EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000119/2024

Hearing held in Edinburgh on 19 & 20 June 2024

Employment Judge R Mackay
Tribunal Member Mr T Jones
Tribunal Member Ms M McAllister

Mrs M Currie	**Claimant** **In Person**
Four Seasons Health Care Group	**Respondent** **Represented by:** **Mr S Irving, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The dismissal of the claimant was not for the reason (or principal reason) of her having made a protected disclosure in accordance with Section 103A of the Employment Rights Act 1996 (**"ERA"**). The claim is accordingly dismissed.

REASONS

Background

1. At a case management preliminary hearing held on 17 April 2024, the claimant confirmed that her sole claim was that her employment had been terminated by reason of her having made a protected disclosure in accordance with Section 103A ERA. The respondent accepted that the claimant had made a qualifying disclosure in accordance with the statutory provisions. The only issue for this Tribunal, therefore, was to decide what the reason for the dismissal of the claimant was.

2. Although the burden of proof rested with the claimant (as she had less than two years' service at the time of her dismissal), the respondent agreed to lead evidence first. The Tribunal heard from Ms K Martin, Manager, and Ms L Johnston, Regional Support Manager. The Claimant gave evidence on her own behalf.

3. Parties lodged a joint bundle of documents which was referred to during the course of evidence. Certain relevant documents were added to the bundle during the course of the hearing.

4. The Tribunal found the respondent's witnesses to be credible and reliable. The claimant herself was broadly credible and reliable. She clearly had strong feelings about the issues before the Tribunal and in some respects her evidence was less compelling. Relevant examples of this are covered in the Findings in Fact section which follows.

Findings in Fact

The Claimant's Employment

5. The respondent is a care home provider. It operates residential care and nursing homes in the UK. It has approximately 11 in Scotland and 46 in the UK as a whole.

6. The claimant was most recently employed by the respondent from 18 July 2023 to 5 February 2024. Her role was that of care assistant. She was based at the respondent's St Margaret's Care Home in Edinburgh (**the "Home"**). The Home is regulated by the Care Inspectorate.

7. The claimant had previously been employed in the Home for approximately six months in 2020. She resigned at the end of that period of employment due to personal commitments which impacted on her ability to work. She was offered a role as a bank member of staff (whereby she would agree to work *ad hoc* shifts). That relationship came to an end as she was not able to maintain a sufficient degree of availability.

8. During both periods of employment, Ms Martin held the position of manager. In this role, she was responsible for the overall management of the Home and was the most senior clinician present. The Home also engages a number of qualified nurses and a larger number of care assistants such as the claimant.

9. The claimant's most recent period of employment came about following her request to Ms Martin for a reference for a job elsewhere. At that time, Ms Martin had a vacancy for a part-time care assistant. In her evidence, the claimant was critical of the working conditions and the standards of care she witnessed at the Home during her earlier period of employment. This was at odds with another part of her evidence where she stated that she was very pleased to go back as she got on very well with Ms Martin and enjoyed working at the Home. In an email to Ms Martin she said she would "*love to*" return. Her evidence about having previously enjoyed working at the Home and wanting to go back is consistent with the fact that travelling to work from her home involved a round trip commute of approximately three hours.

10. The typical working pattern for care assistants is 12-hour shifts starting at either 8.00am or 8.00pm, four days a week. In order to job-share (to a large extent) with another part-time care assistant, the claimant agreed to work Monday to Wednesday, 12.00pm to 8.00pm.

11. The employment was subject to a six-month probationary period.

12. During the period of her employment, the claimant only attended for work on approximately a third of the shifts scheduled. There were a number of reasons for this reduced attendance. First, at her interview with Ms Martin, the claimant indicated that she had certain pre-booked holidays and other commitments. Shortly prior to commencing employment, she notified Ms Martin of these, amounting to 13 days in the months of August and September. Whilst Ms Martin was concerned about the extent of these commitments, having previously agreed to them, she honoured them. Certain days were taken as unpaid leave as the claimant had not accrued sufficient annual leave.

13. Another reason for the limited attendance was several of periods of sickness absence including one extended period relating to surgery. Other absences were for a range of unrelated reasons. On one occasion, the claimant was absent as she said that she had tested positive for Covid. It subsequently transpired that she did not in fact have a positive test. The genuineness of the sickness absences was not disputed by the respondent.

14. On a number of occasions during the period of her employment, the claimant was unable to work her allocated days and requested to work on alternative days. Whilst this was on some occasions accommodated by the respondent, changes in working patterns created difficulties in terms of resource and ensuring that adequate cover was in place for each shift. On occasions, it also led to overstaffing in the morning.

15. By email of 16 October 2023, Ms Martin wrote to the claimant and stressed the importance of her working the three days requested by her and agreed as part of her contract of employment.

16. The respondent operates an attendance system whereby employees are required to clock in and clock out. An analysis of the shifts worked by the claimant showed that on the vast majority of occasions she left early. On a number of occasions, she did not sign out at all.

17. By email of 9 September 2023, Ms Martin wrote to the claimant reminding her of the importance of working until the correct finish time. The claimant failed to sign out at all for four consecutive shifts between 19 September and 4 October 2023. Ms Martin emailed the claimant on 5 October 2023 asking her to ensure that she did so in the future.

18. The claimant gave evidence that she had agreement from Ms Martin to leave early in order to catch a train. This was disputed by Ms Martin whose evidence was accepted. It is consistent with the email exchanges referred to. The claimant did not respond to the effect that there had been any agreement for her to leave early. On the contrary, in response to Ms Martin's email, the claimant stated that going forward there would not be an issue. Despite that, on most of the subsequent shifts she either did not sign out or left early. A member of staff leaving early can create staffing issues for the Home which is required to have a designated level of staff having regard to resident numbers at any time.

The Claimant's Protected Disclosure

19. On 12 December 2023 the claimant was working at the Home. Ms Martin was also present. The claimant spoke to Ms Martin (and one of the nurses). She raised concerns about a particular resident. It is not necessary for the purposes of this Judgment to narrate in detail the concerns raised. In short, they centred around bruising on the body of the resident as well as bleeding. The claimant was adamant in her evidence that she was not suggesting abuse of a sexual nature, but the way in which she described the symptoms was heavily suggestive of that.

20. Ms Martin explained to the claimant that she was aware of the bleeding and that this was connected to a condition being treated by the resident's GP. In relation to the bruising, she instructed the nurse to conduct an assessment. The resident had been examined that day by her GP (who had been treating the bleeding). He did not raise any concerns about bruising.

21. Ms Martin met with the claimant the following day, accompanied by the nurse who had conducted the assessment. Further discussions took place around the bleeding and the explanation for that. In relation to the bruising, the assessment concluded that those were consistent with the fitting of a medical device and the resident leaning against a hard surface.

22. The claimant was dissatisfied with the explanations. Ms Martin indicated to her that if that was the case, she was at liberty to raise the issue with the respondent's regional managers or make use of the respondent's whistleblowing line. The Tribunal accepted the evidence of the respondent's witnesses that there is a culture of encouraging staff to raise whistleblowing concerns.

23. The claimant contacted the whistleblowing line on 17 December 2023. It is operated externally by a firm of solicitors. In essence, she repeated her concerns about the resident and the bleeding and bruising she saw. The matter was passed to two members of the respondent's care quality team based at its head office in London. Their role was to investigate the matter and to produce a report with recommendations. They visited the Home and spoke to relevant individuals including the claimant and the resident. Their completed report was dated 20 December 2023. In short, the investigators were satisfied that there were explanations for the bleeding and the bruising which did not point to any neglect or abuse. The bleeding was a symptom of an underlying medical condition which was being treated as reflected in the resident's medical notes. The bruising was not considered suspicious.

24. The investigators recommended that the matter be raised with the resident's social worker. They also recommended that the claimant (who at that time was off sick) should meet with a regional manager on her return to work as the claimant had indicated that she was worried about returning.

25. In her evidence, the claimant stated that she was reassured by the outcome albeit that she would have preferred investigators who were independent of the respondent.

26. The issues raised in respect of the resident were separately investigated by the local authority social work department. That investigation did not identify any concerns in relation to the resident or her treatment.

27. The claimant's oral evidence became increasingly extravagant, suggesting that inadequate care was rife, that only she was capable of providing adequate care and that this applied not just to her most recent period of employment but to the earlier period. The Tribunal did not accept her account. It is at odds with her desire to return in 2023 and her email to Ms Martin where she stated she would "*love to*" return. It is at odds with the outcomes of the investigations which took place into the concerns the claimant raised. It is at odds with the evidence of the respondent's witnesses and the Home's Care Inspectorate ratings which are positive.

The Claimant's Dismissal

28. Towards the end of January 2024, the claimant indicated that she was fit to return to work. In accordance with the investigators' recommendation, a member of the regional management team (Ms Johnston) became involved. She was aware of the whistleblowing allegations. She had originally envisaged conducting a return to work interview. Prior to the claimant's return, she reviewed the claimant's records. In doing so, she identified the issues over poor attendance and failing to complete shifts. She sought further information from Ms Martin about these issues. She also identified that, due to her absence, the claimant had not had a probationary review meeting.

29. By letter dated 26 January 2024, Ms Johnston wrote to the claimant inviting her to a probationary review meeting. In it, she highlighted concerns relating to the claimant's employment. These were very poor attendance, leaving prior to contracted finishing time and not fulfilling contractual days leading to changes of rota. She outlined the potential outcomes of the meeting including the termination of the claimant's employment.

30. The meeting took place on 5 February 2024. It lasted only several minutes. The claimant was asked to give explanations for various absences and

leaving early. Her position was that the absences were either agreed or for genuine sickness and that leaving early was approved by Ms Martin. At the conclusion of the meeting, the claimant was advised that her employment was being terminated. The reasons given were that the level of absence and sickness was not sustainable, that she could not be relied upon as the respondent did not know if she would turn up for her shifts, and that she was not fulfilling her agreed hours of work.

31. The claimant emailed Ms Johnston later that day to express her dissatisfaction with the outcome. She also stated that she was hard pushed not to draw the conclusion that the decision was to do with her whistleblowing.

32. The dismissal was confirmed by letter dated 9 February 2024. The letter summarised the reasons for the decision being the failure to achieve a satisfactory level of attendance and the failure to work contracted hours. In relation to the issue of contracted hours, Ms Johnston questioned the claimant's account that she had approval to leave early, referring to the emails from Ms Martin asking the claimant to fulfil her contracted hours.

33. She addressed the claimant's suggestion that the dismissal was to do with her whistleblowing complaint. Ms Johnston stated that the issues of her not meeting the required standards predated the complaint and warnings were issued prior to that time. She stated that she was satisfied that the whistleblowing concerns had been thoroughly investigated and that they had no bearing on her decision. The claimant was offered the right to appeal. She did not do so.

Relevant Law and Submissions

34. Section 103A of ERA provides:

"*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.*"

35. In Section 43A ERA, "*protected disclosure*" is defined with reference to Section 43B ERA. Section 43B ERA provides:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

36. Where, as here, the claimant has less than the qualifying service necessary to bring a claim for ordinary unfair dismissal, the burden of showing the reason for the dismissal rests with her (***Kuzel v Roche Products Ltd*** [2008] IRLR 530).

37. In assessing what the reason for the dismissal was, the Tribunal is required to apply the standard test under Section 98 ERA and consider whether a

causal link between the protected disclosure and the dismissal is established (***Simpson v Cantor Fitzgerald Europe*** [2020] EWCA Civ 1601.

38. Both parties made oral submissions (Mr Irving having agreed to make his first). In summary, he invited the Tribunal to prefer the evidence of the respondent's witnesses and conclude that the claimant had failed to prove that her protected disclosure was the reason for the dismissal. He pointed to what he described as strong evidence supporting the reason advanced by the respondent.

39. On her own behalf, the claimant made a number of submissions about what she saw as the unfairness of the dismissal process, the absence of a chance for her to explain and what she saw as the unfairness of being criticised for absences which were approved or otherwise for genuine sickness. She questioned why, if the respondent's reason for her dismissal was genuine, she had not been dismissed before, and invited the Tribunal to uphold her claim.

Decision

40. As noted above, the respondent conceded that the claimant had made a protected disclosure. That was clearly a correct concession to make having regard to the nature of the issues she raised and the manner in which she did so.

41. The only question for the Tribunal, therefore, was to determine the reason (or the principal reason) for the dismissal. Considering the witness and documentary evidence as a whole, the Tribunal was satisfied that the reason for the dismissal was the reason advanced by the respondent. It was clear from the evidence that the levels of attendance by the claimant were very poor indeed. Similarly, there was clear evidence that the claimant was repeatedly failing to work to the end of her shift in circumstances where approval had not been given.

42. Those issues were put to the claimant in her probationary review meeting and whilst the Tribunal had some sympathy with her criticisms of the swift and perhaps pre-judged way in which the process was managed, the Tribunal is not concerned with issues of fairness in this case. It is concerned solely with what the reason for the dismissal was. The Tribunal accepted Ms Johnston's evidence on this. Drawing on the experience of the lay members in particular, the exceptionally poor record of the claimant during her probationary period was of a character that many, if not most, employers would consider terminating during a probationary period.. This was not a case, in other words, where the dismissal appeared to have been manufactured or contrived so as to deflect attention from the protected disclosure.

43. It is notable that the claimant herself appeared to accept that dismissal at an earlier stage might have been appropriate, albeit that she saw this as pointing the protected disclosure as being the real reason.

44. The Tribunal was satisfied that the timing of the dismissal was influenced by her absence from work and the fresh pair of eyes introduced by Ms Johnston rather than the intervening qualifying disclosure.

45. The Tribunal also accepted the evidence of the respondent's witnesses that whistleblowing is encouraged within the organisation and in this particular case, was actively encouraged by Ms Martin to the claimant herself. This is further evidenced by the extensive internal and external investigations which took place into the issues raised. There was nothing in the evidence to suggest that the claimant might in any way be punished for making a protected disclosure.

46. The claimant has not, therefore, satisfied the burden of proof in showing that the protected disclosure was the reason for her dismissal. Even if the burden rested with the respondent, the Tribunal would have been satisfied that the reason advanced on its behalf was correct. There is no causal link between the disclosure and the dismissal.

47. The claim is, accordingly, dismissed.

Employment Judge:	**R Mackay**
Date of Judgment:	**30 July 2024**
Entered in register:	**31 July 2024**
and copied to parties	31/07/2024