the protected disclosures. That influence was more than trivial. The same reasoning applies to the three occasions on which Mr Sutton made critical remarks about Mrs Jenkins to Ms Lloyd.
89. Mrs Jenkins' claim of detriment because of making a protected disclosure is well-founded.
90. The claim that Mrs Jenkins was subjected to detriment done on the ground that Mrs Jenkins had raised health and safety concerns (section 44(1)(c) ERA).
91. On the facts we reach the following conclusions. Mrs Jenkins worked at a place where there was no health and safety representative or safety committee. Mrs Jenkins brought to Mr Sutton's attention, by reasonable means, circumstances connected with her work which Mrs Jenkins reasonably believed were harmful or potentially harmful to health and safety. This is evident from the reasoning above in relation to protected disclosures made by Mrs Jenkins.
92. Further, it is evident from the same reasoning that Mrs Jenkins was subjected to detriment by Mr Sutton.
93. Mrs Jenkin's claim of detriment done on the ground of bringing circumstances connected with the work which Mrs Jenkins was doing which Mrs Jenkins reasonably believed to be harmful or potentially harmful to health and safety, to Mr Sutton's attention, is well founded.
94. The claim that Mrs Jenkins was unfairly constructively dismissed as a result of making a protected disclosure by reference to section 103A ERA.
95. Mrs Jenkins' claim is that Mr Sutton acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence when Mr Sutton (as we have found) subjected Mrs Jenkins to detriment under section 47B of the ERA.

96. It is not always the case that such circumstances automatically translate into a fundamental breach of contract. On these facts, however, it is our conclusion that there was such a fundamental breach of contract.

97. Did Mrs Jenkins resign because of the breach? In short, Mrs Jenkins did not. Mrs Jenkins was quite clear in her resignation that Mrs Jenkins was resigning because Mrs Jenkins did not want to move into the caravan (see paragraph 33 above). Further, that resignation predated any detriment that we have found. The resignation cannot, therefore, have been a response to any fundamental breach of contract.

98. It is the case that Mrs Jenkins brought the effective date of her resignation forward by leaving peremptorily on 18 November 2022. However, the cause of that was the events on 18 November 2022 and not the fundamental breach of contract we have found.

99. This claim therefore fails.

100. The claim that Mrs Jenkins was unfairly constructively dismissed by reference to section 100 ERA.

101. Mrs Jenkins' claim is that Mr Sutton acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence when Mr Sutton (as we have found) subjected Mrs Jenkins to detriment under section 44 of the ERA.

102. It is not always the case that such circumstances automatically translate into a fundamental breach of contract. On these facts, however, it is our conclusion that there was such a fundamental breach of contract.

103. However, this claim fails for substantially the same reasons that the claim of unfairly constructive dismissal as a result of making a protected disclosure by reference to section 103A ERA fails. In short, Mrs Jenkins did not resign because of any fundamental breach of contract in this respect nor was her early departure caused by it.

104. Wrongful dismissal

105. Mrs Jenkins was not dismissed in breach of contract and her claim for notice pay in this respect is dismissed.

106. Holiday pay

107. As Mrs Jenkins was an employee, Mrs Jenkins had an entitlement to holiday pay.

108. Remedy

109. Mrs Jenkins is entitled to an award for injury to feelings in respect of the detriments to which Mrs Jenkins was subjected. Here we look across both the protected and health and safety disclosures.

110. Such an award is to compensate Mrs Jenkins for the anger, distress and upset caused by the unlawful treatment Mrs Jenkins received. It is compensatory, not punitive. The focus is on the actual injury suffered by Mrs Jenkins and not the gravity of the acts of Mr Sutton.

111. There is no doubt that Mrs Jenkins presented as very angry in the hearing. However, we are not at all persuaded that much of that had to do with the detriment we have found. Rather, it was about who was right and who was wrong across all the areas of disagreement between Mrs Jenkins and Mr Sutton. Looking back to the time the events with which we are concerned took place, Mrs Jenkins' anger, distress and upset started on her first day in the job, when Mrs Jenkins discovered the caravan that it was planned Mrs Jenkins should move into with Mr Sutton's father. That set the scene for Mrs Jenkins' feelings when Mr Sutton did not agree with her on a lot of topics and not just those that amounted to health and safety disclosures. All in all, our view is that little anger, distress or upset was caused by the detriments themselves. In addition, whilst we have found detriment, that detriment itself was attributable to many factors apart from the health and safety disclosures.

112. Accordingly, we award compensation for injury to feelings of £1,100. This award is made having due regard to the Presidential Guidance on "Employment Tribunal awards for injury to feelings and psychiatric injury following *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879" as updated. The award is the bottom of the lower band of £1,100-£11,200.

113. Mrs Jenkins is awarded holiday pay of £675, gross, being the amount agreed between the parties.

Employment Judge A Matthews

Date: 17 November 2023

Judgment & Reasons sent to the Parties:

4 December 2023

FOR THE TRIBUNAL OFFICE