



EMPLOYMENT TRIBUNALS

Claimant: Ms M Fitzgerald

Respondent: Cherry Orchards Care Ltd

Heard at: Bristol (in person)

On: 2 April 2024

Before: Employment Judge Cuthbert

Appearances:

For the Claimant: In person

For the Respondent: Did not attend

REASONS FOR RULE 21 DECISION AND REMEDY DECISION

1. These written reasons are provided following a request made on behalf of the respondent dated 9 April 2024, after an oral decision given on 2 April 2024.
2. The respondent's request was not made in accordance with the time limits in Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. It was not made at the Rule 21 and Remedy hearing on 2 April 2024, which the respondent did not attend, nor was it made within 14 days of receipt by the respondent of the written record of the judgment arising from that hearing. Rather it was made after the hearing but **before** the judgment was sent out by the Tribunal. Nonetheless, to avoid a duplicate request being made, which it invariably would be, and to limit unnecessary administration for the Tribunal, I have varied the time limit in accordance with Rule 5, and acceded to the request.

Background

3. The claimant's claim was presented in the Bristol Employment Tribunal on 24 May 2021. The respondent's response to the claim was struck out by Employment Judge Midgeley on 28 December 2023 on the basis that the respondent was not actively

pursuing its defence to the claim – it had failed to attend a previous hearing and to respond to warnings that its defence may be struck out.

4. The 2 April 2024 hearing was listed on 28 February 2024 and the respondent was notified of the hearing by the Tribunal.
5. Belated requests by the respondent to postpone the hearing were refused by EJ Bax on 29 March and by me on 2 April 2024. The respondent did not attend the hearing and was not represented at it.
6. I decided that a determination could properly be made of the claimant's claim, at the hearing, in accordance with Rule 21.

The relevant law

7. The following provisions of the Employment Rights Act 1996 apply to the claimant's claims:

Section 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.

Section 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—

(a) ...

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) ...

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

(e) ...

(f) ...

Section 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...

Section 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.*

Section 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.

The claimant's claims

8. The claimant worked in a residential care home for service users with mental health issues and learning disabilities. Her employment commenced on 18 May 2020 and she was dismissed by the respondent on 6 January 2021.
9. The claimant brought claims, presented on 24 May 2021, for automatic unfair dismissal under section 103A of the Employment Rights Act 1996 and for detriment under section 47B of the same Act – both claims based on the claimant having made protected disclosures.
10. I heard brief oral evidence from the claimant during the Rule 21 hearing, who confirmed the accuracy of the contents of her claim (10-page “Particulars of Claim”) and her witness statement (six pages). These documents set out her case in some detail.

Protected disclosures

11. She relied on a number of potential protected disclosures, which had been identified in previous case management preliminary hearings (of which there had been **four** such hearings during the rather protracted progress of the claim) as follows:

Disclosure 1: In early June 2020 the claimant reported a potential breach of the GDPR to her line manager, complaining that the display of employee's names and telephone numbers in the manager's office was visible to residents and their families; and

Disclosure 2: On 5 June 2020 the claimant verbally reported to her line manager that the service users were vaping indoors; and

Disclosure 3: On 25 June 2020 the claimant informed her line manager that the claimant had not received sufficient training on fire drills/alarm. This was also recorded in an incident report form in Lincoln House; and

Disclosure 4: On 17 July 2020 the claimant told a senior manager that she was unwilling to collect service users' medication (diazepam) from the pharmacy because of a risk to her safety in carrying such medication in a public place; and

Disclosure 5: In August 2020 the claimant told her line manager that she would not leave medication out in a service user's flat as instructed as there had been

previous mistakes with the service user's medication which had required him to have medical treatment in hospital. This was also recorded in an incident report form in Lincoln House; and

Disclosure 6: At the beginning of August 2020, the claimant completed an incident report form detailing an occasion that day when a visitor had been permitted to access a service user's flat without signing the visitors book so as to comply with fire regulations and the respondent's policies; and

Disclosure 7: On a date between 12 August and 5 October 2020 the claimant completed an incident report in which she identified that a team leader had failed to comply with the respondent's rules in relation to medication, because he did not wish to complete the necessary information reports if service users failed to collect the medication; and

Disclosure 8: On or about the week following 5 October 2020, the claimant spoke to a senior manager by telephone and complained that her line manager and the staff at Lincoln House were failing to adhere to the one-way entrance and sanitising requirements which the senior manager had directed should be adopted there; and

Disclosure 9: On 23 November 2011, the claimant emailed the senior manager about the events detailed in Disclosures 1 to 8 above.

12. The document which the claimant sent in respect of disclosure 9, a report in effect sweeping up all of the previous matters, was at pages 191 to 193 of the bundle which was before me.
13. I was satisfied that the claimant had made protected disclosures within the meaning of section 43B of the Employment Rights Act 1996. The content of the disclosures made, particularly those numbered 1, 3, 5, 6, 8 and 9 above, included information which concerned various breaches of legal obligations and risks to health and safety, including in respect of the GDPR, risks to health and safety of staff and service users (fire alarms, lack of training, medication procedures) and these were swept up in the final disclosure, 9. I was satisfied from the content of the claim and the claimant's witness statement that the claimant reasonably believed both that the disclosures tended to show breaches of legal obligations and/or risks to health and safety and also that they were in the public interest. The disclosures were all made to the claimant's employer.

Unfair dismissal

14. In respect of the unfair dismissal complaint, I accepted the claimant's unchallenged evidence that the reasons which the respondent's senior manager gave for dismissing her, in summary alleged complaints from staff and service users about her such that the respondent decided to end her probationary period, were fabricated. This was the same senior manager to whom some of the disclosures had been made, including disclosure 9. The claimant's case, in summary, was that the respondent had had not raised the complaints in question with her prior to her dismissal, the respondent had responded negatively at times to some her disclosures, and that any issues arising during her employment had been as a result of the disclosures she made.

15. I accepted her case that the real reason she was dismissed was because she had challenged the respondent on multiple occasions about its procedures, by way of the disclosures above.
16. There was a short gap between last and most comprehensive disclosure (the sweep up report emailed by the claimant on 23 November 2020, disclosure number 9) and the claimant's dismissal on 6 January 2021. The respondent, had its response not been struck out, may well have said that the dismissal was for other reasons, and it may have earlier thought that the claimant would leave in any event to take up new employment. It was not, however, present or participating to put whatever its case may have been on such matters. I accepted the claimant's case that the reason for her dismissal was the concerns she had earlier raised.
17. I found that the reason or principal reason for the claimant's dismissal was the making of the protected disclosures and so her dismissal was automatically unfair. The unfair dismissal complaint succeeded.

Detriment

18. The detriment complaint had been identified at previous hearings as follows:

On or about January 2021, did the respondent provide an inaccurate and unfair reference in its terms to a prospective employer of the claimant?

19. In the bundle before me was a reference provided by a senior manager of the respondent in respect of the claimant, dated 3 February 2021. It included the following:

Probation ended as not meeting the requirements and standards of the Company

...

Would you re-employ the applicant? Yes No x

If no, please state reason

When notice was given, she left the premises without warning leaving vulnerable Service Users without support. She did not work any of her notice period.

A similarly negative reference appeared to have been supplied on 5 March 2021.

20. On 23 February 2021, a prospective employer wrote to the claimant withdrawing a provisional offer of employment it had made to her, as a support worker, following receipt of the first reference.
21. I accepted the claimant's unchallenged evidence and case that the negative reference from the senior manager was provided on the ground that she had made protected disclosures, namely they were a material influence on the negative reference. The author of the reference was the same senior manager to whom some of the disclosures were made, including disclosure 9, and who had dismissed the claimant.

22. I therefore found that the claimant was subjected to a detriment, by way of the provision of a negative reference by the respondent, on the ground that she had made protected disclosures.

Remedy

23. Having found that the claimant had succeeded in her claims, I heard oral evidence from her on remedy. The respondent had not attended or provided any submissions and so the claimant's case on remedy was unchallenged. She had provided a Schedule of Loss in which she claimed £42,660.52.
24. The claimant explained that, following her dismissal, she claimed Jobseekers' Allowance, which she continued to claim following the withdrawal of the provisional offer of new employment due to the reference. She believed that the new support worker role would have started during February 2021.
25. She worked instead in various temporary and agency roles and explained and confirmed during her oral evidence the various figures which were set out in the Schedule of Loss, which she said were net, after deductions. She moved out of support work and into teaching and eventually started a full-time role on 24 July 2023. No losses were claimed from that time onwards.
26. As a result of the negative reference and her upset about this, she said she suffered adverse psychological effects and she started having panic/anxiety attacks and memory loss, which became substantially worse whenever she went for a job interview. She saw her GP on 3 November 2021 and was prescribed Propranolol to take when she felt a panic/anxiety attack coming on and before attending any interviews.
27. I awarded the claimant **£14,233.32** by way of a compensatory award for unfair dismissal (net loss of earnings for the period from 14 January 2021 until 23 July 2023), pursuant to section 123 of the Employment Rights Act.
28. I awarded net losses for the period 14 January 2021 – 7 February 2021 during which the claimant was unemployed: **£1,134.60**, based on the claimant's average earnings for the respondent, in the wage slips before me.
29. I awarded net losses for the period from 8 February 2021 to 23 July 2023 on the basis that the claimant said she would have been working in the new support worker role, which was withdrawn due to the negative reference, which was an act of detriment. I based the figures on an assumed starting salary of £25,452 gross, which the claimant said was the lowest end of the salary range for the role, stated in the Schedule of Loss. Her assumed net earnings with Greenfield in period were calculated by me at £51,618.56.
30. I then deducted net earnings the claimant had set out from various temporary engagements:

Provide: £4,551.75

Midway: £11,522.38

LTT: £3,742.81

Supply Room: £1,530

Agency work in a teaching role (term-times only): £17,172.90

Total earnings in period: £38,519.84

Net loss in period: **£13,098.72**

31. I then awarded the claimant **£8,000** for injury to her feelings in respect of the detriment claim. This was close to the top of the lower *Vento* band (£900 - £9,100) at the time the claim was lodged, during 2021/2022 and I considered it appropriate in view of the hurt and upset experienced by the claimant.
32. I indicated that recoupment may apply to the award given receipt of JSA.

Employment Judge Cuthbert

Date: 17 May 2024

WRITTEN REASONS SENT TO THE PARTIES ON
22 May 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE