



EMPLOYMENT TRIBUNALS

Claimant

Miss H. Opong

v

Respondent

Cygnets Health Care Limited

Heard at: Bury St Edmunds on 8th, 9th, 10th, 11th and 12th April 2024

Before: Employment Judge: Mr. A Spencer
Mrs. L. Gaywood (non-legal member)
Mrs. A. Buck (non-legal member)

Appearances:

For the Claimant: In person (assisted by an interpreter)

For the Respondent: Mr. G. Deane (counsel)

JUDGMENT having been sent to the parties on 14 May 2024. and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The respondent is in business providing healthcare and rehabilitation services and operates hospitals including the Cygnets Hospital, Stevenage ("the Hospital") which is a medium secure hospital providing services for patients with mental health needs, learning disabilities and autism.
2. The claimant was employed by the respondent at the Hospital as a Support Worker from either 10th or 11th October 2021 until her employment ended by dismissal on 15th August 2022.
3. By two very similarly drafted claim forms presented to the tribunal on 15 and 17 August 2022 the claimant brought various claims (including a complaint of unfair dismissal and an application for interim relief). The claimant did not refer the dispute to ACAS for early conciliation before presenting the claim forms. The two claims have been consolidated. Most of the claims raised in those claim forms are no longer pursued. In particular:
 - (a) At a public preliminary hearing on 22 August 2023 Employment Judge Mason gave judgment dismissing the claims for discrimination (age, race, disability and sex). This was on the basis that the tribunal had no jurisdiction to hear them due to the failure to refer the dispute to ACAS for early conciliation; and

- (b) Employment Judge Mason’s judgment also dismissed the claim for a redundancy payment on withdrawal by the claimant;
 - (c) The claimant withdrew her application for interim relief.
 - (d) The claimant withdrew her claims in respect of notice pay and holiday pay at a preliminary hearing on 22 June 2023.
4. This left only the claim for unfair dismissal to proceed to a final hearing. The claimant did not have the requisite two years continuous service as at the date of her dismissal to bring an “ordinary” unfair dismissal complaint. She asserts that she was dismissed for making protected disclosures (i.e., she relies on automatic unfair dismissal pursuant to s103A Employment Right Act 1996 (“ERA”)).
5. The issues in relation to the unfair dismissal claim were confirmed in the list of issues attached to a case management summary prepared by Employment Judge Havard following a preliminary hearing on 25 September 2023.
6. There is no dispute that the claimant was dismissed by the respondent. The claimant says that she made disclosures about working conditions and other issues at the hospital. She relies on eleven occasions where she alleges that she made such disclosures. She says that these disclosures amounted to Protected Disclosures (or “whistleblowing”) and that she was dismissed because of her whistleblowing. The respondent denies this and asserts that the claimant was dismissed for issues unrelated to the alleged whistleblowing. The respondent says the claimant was dismissed for her conduct and performance.
7. The issues for us to determine are set out in the list of issues. However, the case is about:
- (a) whether the claimant’s actions amounted to whistleblowing and gave her legal protection as a whistleblower. The respondent accepts that most of the events relied on by the claimant as whistleblowing occurred (many are contained in emails) but does not accept that they amounted to protected disclosures which give the claimant protection as a whistleblower; and
 - (b) whether the claimant was dismissed for whistleblowing.
8. Throughout these Reasons we refer to the claimant’s alleged Protected Disclosures by reference to the numbers given in the list of issues at page 127 of the hearing bundle (i.e., we refer to Protected Disclosures 1 to 11). The claimant’s witness statement refers to some of them by different numbers. We use the nomenclature from the list of issues for clarity. The claimant’s witness statement also refers to some further or different alleged Protected Disclosures that do not appear on the List of Issues. I explained to the claimant during the hearing that if she sought to rely on different Protected Disclosures to those set out in the List of Issues, she would need to make an application to amend her claim. No amendment application was made and so we confine our determination to the eleven Protected Disclosures confirmed in the List of Issues.

Witnesses

9. We heard evidence from the claimant herself. She confirmed the truth of her witness statement and called no other witnesses.
10. For the respondent we heard evidence from the following witnesses:
- (a) Frank Egbo, (Ward Manager);

- (b) D'Monte Watson, (Ward Manager);
- (c) Eve Kaklamanos, (Clinical Manager);
- (d) Suzie Adam, (Hospital Manager).

11. The witnesses gave evidence under affirmation or oath and confirmed the truth of their written statements. We had the benefit of seeing the evidence of each witness tested under cross examination and the opportunity to put questions to each witness ourselves.

Documentary Evidence

12. We considered the contents of an agreed hearing bundle, a bundle of witness statements, a supplementary bundle of documents from the claimant, a cast list, the respondent's list of key documents and chronologies from each party.
13. On the morning of day two of the hearing the claimant sought to add some further documents to the hearing bundle:
- (a) One was the respondent's disciplinary policy. We allowed this to be added. It was of some relevance in that the claimant had received letters of concern about her conduct and performance which referred to potential disciplinary action;
 - (b) The claimant also sought to rely on a further collection of documents she sent to the tribunal by email at 05:47 on the morning of day two of the hearing. After hearing submissions from both parties, we refused to allow these documents to be added to the bundle. The claimant had not disclosed them until that day despite an earlier order that all relevant documents be disclosed by 30 November 2023. There was no good reason for the late disclosure. Further, the claimant had confirmed at the outset of the hearing on day one that there were no further docs she wanted to rely on. In any event, the further documents were not relevant to the issues before us.
14. We also heard oral closing submissions from the claimant and the respondent's counsel who provided us with a written note on s103A ERA

Findings of Fact

15. The Hospital is an 82-bed low and medium secure psychiatric hospital providing services for patients with mental health needs, learning disabilities and autism. Patients have a variety of acute psychiatric conditions, and mental health disorders. There are six wards (two for female patients and four for male patients). The claimant spent most of her time working on Pattison Ward (a ward for male patients). The behavior of patients can be challenging. Patients may behave in an abusive, aggressive and violent way.
16. The claimant has had prior experience of psychiatric care as a patient in both Italy and the UK after a diagnosis of borderline personality disorder. She had also experienced anxiety and depression.
17. This personal experience informs the claimant's behaviour. She clearly feels passionately about the welfare of patients and is motivated to speak out whenever she perceives that care is not to the standard she expects.
18. The claimant worked under the terms of a written contract of employment. The contract provided for the claimant's employment to be subject to the successful completion of a six-month probationary period. It also provided for

the respondent's Probationary Policy to apply during the probationary period. The contract also contains clauses requiring the claimant to comply with the respondent's rules, policies and procedures and requiring the claimant to report any wrongdoing by herself or any other employee.

19. The respondent has whistleblowing policy which encourages staff to speak up about concerns. It gives examples of the types of concerns that may be raised and sets out a procedure for raising, investigating and addressing concerns.
20. The claimant was an experienced care worker. She worked for the respondent throughout as a Support Worker providing support to patients. Her employment commenced on either 10th or 11th October 2021. Initially the claimant was employed on a "bank" basis and not as a permanent employee.
21. D'Monte Watson and Frank Egbo were both Ward Managers. Mr. Watson was the claimant's immediate Line Manager. Eve Kaklamanos (Clinical Manager) was Mr. Watson's Line Manager. Suzie Adams (Hospital Manager) managed the hospital.
22. There was little evidence before us about the claimant's performance at work in the period before late January 2022 when she moved from being "bank" to become a permanent member of staff. There was no evidence of any significant problems or issues in this period and the fact that the claimant was offered a permanent position indicates that there were no such issues.

Protected Disclosure 1(a) (email 17 Nov 2021)

23. C sent an email to Chloe Wratten (HR & Training Coordinator) on 17 November 2021. The claimant relies on this as Protected Disclosure 1. Protected Disclosure 1 is in fact said to be a combination of two emails sent on different dates and so we refer to this as Protected Disclosure 1(a) (with the second email referred to as Protected Disclosure 1(b)). The email was entitled "*counselling [sic] enquiry*". The relevant text reads:

"I have seen that independent adjustments are not working - when it comes to the way I perform at work and with my colleagues in general - and I was wondering if I could sign up for the employee well-being / with the Counselling [sic] support programme please.

I believe that this programme and Councilors [sic] advice will surely be helpful as I plan on working full time very soon at the hospital but to keen to become strong minded and positive as much as possible to be able to assist patients in the best way possible as well as becoming a genuine colleague"

24. There were general concerns on the part of the respondent's management regarding lateness of staff in January 2022. Communications were sent to staff reminding them that they must attend on time and warning that continued lateness may result in a letter of concern being issued and thereafter formal disciplinary action. A program was initiated whereby the reception at the hospital recorded arrival times for staff and notified HR so that persistent lateness could be identified and addressed.
25. The respondent had concerns about the claimant being late for work as she had been late for work on several occasions. Chloe Wratten sent a letter of concern to the claimant on 25 January 2022 regarding lateness. The claimant was warned about her punctuality, informed that her attendance would be monitored and that further incidences of lateness may result in disciplinary action.

Protected Disclosure 1(b) (email 25 January 2022).

26. Later the same day on 25 January 2022 the claimant sent an email to Chloe Wratten in response to the letter of concern. In the email the claimant said:

"Thank you for your e-mail and thank you for resign [sic] this concern to me. I do struggle during the night to actually sleep due to previous life experiences and mental health - I will be starting counseling soon and that should help me to not feel as anxious and worried when I am supposed to sleep and when I am supposed to come into work".

27. Chloe Wratten responded to the email on 27 January 2022 to confirm that she would make a note of what the claimant had said and to ask the claimant to let her know if the respondent could support the claimant in any way. She also gave the claimant the phone number for the respondent's Employee Assistance Program.
28. The claimant moved from working as a "bank" worker to a permanent employee on 31 January 2022. She had signed her contract of employment earlier that month.
29. There were serious issues with respect to the claimant's lateness and her relationship with work colleagues from the outset after she moved to become a permanent employee. This is clear from the contemporaneous documents. For example:
 - (a) The claimant raised a complaint about an incident with a fellow employee on 1 February 2022. She complained about the way her work colleague (who was her "induction buddy") spoke to her. The claimant alleged that her work colleague had shouted and sworn at her in front of patients;
 - (b) By March 2022 Frank Egbo had identified interpersonal problems between the claimant and her work colleagues. These concerns are recorded in a clinical supervision record dated 19 March 2022. Mr. Egbo identified the need for the claimant to improve her interpersonal skills and be more patient and relatable with her colleagues;
 - (c) The claimant sent an email to Mr. Watson on 20 March 2022 headed "*Grievance details*" in which she referred to work colleagues "*lack of patience and tolerance*" towards her when she raised concerns about work colleagues doing things wrong;
 - (d) The claimant sent an email to Mr. Watson on 23 March 2022 asking him to obtain CCTV footage in relation to an altercation with work colleagues over some missing cutlery;
 - (e) Frank Egbo raised written concerns to D'Monte Watson on 24 March 2022. He gave a list of what he described as "*the reasonable things within her job description that she has challenged and disrespectfully refused to do*". The list included examples of the claimant inappropriately using an alarm, being "*verbally threatening*", refusing to comply with instructions, frequently attending late, being disrespectful and argumentative, threatening to report work colleagues and being rude to work colleagues.
 - (f) A written note addressed to Mr. Watson records the claimant being late on five occasions in March 2022.
 - (g) The claimant sent an email to Mr. Watson on 26 March 2022 entitled "*Grievance and IMPORTANT CONCERNS*" in which the claimant raised several complaints and concerns about her work colleagues not undertaking tasks.
 - (h) On 29 March 2022 Sian Collinson (a Nurse) made a written complaint to Mr. Watson regarding the claimant. She gave several examples of the claimant's conduct and alleged that the claimant was regularly disappearing from the ward, being late and being rude and argumentative. She named another work colleague who had told her

he was struggling to work with the claimant as she was questioning everything he did and correcting him on how to do things. The complaint referred to the effect of the claimant's behavior being to *"brings down the moral [sic] of the team when she is on shift"* and described the claimant as *"incredibly difficult to work with, is resistant to training and being managed, and frankly does not wish to work whilst on shift"*;

- (i) On 10 April 2022 the claimant sent an email to Mr. Watson entitled *"Favouritism and bullying"* in which she raised complaints about a nurse work colleague who she described as a *"non-team player, awful to work with, bad minded"* and bullying;
 - (j) On 17 April 2022 Mr. Egbo approached the claimant to undertake a clinical supervision due to what he described in his written record as *"constant lateness and other issues raised on the ward"*. The claimant declined to participate as she said that she did not trust Mr. Egbo and wanted another supervisor.
30. By April 2022 there were significant problems between the claimant and several different work colleagues. There was also a pattern of the claimant being late for work.
- Protected Disclosure 2 (Email 20 April 2022)
31. The claimant's second alleged Protected Disclosure is said in the list of issues to have been made in an email to Agnes Tutani and Mr. Watson on 20 April 2022. This is an error in two respects:
- (a) the relevant email was in fact dated 17 April 2022; and
 - (b) the claimant's evidence made no mention of the email being sent to Mr. Watson. She only gave evidence to say was sent to Agnes Tutani who was the "Freedom to Speak Up Guardian" under the respondent's whistleblowing policy. This policy provides for staff to raise concerns with management in the first instance. It also provides for concerns to be raised to the Freedom to Speak Up Guardian where staff do not feel able to raise concerns with management or where they have done so and feel their concerns are not being taken seriously.
32. The email is entitled "Concerns at work". The part of the email that the claimant relies on as containing a Protected Disclosure focuses on the fact that the claimant had received a letter of concern about her lateness. She confirmed in the email that her lateness was due to her health issues and complained that there was insufficient awareness on the part of the respondent's staff about the mental health issues she was experiencing.
33. The respondent denies that this email was ever sent. We find it is more likely than not that the email was not sent (i.e., it was drafted by the claimant but not actually sent). The reasons for this are:
- (a) The copy email produced by the claimant does not show it was sent to Agnes Tutani. It shows that it was forwarded from the claimant's work email to her personal email;
 - (b) The claimant said in her pleaded case that the email was also sent to Mr. Watson. However, he did not receive it and the claimant's evidence does not suggest she sent it to him;
 - (c) The email does not have an ending or sign off (unlike the claimant's other emails). This is again consistent with it being a draft);
 - (d) There is no evidence of any acknowledgment or response from Ms. Tutani. It is implausible that there would be no response. Particularly as the claimant was raising serious issues to someone whose role is to deal with

- those concerns under the whistleblowing policy;
- (e) There was no follow up by the claimant (i.e., she did not chase when received no response)
34. We conclude that the claimant is mistaken on this point. The email is more likely to be a draft and not a final version that was ever sent.
35. On 20 April 2022 Mr. Watson held an informal meeting with the claimant. He followed up by writing to the claimant to issue her with a letter of concern [226]. He warned the claimant about her conduct and performance and what he described as “*ongoing and persistent lateness*” and “*challenging and undermining the nurse in charge*”. The claimant was warned that her conduct and performance would be monitored and that if there was no improvement, formal disciplinary action may follow. By a separate letter the same day Mr. Watson wrote to the claimant to inform her that he was extending her probation period by three months to 31 October 2022 for the same reasons.
36. After the meeting the claimant had an email exchange with Mr. Watson about her mental health problems in which he suggested an Occupational Health referral. The claimant agreed and a telephone medical assessment was arranged. In one of her emails the claimant said that whilst she would stop challenging nurses, she hoped that she could still make formal complaints if it was justified. Mr. Watson replied to this by encouraging the claimant to raise any concerns to her team lead, himself or the clinical service manager. He also reminded the claimant of the respondent’s “Speak up” policy under which concerns could be raised anonymously.
- Protected Disclosure 3 (Email 30 April 2022)
37. The claimant sent an email to Mr. Watson on 30 April 2022. She relies on this as Protected Disclosure 3. The email is entitled “*Concern/Report*”. The claimant reported that during her shift she saw a member of staff asking a service user for a cigarette and then smoked the cigarette next to other service users. She referred to the fact that during her training she had been told that staff were not to smoke during shifts and expressed the view that it was inappropriate for the staff member to have asked a service user for a cigarette. Mr. Watson replied by asking for the name of the staff member. The claimant provided this. Mr. Watson acted on the claimant’s concern. CCTV footage was reviewed to see if this captured the incident. However, it could not be substantiated from the footage. At a later stage, further investigation disclosed further evidence and action was taken by respondent.
- Protected Disclosure 4 (Verbal approximately April/May 2022)
38. In April 2022 the claimant had responded to an emergency alarm. When she arrived on scene she was told by Shane (a senior support worker from another ward) that she should not get involved in restraining the patient that caused the incident as he only wanted assistance from male staff. The claimant raised her concerns about this to Shane. He told the claimant that it was common practice because, as he put it, “*men were stronger than women*” and because the claimant did not look like she was capable of restraining the patient.
39. The claimant made a verbal complaint about the matter to Clement the nurse in charge of the relevant ward (Chamberlain Ward). Clement agreed with the claimant that Shane’s behavior was insulting and discriminatory and advised her to report the matter further. The claimant put the complaint in writing to Mr. Watson. However, we do not have a copy of the relevant email as it was not in the hearing bundle. Mr. Watson accepted that the claimant had reported this incident to him. The claimant relies on these complaints as Protected Disclosure 4.
40. Mr. Watson took no action in relation to the complaint other than to discuss it

with the claimant and to seek to explain or justify Shane's decision. He took the view that it was not a policy issue. His view was that all members of staff (whether male or female) were trained in restraint. He explained that the policy was sometimes to use stronger members of staff based on an assessment of the risk presented by each incident. He did not address Shane's apparently sexist comments, attitude and approach.

Protected Disclosure 5 (Email 4 May 2022)

41. On 4 May 2022 the claimant sent an email to Chloe Wratten and others entitled "*Grievance/Enquiry*". The claimant relies on this as Protected Disclosure 5. In the email the claimant asked the recipients to "*please receive this email as an enquiry*". The email raised an enquiry about racial abuse experienced by the claimant. Little detail or information was given. The claimant referred to "*the fact that 3 different patients were constantly racially discriminatory*" without giving any other details as to which patients were involved, when the incidents had occurred or what was done. The claimant also went on to give a little more detail about an incident that day by saying "*The most recent incident being today 04/05/22 when I heard again racist comments about my looks*". Although the date and general nature of the comments were given, again no details were given as to which patients were involved or what the comments were.
42. The claimant referred to such conduct affecting her mental health and concluded by saying "*May I please ask for you to look into this ... and let me know your best advice please?*".
43. Chloe Wratten replied to the claimant's email the same day. She acknowledged that it was unpleasant for the claimant to hear such remarks and made the point that such situations could arise when working within a mental health hospital with patients who are disinhibited. The email concluded with a request for the claimant to let Ms. Wratten know what support she would like so this could be discussed with management to see if it could be implemented. The claimant replied later the same day by making it clear that moving her way from work on Tiffany Ward would assist her. This would take her away from the patient concerned.
44. Ms. Wratten replied by asking the claimant to meet with her and Mr. Watson on 10 May 2022 to discuss the matter further.
45. The claimant attended an Occupational Health assessment. A written report was prepared on 5 May 2022. The report records that the claimant had a history of anxiety and symptoms of stress related illness and that although she was fit for work, there were some "*work placed adjustments*" that were recommended "*as a supportive measure*". In particular, a risk assessment was recommended so that the sources of stress could be clearly identified and measures put in place to reduce the stress to the claimant.
46. The claimant attended a meeting with Mr. Watson, Alicia Hammond (HR & Training Coordinator) on 10 May 2022. At the outset Mr. Watson explained that the purpose of the meeting was "*to understand how things are for you and how you feel things are going*". He referred to the fact that since the claimant became full time there had been several issues raised by the claimant and her work colleagues and that he wanted to explore how these issues could be reduced. During the meeting various matters were discussed including the comment about the claimant being unable to restrain a patient because she was female and the racial abuse from service users. The meeting concluded with Mr. Watson encouraging the claimant to reflect upon the discussion and to consider how she might develop her resilience and confirmed that the respondent would look at how they could support her

further.

Protected Disclosure 6 (Verbal – approximately May/June 2022)

Protected Disclosure 7 (Verbal – daily approximately May to August 2022)

47. The claimant's witness evidence was that daily from April 2022 to August 2022 she verbally reported to her team leaders, concerns about hygiene in relation to several patients. She relies on these as Protected Disclosures 6 and 7. In particular she says that she disclosed that patient RM on Pattison ward was not having a bath or shower and that conditions were "unhygienic/unclean". The claimant also said in her pleaded case that she reported "dirty room, clothes, cup on floor, no bedsheets, smell of urine". However, these specific matters were not mentioned in her witness statement and are not supported by her evidence. The claimant's evidence as to what she actually said was "I verbally reported several concerns about (a) the patients RM, B and KB in Pattison Ward not having baths/showers (b) unhygienic/unclean conditions but these were disregarded".
48. We find that on more than one occasion the claimant brought to her team leader's attention the fact patient RM and the other patients had not had a bath or shower and that she raised general concerns about hygiene. The claimant said she did so daily from April to August 2022. However, we do not accept that the claimant made such complaints daily over this 5-month period. This is plainly an exaggeration. We accept that on a few occasions the claimant made such comments. We accept Mr. Egbo's evidence in this regard. The claimant had little hesitation in raising frequent concerns by email. It is inconceivable that the claimant would not have referred to these matters in an email had she been raising such concerns daily for several months without any action being taken. This is an example of a conscientious employee reporting things that needed doing (e.g., where a patient needed encouragement with personal hygiene or where areas needed cleaning).
49. On 15 May 2022 the claimant had a clinical supervision meeting with a supervisor Jane Ngwenya in which the claimant confirmed that in her view her lateness had improved, that she was getting on with the members of her team and taking a little bit more time before raising complaints.
50. An incident occurred between the claimant and a work colleague named Felix (a Bank Support Worker) on 15 June 2022. The claimant had objected to Felix abbreviating her name to "Hep" when writing it up on the daily planner. She asked in front of patients whether Felix had a learning disability. Felix found the comment offensive and complained about the incident. The claimant also complained about the incident. She sent an email to Mr. Watson on 15 June 2022 entitled "Grievance". In the email the claimant objected to the shortening of her name and complained about the way the Nurse in Charge had spoken to her about the matter. She also complained about the nurse redeploying the claimant to a different ward due to the incident.
- Protected Disclosure 8 (Email 16 June 2022)
51. The claimant's pleaded case was that by an email on 16 June 2022 she disclosed that she had been subjected to abuse by a Senior Support Worker named Daniel. The claimant relied on this as Protected Disclosure 8. The claimant sent an email to Mr. Watson on this date. However, it contains no reference to the incident. The claimant accepted in evidence that the incident with Daniel occurred on 30 July 2022 and was not mentioned in the email dated 16 June 2022.
52. The claimant did, however, make a short reference in the email to racial abuse. She referred to "a service user (with mental capacity) deliberately racially abused me on countless occasion [sic]". She also referred to the

impact this had on her and the difficulty she had dealing with this.

53. On 29 June 2022 Mr. Watson undertook a stress risk assessment in discussion with the claimant in accordance with the Occupational Health recommendation. The claimant identified that her main work place stressor was because she felt that concerns she raised were not listened to or responded to. She confirmed that she felt supported most of the time and that despite past problems she was getting on much better with the other members of her team. Mr. Watson also discussed the claimant's recent levels of lateness with her. The claimant explained that this was due to anxiety and worry about coming to work and the time that she left home. Mr. Watson confirmed that any further lateness would trigger a probation review.

54. The claimant was late the next day on 30 June 2022. She was clearly concerned about this as Mr. Watson had discussed lateness with her only the previous day. The claimant emailed Mr. Watson that day to explain that she was late because there was long queue to access the site due to covid testing.

55. The claimant had a clinical supervision with Sarathamani Alias on 5 July 2022. In the written record the claimant's performance was recorded as "*exceeding required standards*". It is unexplained as to why that view taken. We heard no evidence about the matter. The conclusion seems at odds with the other evidence.

Protected Disclosure 9 (Email 5 August 2022)

56. The claimant had an altercation with a Senior Support Worker named Daniel on 30 July 2022. She sent an email about this to Mr. Watson, Alicia Hammond and Chloe Wratten on 5 August 2022. The claimant relies on this as Protected Disclosure 9. In her email she complained that a Senior Support Worker had shouted at her, raised his voice to her and made comments such as "*gosh you have such a bad attitude*" and "*you ... are so annoying*". Mr. Watson responded by asking for the name of the person involved and for the claimant to confirm how she would like the issue to be resolved. The claimant replied and confirmed that it was "Daniel" who worked on Pattison Ward and that she would like Mr. Watson to speak to Daniel about the matter.

Protected Disclosure 10 (Email 10 August 2022)

57. The claimant sent an email to Chloe Wratten and Alicia Hammond on 10 August 2022 entitled "*Whistleblowing*". The email began by stating that the claimant's purpose was to enquire "*what measures are in place in order to make my voice heard in regard to how the Pattison ward and its environments are poor in hygiene, tidiness and cleanliness*". In the email the claimant mentioned what she described as "*mess*" that had built up on days when she was not at work. However, this was not the focus of her email. The focus was to complain that work colleagues were not as diligent about cleaning as the claimant and that the claimant was doing a disproportionate amount of the cleaning work. This was emphasized by the claimant putting text in bold and capital letters at one point in the email with the words:

"YET I AM TOLD TO CLEAN FOR OTHERS WHEN THEY STILL HAVE THE TIME TO DO IT??? YET OTHERS (SUCH AS SENIORS) ARE REFUSING TO DO CLEANING BUT AREN'T TOLD OFF BY THE NURSE???".

58. Further, the claimant concluded with the words:

"I hope that this brief email have [sic] giving you an insight of the immense challenge that I face every day with both teams. By all means if the cleaning of the ward or after the patients is a choice and not a mandatory task to be completed within the hour please I would like to know".

59. A short while later that same same day Chloe Wratten sent a letter to the claimant inviting her to a probation review meeting on 12 August 2022.
60. The claimant responded by email to express her view that the meeting had been called because she had raised concerns. Chloe Wratten replied on 11 August to confirm that the reason for the meeting was because of several conduct issues that had been brought to her attention. These included signing hourly presence checks when the claimant had not actually completed the checks, failing to conduct an arm's length observation correctly and refusing to complete a reasonable task when requested to do so.
61. The claimant points to the fact that she was sent the invitation to the probation review meeting within an hour and half of sending her email entitled "Whistleblowing" She invites us to infer from the timing that the respondent took punitive action in response to her whistleblowing. We do not accept this. We accept the respondent's evidence that the decision to invite the claimant to the probation review meeting was made before the claimant sent her email. Several concerning matters regarding the claimant had been brought to the attention of Mr. Watson in the days leading up to 10 August. In particular:
- (a) In July 2022 a nurse had emailed Mr. Watson to express concern that the claimant was not completing patient observations correctly. Mr. Watson had reviewed CCTV footage which supported this.
 - (b) On 5 August 2022 Mr. Watson came to work and discovered that a patient had fallen and sustained a head injury during the night and had been taken to hospital. He wanted to find out when this might have happened and why it was not picked up earlier. He cross referenced the CCTV footage against the observation sheets. He discovered that the claimant had signed an observation sheet to say that she had observed the patient when the CCTV footage showed that the claimant had not been present during the relevant time.
 - (c) Mr. Watson had investigated the claimant's complaint about the incident with Daniel on 30 July. His investigation suggested that the claimant had not been shouted at and that it was she who had argued with colleagues about taking over duties;
 - (d) A further incident on 9 August 2022 had been brought to Mr. Watson's attention in which the claimant had been asked to complete a reasonable task but had refused to do so.
62. Mr. Watson had discussed these matters with his clinical manager Eve Kaklamanos who decided to invite the claimant to a probation review meeting. The decision to invite the claimant to the probation review meeting was taken before the claimant sent her e-mail on 10 August 2022.
63. The date of the probation review meeting was subsequently changed to 15 August 2022.
- Protected Disclosure 11 (Verbal 14 August 2022)
64. On 14 August 2022 the claimant made a verbal complaint to her team leaders that cleaners were coming in every morning but were avoiding cleaning certain patient's rooms and that she witnessed a cleaner avoiding cleaning up a mess in the kitchen and instead purposely cleaning around the mess.
65. Before the probation review meeting took place Mr. Watson prepared a written summary of the claimant's conduct since she began work as a permanent employee on 31 January 2022. The document referred to:
- (a) lateness;
 - (b) behavior in challenging and undermining more senior staff;
 - (c) reluctance to undertake tasks asked of her by senior staff;

- (d) making the offensive comment to Felix about learning disabilities;
 - (e) not conducting an arm's length observation of a patient correctly;
 - (f) signing a record to confirm that she had conducted an hourly check on a patient when CCTV footage showed the claimant had not completed the check;
 - (g) a persistent and ongoing pattern of clashes with staff.
66. Mr. Watson's view was set out at the end of his note with the recommendation that "*I truly feel there is no other option over [sic] than to terminate her contract at this point*".
67. The probation review meeting took place on 15 August 2022 and was attended by the claimant, Eve Kaklamanos (Clinical Manager) and Alicia Hammond (HR & Training Coordinator). At the meeting there was a discussion about various matters including:
- (a) the claimant's lateness;
 - (b) the claimant having failed to conduct an "arm's length observation" of a patient correctly. Such observations required the support worker to always remain within an arm's length of the patient. The claimant accepted that during the observation she had moved away from the patient while he was changing to preserve his dignity;
 - (c) the claimant having recorded in writing that she had conducted an observation of a patient who required hourly observations when the CCTV footage showed that she had not conducted the observation. The claimant apologised for this.
 - (d) The incident with Felix in which the claimant had asked him if he had a learning disability.
68. At the end of the meeting Eve Kaklamanos confirmed to the claimant that her employment would be terminated. The reason given was "*I think you have had the support you need; I do not feel that this environment is right for you.*"
69. Eve Kaklamanos wrote to the claimant on 15 August 2022 to confirm that the claimant's probation period had been unsuccessful and that her employment would be terminated that day with payment in lieu of notice. The reasons given for the decision were the claimant's conduct whilst on the wards and concern about the claimant's levels of lateness.
70. All this action was taken under the respondent's probation policy.
71. The claimant subsequently appealed unsuccessfully against her dismissal. We need make no specific findings about that part of the process as does not assist us in determining the issues before us.

Conclusions/Discussion (including applicable law)

72. Taking the issues in turn our conclusions and the applicable law is as follows:

Was the claimant dismissed?

73. An employee who wishes to claim unfair dismissal must show that he or she has been dismissed within the meaning of section 95 Employment Rights Act 1996 (ERA). There is no dispute that the claimant was dismissed by the respondent on 15 August 2022.

Did the claimant have protection as a whistleblower?

74. To be protected as a whistleblower the claimant must show that she made

one or more “protected disclosures” (i.e., she “blew the whistle” in a way that gives her protection under the law). A “protected disclosure” is defined in section 43A Employment Rights Act 1996 as being a “qualifying disclosure”. This, in turn, is defined in section 43B ERA.

75. To be a “qualifying disclosure” all the conditions set out in Part IVA of the ERA must be met. These were broken down into five elements in the guidance given by the Employment Appeal Tribunal in Williams v Brown UKEAT/0044/19/OO as follows:
- (a) First, there must be a disclosure of information;
 - (b) Secondly, the worker must believe that the disclosure is made in the public interest;
 - (c) Thirdly, if the worker does hold such a belief, it must be reasonably held;
 - (d) Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f) of section 43B(1);
 - (e) Fifthly, if the worker does hold such a belief, it must be reasonably held.
76. Unless all five conditions are satisfied there will not be a qualifying disclosure and the worker making the disclosure will have no protection as a whistleblower.
77. Furthermore, it is not enough for all five conditions to be satisfied. To gain the necessary protection s43A also requires that the disclosure be made by one of the methods in s43C to 43H of the ERA. However, this is not an issue in this case as all disclosures were made to the respondent as the claimant’s employer and were therefore made pursuant to s43C ERA.
78. Although there are five essential elements to a protected disclosure, in this case, some of the five elements present more difficulty than others. The legal position concerning two of the elements warrant further explanation as they are of prominence in this case. They are:

Has there been a disclosure of information?

79. The term “disclosure” is not defined in the legislation. However, a disclosure must convey facts. In Cavendish Munro Professional Risks Management Ltd v Geduld UKEAT/0195/09, the Employment Appeal Tribunal held that to be protected a disclosure must involve giving information, and not simply voice a concern or raise an allegation. However, in Kilrairie v London Borough of Wandsworth [2018] EWCA Civ 1436, the Court of Appeal rejected the suggestion that there was a rigid distinction between the two categories of “information” and “allegation” and rejected the contention that the two were mutually exclusive. Thus, some (but by no means all) allegations may contain sufficient information to satisfy the requirement of disclosing information. It will depend on the factual context and whether the disclosure has “sufficient factual content and specificity” to be capable of showing a relevant failure.

Public interest

80. The reference in the legislation to **public interest** disclosures must not be ignored. Disclosures that lack the required public interest element do not give a worker protection under the law as a whistleblower. The public interest test was considered by the Court of Appeal in Chesterton Global Ltd (t/a

Chestertons) v Nurmohamed [2017] EWCA Civ 979. In that case tribunals were reminded that “*the broad intent is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers*”. Further, Chesterton established that when assessing whether the public interest element is present, a tribunal should take into account four factors:

- (a) The number of individuals in the group whose interests the disclosure served. The larger the number of persons whose interests are engaged, the more likely it is that there will be features of the situation which will engage the public interest.
- (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed. Disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, or where the effect of the wrongdoing is marginal or indirect.
- (c) the nature of the wrongdoing disclosed. Disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people.
- (d) the identity of the alleged wrongdoer. The larger or more prominent the wrongdoer, the more readily the disclosure will engage the public interest.

81. The claimant relied on eleven potential protected disclosures. Taking each in turn, our conclusions are:

Protected Disclosure 1(a) and 1(b) (Emails 17 November 2021 and 25 January 2022):

82. The claimant says that the information disclosed in these e-mails was that she had mental health issues including borderline disorder and that she required support from the respondent. She says this information tended to show that the respondent was failing to comply with a legal obligation to which they were subject (i.e., section 43B(1)(b) ERA is engaged). The legal obligation relied on is the duty to make reasonable adjustments for the claimant as a disabled employee under sections 20 and 21 Equality Act 2010 (EQA).
83. The information disclosed by the claimant in these emails was that she was struggling with work performance and relationships with colleagues and would like to seek support from the respondent’s employee wellbeing and counseling support program. In her second email the claimant referred to starting a course of counselling. There is no mention of any specific mental health condition in either email. There is no disclosure of information that tends to suggest a breach of the duty concerned. Informing the respondent of a problem and either asking for help or informing them that help is being sought elsewhere does not disclose a breach of the relevant legal obligation.
84. The emails do not amount to protected disclosures (either individually or in aggregation). Specifically, the following necessary elements are missing:
- (a) We do not accept that the claimant believed at the time that the disclosures contained in her emails tended to show that her disclosure was in the public interest or that the disclosure tended to show the relevant breach of duty; and
 - (b) Those beliefs (even if they had been present) could not be reasonably held.
85. These were not protected disclosures and gave the claimant no protection as a whistleblower.

Protected Disclosure 2 (Email 17 April 2022)

86. The claimant says the information disclosed in this email was that “*she had been diagnosed with Mental and behavioral by disorder by Herts Partnership University NHS Trust with symptoms of severe anxiety causing her to be late for work and amendment to her working conditions*”. The claimant says this information tended to show that the respondent has failed, is failing or is likely to fail to comply with any legal obligation to which they were subject (i.e., section 43B(1)(b) ERA is engaged).

87. We have concluded that this email was never sent. There was therefore no disclosure of information. This was not a protected disclosure and gave the claimant no protection as a whistleblower.

Protected Disclosure 3 (Email 30 April 2022)

88. The information disclosed in this e-mail was that a member of staff was taking cigarettes from a service user and smoking it while next to other service users. This was supplemented by the claimant later identifying the member of staff when asked to do so.

89. The claimant says that this disclosure of information tended to suggest that that the health or safety of any individual has been, is being or is likely to be endangered (i.e., section 43B(1)(d) ERA is engaged). Although the claimant did not put her case in this way, it is also a disclosure that tends to show that the relevant worker was failing to comply with a legal obligation (i.e., the obligation in their contract of employment to follow the respondent’s policies and procedures and the duty of care owed to patients).

90. Taking the five essential elements of a protected disclosure in turn we conclude:

- (a) The claimant made a disclosure of information;
- (b) She believed that the disclosure was made in the public interest;
- (c) That was a reasonably held belief. The disclosure directly affected only a single patient but potentially affected all patients in the Hospital as the member of staff concerned could behave in a similar way to any patient. The wrongdoing was particularly egregious to the extent that it involved taking advantage of a vulnerable individual and was done by someone in a position of power over patients;
- (d) The claimant believed that the disclosure tended to show the necessary endangerment of health or safety and/or breach of a legal obligation; and
- (e) That was a reasonably held belief.

91. Protected Disclosure 3 was therefore a Protected Disclosure and gave the claimant protection as a whistleblower.

Protected Disclosure 4 (Verbal approximately April/May 2022)

92. The claimant says that the information she disclosed was that “*she had been subjected to discrimination on the grounds of her sex by a nurse on Pattison Ward who told the claimant not to get involved with a patient because he only wanted assistance from male staff*”. The claimant says this information tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (i.e., section 43B(1)(b) ERA is engaged). The legal obligation is the obligation not to discriminate against persons on grounds of their sex.

93. Taking the five essential elements in turn:

- (a) There has been a disclosure of information. Sufficient facts about the incident were disclosed.
- (b) The claimant believed that such a disclosure was in the public interest. The main purpose of the complaint was in relation to the way the claimant alone was treated. However, she also made the

- disclosure with the intention of preventing future discrimination both to herself and other female employees at the Hospital;
- (c) That belief was not reasonable. The necessary public interest element is not present. Only the claimant was affected by the incident. Whilst it engaged an important matter (sex discrimination), it is not indicative of a systemic wider problem and was a one-off act by a relatively junior member of staff. Whilst it was plainly right for the claimant to raise a complaint about this, it is an example of a private workplace dispute between two employees that should not attract the enhanced statutory protection accorded to whistleblowers.
 - (d) The claimant did believe that the disclosure tended to show breach of a legal obligation; and
 - (e) That belief was reasonably held.
94. This was not a Protected Disclosure and gave the claimant no protection as a whistleblower.
- Protected Disclosure 5 (Email 4 May 2022)
95. The claimant says that the information she disclosed in this email was that she *“had been subjected to racial abuse from a patient on Tiffany ward and the threat of further abuse caused her anxiety”*. The claimant says this information tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (i.e., section 43B(1) ERA is engaged).
96. Two of the five elements of a Protected Disclosure are missing:
- (a) The necessary disclosure of information is absent; The required “sufficient factual content and specificity” is missing. No disclosure is made about what happened. At its highest what is disclosed is that racial comments were made about the claimant’s looks by unnamed patients. The reader is left with no understanding of what happened due to the lack of information disclosed.
 - (b) We do not accept that the claimant believed that the disclosure was made in the public interest. It was her own interest that motivated her to raise the complaint (albeit that interest was the entirely legitimate interest of stopping racist, abusive and offensive comments being made about her). The email was sent as an enquiry about what action could be taken to protect the claimant from such abuse.
97. This was not a Protected Disclosure and gave the claimant no protection as a whistleblower.
- Protected Disclosure 6 (Verbal – approximately May/June 2022)
- Protected Disclosure 7 (Verbal – daily approximately May to August 2022)
98. We deal with these together as they raise the same complaints.
99. The claimant says that the information she disclosed was that there were:
- (a) *“serious patient hygiene issues in connection with a patient (RM) on Pattison Ward dirty room, clothes and cup on floor, no bed sheets smell of urine.”*
 - (b) there were *“general and cleanliness issues on Pattison Ward, specifically (a) patients not having a bath or shower, (b) unhygienic/unclean conditions but these were disregarded”*.
100. The claimant says that these disclosures of information tended to show that the health or safety of patients has been, is being or is likely to be endangered (i.e., section 43B(1)(d) ERA was engaged).
101. The facts quoted above are not in fact what the claimant disclosed. The information disclosed was slightly less specific. We have found that on more than one occasion the claimant brought to her team leader’s attention the fact

patient RM and other patients had not had a bath of shower and raised general concerns regarding hygiene in the wards.

102. Taking the five essential elements of a Protected Disclosure in turn:
- (a) The claimant disclosed sufficient information. Although our finding on the evidence is that the disclosure lacked the specificity claimed by the claimant in her pleaded case, there was sufficient specificity in terms of the specific patients and the specific hygiene issues regarding bathing to amount to a disclosure of information.
 - (b) She believed that the disclosure was made in the public interest (i.e., in the interests of the specific patients affected and all the patients at the hospital). The disclosure affected several patients, it was a disclosure of an important matter relating to patient care and potentially related to systemic failings on the part of the respondent as regards patient care;
 - (c) That was a reasonably held belief;
 - (d) The claimant believed that the hygiene issues tended to show that health and/or safety of the patients was endangered; and
 - (e) That was a reasonably held belief.
103. Protected disclosures 6 and 7 were therefore Protected Disclosures and gave the claimant protection as a whistleblower.
- Protected Disclosure 8 (Email 15 June 2022)
104. The claimant says that the information disclosed was that she had been “*subjected to abuse by a senior support worker “Daniel” on 15.06.22 and the racial abuse from a service user and was fearful to return*”. However, she now accepts that this was an error and the email did not disclose the incident with Daniel as it did not happen until 30 July 2022.
105. The email also included a short reference to “*a service user (with mental capacity) deliberately racially abused me on countless occasion [sic]*” and referred to the upset this caused to the claimant.
106. We find that this did not amount to a Protected Disclosure for the same reasons given in relation to alleged Protected Disclosure 5.
107. The email does not amount to a Protected Disclosure and gave the claimant no protection as a whistle blower.
- Protected Disclosure 9 (Email 5 August 2022)
108. The claimant says that the information disclosed in the e-mail was that “*she had been subjected to bullying by a member of staff “Daniel”*”.
109. The claimant says that this disclosure of information tended to show that her health or safety had been endangered (i.e., section 43B(1)(d) ERA was engaged).
110. Taking the five essential elements in turn:
- (a) There has been a disclosure of information. Sufficient facts about the incident were disclosed.
 - (b) We do not accept that the claimant believed that such a disclosure was in the public interest. She was plainly making the complaint on her own behalf.
 - (c) It would not in any event have been reasonable for the claimant to have believed that the disclosure was in the public interest. The necessary public interest element is not present. Only the claimant was affected by the incident. It was an example of a clash between two junior members of staff. It was not a wider or systemic issue. This is an example of a private workplace dispute that should not attract the enhanced statutory protection accorded to whistleblowers;
 - (d) The claimant did believe that the disclosure tended to show breach

- of a legal obligation; and
- (e) That belief was reasonably held.
111. This was not a Protected Disclosure. It was a complaint about an altercation between two workers. It lacks the required public interest element.
Protected Disclosure 10 (Email 10 August 2022)
112. The claimant says that the information disclosed was that there were “*issues relating to (i) cleanliness on wards (ii) short staffing and overwork causing safety issues (iii) abuse of patient dignity*”.
113. The claimant says that this disclosure of information tended to show that the health or safety of any individual has been, is being or is likely to be endangered (i.e., section 43B(1)(d) ERA was engaged).
114. The claimant’s email does not disclose this information. The email does not have this content. The content relates to complaints regarding work colleagues not doing enough cleaning and the claimant doing more of this work than others. This is emphasized by the text the claimant put in bold type and capitals and the final paragraph of email quoted earlier. It was not public interest matter. It is an example of a private complaint regarding work colleagues.
115. Taking the five essential elements in turn:
- (a) There has been a disclosure of information. Sufficient facts were disclosed.
- (b) We do not accept that the claimant believed that such a disclosure was in the public interest. She was plainly making the complaint on her own behalf and in her own interests.
- (c) It would not in any event have been reasonable for the claimant to have believed that the disclosure was in the public interest. The necessary public interest element is not present. Only the claimant was affected by the matters disclosed. It is not indicative of any wider or systemic failings. This is an example of a private workplace dispute that should not attract the enhanced statutory protection accorded to whistleblowers;
- (d) The claimant did believe that the disclosure tended to show breach of a legal obligation (i.e., the obligation for her co-workers to do their allotted duties under their contracts of employment); and
- (e) That belief was reasonably held.
116. This was not a Protected Disclosure. It did not give the claimant protection as a whistleblower.
Protected Disclosure 11 (Verbal 14 August 2022)
117. The claimant says that the information disclosed was “*further concerns about patient hygiene issues on Pattison Ward*”.
118. The claimant says that this disclosure of information tended to show that the health or safety of any individual has been, is being or is likely to be endangered (i.e., section 43B(1)(d) ERA was engaged).
119. We refer to our earlier findings about what information the claimant disclosed.
120. We accept this was a Protected Disclosure for same reasons as Protected Disclosures 6 and 7
121. We also note that Protected Disclosures 6, 7 and 11 all relate to hygiene issues at the hospital. In that sense they raise similar concerns. We have of course found that each disclosure, in isolation, amounted to a Protected Disclosure. However, had we not done so, we would have taken the view that the three disclosures in aggregation amounted to a Protected Disclosure.

What was the sole or principal reason for dismissal ?

122. The fact that the claimant made Protected Disclosures was not the sole or principal reason for her dismissal. We accept that the Respondent's management was likely to have perceived the claimant as a problem employee, in small part because of her propensity to complain. The claimant made an excessive number of complaints which clearly took up a considerable amount of management time. A small number of those complaints amounted to Protected Disclosures. However, that was only a very a minor factor in the Respondent's decision.
123. The respondent was not an employer who discouraged whistleblowing or sought to close it down when it was done. They actively encouraged whistleblowing. This is evident from their whistleblowing policy and the behavior of Mr. Watson who continued to actively encourage the claimant to disclose important issues when other managers might have done otherwise given the number of complaints made by the claimant.
124. The main reason for the claimant's dismissal was her conduct and conduct and performance as set out in the dismissal letter. There was ample evidence of serious concerns regarding the claimant's conduct and performance. Those that were the most prominent factor in the decision to dismiss were those discussed at the probation review meeting including:
 - (a) persistent lateness;
 - (b) the claimant's admitted failure to conduct an "arm's length observation" of a patient correctly.
 - (c) The claimant had falsely recorded in writing that she had conducted an observation of a patient when she had not done so.
 - (d) The constant clashes with many different work colleagues.
125. The claimant's Protected Disclosures were not the sole or principal reason for her dismissal.
126. For these reasons the claimant's complaint of unfair dismissal is unsuccessful.

Employment Judge: Mr. A Spencer

Date: 20th April 2024

Reasons sent to the parties on
14 May 2024

For the Tribunal office