EMPLOYMENT TRIBUNALS

Claimant: Ms K Adedeji

Respondent: MacIntyre Academies

RECORD OF A HEARING

Heard at: London Central **On:** 22, 23, 24 and 27 January 2025 and 29 and 31 March 2025

Before: Employment Judge Joffe

Appearances
For the claimant: Represented herself
For the respondent: Mr T Sheppard, counsel

JUDGMENT

The complaint of unfair dismissal for making protected disclosures (section 103A Employment Rights Act 1996) is not well-founded and is dismissed.

REASONS

Claims and issues

1. The claims were set out in a list of issues at a case management preliminary hearing in front of Employment Judge Adkin on 9 December 2024. Other claims brought by the claimant were struck out at that hearing.

2. The list of issues before me was as follows:

1. Protected disclosure

1.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

1.1.1 Did the Claimant send a communication to HR on 29 January 2022?

1.1.2 Did the Claimant made a disclosure to LADO (Local Authority Designated Officer) on 22 February 2022?

1.1.3 Did the Claimant made a disclosure to OCC (either Oxfordshire County Council or Oxford City Council?) on 22 February 2022?

1.2 In each case

1.2.1 Did she disclose information?

1.2.2 Did she believe the disclosure of information was made in the public interest?

1.2.3 Was that belief reasonable?

1.2.4 Did she believe it tended to show that:

1.2.4.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;

1.2.4.2 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

1.2.5 Was that belief reasonable?

1.3 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

or

1.4 If the claimant made a qualifying disclosure, was it made:

1.4.1 To a prescribed person pursuant to section 43F, in which case:

1.4.1.1 did the Claimant reasonably believe that the relevant failure fell within any description of matters in respect of which the prescribed person was so prescribed; and

1.4.1.2 did the Claimant reasonably believe that the information disclosed and any allegation contained in it were substantially true.

1.4.2 To another person pursuant to section 43G, in which case:

1.4.2.1 did the Claimant reasonably believe that the information disclosed and any allegation contained in it were substantially true;

1.4.2.2 did she not make the disclosure for purposes of personal gain;

1.4.2.3 at the time of making the disclosure she reasonably believed she would be subject to a detriment if she made a disclosure to her employer or a prescribed person; or if there was no prescribed person evidence would be concealed or destroyed if she made a disclosure; or she had previously made a disclosure of substantially the same information to her employer or to a prescribed person.

1.4.2.4 in all the circumstances it was reasonable for her to make the disclosure;

1.4.2.5 did the Claimant reasonably believe that the relevant failure fell within any description of matters in respect of which the prescribed person was so prescribed; and

If so, it was a protected disclosure.

2. Unfair dismissal

2.1 Was the claimant dismissed?

2.1.1 Did the respondent do the following things:

2.1.1.1 Commence a disciplinary investigation against the Claimant in May 2022 in relation to alleged data breaches;

2.1.1.2 Take nine months to deal with the Claimant's grievance between April 2022 and January 2023;

2.1.1.3 Withhold money from her pay during suspension.

2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.1.2.2 whether it had reasonable and proper cause for doing so.

2.1.3 Did that breach any other term of contract? It will be for the Claimant to identify this in her witness statement.

2.1.4 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.1.5 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.1.6 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?

2.3 Was it a potentially fair reason?

2.4 Was the reason or principal reason for dismissal that the claimant made a protected disclosure (an automatically unfair reason)?

2.5 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

3. Remedy for unfair dismissal

3.1 Does the claimant wish to be reinstated to their previous employment?

3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.6.1 What financial losses has the dismissal caused the claimant?

3.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.6.3 If not, for what period of loss should the claimant be compensated?

3.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.6.5 If so, should the claimant's compensation be reduced? By how much?

3.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.6.7 Did the respondent or the claimant unreasonably fail to comply with it?

3.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.6.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

3.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.6.11 Does the statutory cap of fifty-two weeks' pay or £105,707 apply?

3.7 What basic award is payable to the claimant, if any?

3.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Findings

The hearing

Adjournment

3. The claimant did not attend the hearing on 27 January 2025 due to ill health. I postponed the hearing for reasons I gave orally at the time and gave directions for it to resume.

Rule 49 order

4. I made a Rule 49 order of my own motion to anonymise the names of the young people who were named in the claimant's disclosures. I gave reasons orally for my decision at the hearing. The young people are referred to as AB and CD in these Reasons.

Reasonable adjustments

5. The claimant has a significant visual disability, keratoconus. She was able to look at documents by enlarging and enhancing them on a tablet device. This was obviously cumbersome for her and it was apparent that it was a significant strain for her to conduct the proceedings in this way.

6. To manage that difficulty and the claimant's mental health issues I agreed she could have breaks every twenty five minutes (every half hour on the final day of hearing). Generally we managed to keep to those timings although sometimes the period of hearing was extended so a line of questioning could be completed.

7. Ms Deehan gave some of her evidence using text to speech technology as an adjustment for her own impairment.

Documents

8. I had a bundle from the respondent running to 438 pages which was intended to be an agreed bundle. It appeared at the outset of the hearing however that the claimant was not satisfied that this contained all of the documents which she wished to include. She said that the respondent had refused to accept some of her documents although the respondent and I was not ultimately able to resolve that dispute. It appeared to me that the claimant had had difficulty finding and submitting the documents which she wished to rely on and had sent documents piecemeal electronically to the respondent and the Tribunal. It appeared she had not understood that the Tribunal does not have facilities to gather up the individual documents sent in this way and make them into a file.

9. Ultimately, the respondent very helpfully provided hard copies of the documents sent through by the claimant before and during the hearing. There were some breaks and delays in the hearing because of the production of new documents and the evidence of Ms Deehan had to be interrupted so she could look at some of the new documents produced. When the hearing adjourned due to the claimant's ill health, I made an order for the respondent to gather up the claimant's documents into a supplementary bundle. The respondent produced a supplementary bundle of some 648 pages for the resumed hearing.

10. The claimant had continued to produce additional documents in the days leading up to the resumed hearing and on the day itself. She told me that this was because she had to work so slowly due to her visual impairment and her mental health issues. She told me she needed a further hour on the morning of the hearing to complete the provision of documents and I allowed her that further time,. She provided some further documents, a number of which were already contained in one of the existing bundles.

11. The claimant told me that the risk assessment from 2018 in the respondent's bundle was a fake document as was a contract of employment which purported to be her contract. Part of her reasoning was that versions had been produced which were signed and also versions which were unsigned. Mr Sheppard on instructions said that the documents were retained in both hard and electronic copy by the respondent. The hard copy versions were signed and the electronic versions were not signed. I did not have evidence on the basis of which I could conclude that any of the documents which I had been provided with were forgeries.

Timetabling

12. On the final day on the hearing, the Tribunal sat until after 5 pm to finish evidence and submissions. I had had to explain to the claimant during the course of the day that she needed to plan her time to finish cross examining the witnesses and for there to be time for submissions. I considered that the claimant had had sufficient time to cross examine the respondent's witnesses and that it would not have been proportionate for the matter to go part heard again to another date. The claimant wanted to ask the witnesses questions about matters which did not form part of her claim because they had been

struck out and I encouraged her to focus on the claims in the list of issues. Mr Sheppard kept his oral submissions to under ten minutes to facilitate the hearing finishing.

Witnesses

13. I had witness statements for and heard evidence from the claimant and Ms A Gardner, a former employee of the respondent, on her behalf.

14. For the respondent, I had statements for and heard evidence from:
Mr K Rodger, formerly group director of education and children's services;
Ms G Deehan, head of operations;
Ms E Bastock, human resources manager.

Facts in the claims

15. The respondent is a multi academy trust for special schools. It is sponsored by a charity called MacIntyre Care, which is a separate legal entity.

16. The claimant commenced employment with the respondent on 16 April 2018 as a residential support worker at the respondent's Endeavour Academy. This is a specialist school and children's home in Oxford for children and young people with autism and severe learning difficulties. The claimant was initially doing waking nights.

17. I saw a risk assessment which the claimant appeared to have signed on 15 March 2018. The risk assessment noted some adjustments which needed to be made for the claimant to accommodate her visual impairment. These included providing her with written materials in a larger font and 'with enough notice'.

18. A further risk assessment dated 20 April 2021 related to covid adjustments rather than to the claimant's visual impairment.

19. The claimant brought a grievance on 16 November 2021 about treatment by colleagues which she considered to be bullying. She made allegations of race discrimination and age discrimination. By a letter dated 13 December 2021, Ms S Hasler, HR adviser, did not uphold that grievance.

Protected disclosure

20. On 29 January 2022, the claimant sent a long email to the HR inbox entitled 'Whistleblowing MAT (EH) Part 1'.

21. In this email the claimant raised a number of concerns about how children and young people were being cared for at Endeavour House. In particular, she was concerned about the care provided to AB, a young person who was gravely ill and had recently died. It is clear that the claimant had been profoundly affected by AB's illness. She considered that his care had been

inadequate. She was also concerned about CD, a young person whom she said had been confined to his room as a result of covid . She raised some more general concerns about other matters, including training on handling of medication, food storage, food provision, staffing levels and other safety issues.

22. The claimant wrote a further email on 4 February 2022 raising further concerns.

23. Mr Rodger was appointed to manage the claimant's whistleblowing concerns. He met with the claimant via Teams on 8 February 2022 to obtain information about her concerns. He then sent her a letter dated 10 February 2022. He attached draft notes of their meeting and thanked her for raising her concerns.

24. He told the claimant that there would be an external investigation into AB's care and support covering the areas which the claimant had raised. The investigation would also consider the handling of the incident where CD was isolated in his bedroom and the more general issues the claimant had raised about matters such as staffing shortfalls.

25. Some of the other matters raised by the claimant had already been raised by Ofsted after an inspection in September 2021 and were being addressed. This included issues about food storage.

26. Mr Rodger attached the letter and minutes to an email of 11 February 2022. There was an interchange of emails between the claimant and Mr Rodger in which Mr Rodger said that there had been some immediate changes in respect of the preparation of medicine. On 14 February 2022, the claimant wrote to Mr Rodger:
'Thank you. This is incredibly reassuring,'

27. On 24 March 2022 the claimant submitted a Data Subject Access Request asking for data the respondent held about her from 2018 onwards.

28. Mr Rodger was absent from work for a significant period due to ill health and Ms Deehan wrote to the claimant on 1 April 2022 to inform the claimant about the outcome of the investigation conducted by Ms A Parr. She was assisted in preparing the letter by Ms S Campos, the respondent's governance and compliance manager. Ms Deehan had been employed by the respondent since November 2021 and had not previously had contact with the claimant.

29. The investigation had led to various recommendations being made including as to the need for risk assessments for the handling of cytotoxic medication. The investigation did not conclude that there had been a shortfall in the care provided to AB nor that there had been an issue in the isolation of CD in his room. Ms Deehan said:
'A review of this kind always brings helpful recommendations to support best practice and, and address areas for development. I can assure you that the Principal and her Senior Leadership Team will be working to ensure that all learning gleaned from the investigation is implemented going forwards.'

30. The claimant meanwhile had been signed off sick from 28 March 2022 with stress at work and did not return to work with the respondent prior to her resignation.

31. On 4 April 2021 the claimant submitted a grievance about what she described as 'systematic bullying and differential treatment' at Endeavour House. She included a number of complaints about her treatment by her manager and colleagues.

32. Ms Deehan said that a decision was made to ask an external HR professional to investigate this grievance to provide the claimant with reassurance that the matter was being looked at objectively. Ms S Francis-Myles was appointed in April 2022.

33. Ms Campos was preparing the response to the claimant's DSAR. In the course of her work on the DSAR, she found that the claimant had sent 22 emails containing data including photographs, names and health care details of service users, to her personal email address. On 6 May 2022, Ms Campos submitted an account of the issue to the respondent's adviser on data protection matters, an organisation called GDPRIS.

34. Ms Campos contacted the claimant about the matter and the claimant told her that she had been given permission to use her personal tablet because of her visual impairment. This involved information being sent between her work and personal email accounts. She also said that information had to be passed to third parties with respect to the whistleblowing. Ms Campos was told by GDPRIS that the matter would need to be reported to the ICO and that the claimant should be told to delete the emails. A report was made to the ICO on 10 May 2022.

35. Ms Deehan wrote to the claimant on 9 May 2022 to tell her that the 22 emails had been found whilst the respondent was responding to her DSAR. She said that the respondent was obliged to report the breach to the ICO. The claimant was asked to delete the emails and confirm she had done so and to return any hard copies she might have made.

36. The email concluded:
'As per the MacIntyre Academies Data Protection Policy paragraph 23 this may now be investigated under MacIntyre Academies' Disciplinary Policy and Procedure. We have temporarily restricted your access to the MacIntyre Academies ICT systems'.

37. The claimant was cross examined about the fact that the email did not say that the claimant would certainly be investigated but only that she 'may'. I understood the claimant's evidence to be that, because of the nature of her employment, once an allegation was raised involving a child and safeguarding, a disciplinary investigation was mandatory. She considered that she was under investigation from 9 May 2022. She said that this was

necessary in accordance with statutory guidance from the Department of Education: *Keeping children safe in education*.

38. The claimant said that the alleged data breach was a safeguarding incident and that she was immediately suspended once the email was sent to her on 9 May 2022. She said that she remained under investigation thereafter and the effect of this situation was that she could not be interviewed in respect of her whistleblowing. Her evidence in this respect was confusing but the gist of it was that she believed that, under the Public Interest Disclosure Act 1998, if a person was identified as 'part of the problem' they did not have a right to be interviewed and asked questions about the whistleblowing.

39. Ms Deehan had not looked at the claimant's employee file at the time and was not aware of her risk assessment or risk assessments. She said that the respondent had an obligation to report a data breach within 72 hours. She had not further investigated what adjustments the claimant had had because she accepted what the claimant said about sending the emails in connection with her disclosure. Ms Deehan said she never mentioned safeguarding. She saw the issue as being an issue about data breach. The respondent's case was that there was no disciplinary investigation and no suspension.

40. Mr Rodger said that the 9 May 2022 email was not about safeguarding.

41. The claimant put to Ms Deehan that she was aware that the claimant had an adjustment which allowed her to send emails to her private email account. Ms Deehan denied that that was the case. The claimant suggested to Ms Deehan that it was Ms Deehan who had destroyed the much more extensive risk assessment the claimant alleged had been prepared which contained the adjustment the claimant relied on. The claimant said that this risk assessment was so extensive it had to be carried out and updated on a daily basis. She said that the risk assessment in the bundle was a forgery. The claimant put to Ms Deehan that she had done this because the claimant had pursued her whistleblowing from 1 April 2022 to 11 May 2022, escalating her whistleblowing complaints. There were emails between these dates in which the claimant wrote to Ms Deehan reiterating her concerns and copying in Ofsted and Oxfordshire County Council.

42. The claimant wrote back the same day to say that she could not be in breach as she had permission to use her own tablet and had to send information between email accounts. Also she was in the middle of the whistleblowing process and had to pass information to third parties.

43. Ms Deehan wrote again to the claimant on 10 May 2022 saying that if the matter was investigated under the disciplinary procedure, the claimant would be asked about her account of events. The priority at that time was the deletion / return of the emails.

44. On 12 May 2022, Mr Rodger sent the claimant an email covering a number of matters involving the claimant. He told her she had done the right thing in raising her concerns and pursuing them further with Oxfordshire County

Council. He updated her about her DSAR. On the issue about the data, he said that they had sought clarity from the ICO and had been told that it was correct for them to report the issue and to request deletion of the emails. He said: 'Please can you confirm that they will not be used for any other purpose than the whistle blow and that they will be deleted once OCC's deliberations are concluded.'

45. He also wrote to the claimant about a concern she had raised concerning staff members using work devices on the WhatsApp platform: 'This was an inappropriate use of Trust IT and the devices have been removed from the group. Having reviewed the data we control we can confirm that there was one piece of information shared about you (your initials on an allocation list). This has been given to you under the Subject Access Request.
I'm sure you will appreciate that the Trust cannot provide you with data it does not own or have access to. Colleagues may have created WhatsApp groups on their personal devices over which we have no control from a data perspective., We have reiterated to all colleagues that WhatsApp is not a suitable tool for work and the group in question has been shut down.'

46. He said that if the claimant felt that colleagues had used social media or messaging platforms inappropriately she should raise it as part of her grievance.

47. Mr Rodger also updated the claimant on her grievance, saying that an external investigator had been appointed 'but [we] have been awaiting your return to work or an occupational health assessment to confirm that you are well enough to engage in the process before commencing an investigation.'

48. An occupational health report dated 18 May 2022 said that the claimant was not at that point fit to attend a grievance hearing due to having recently undergone eye surgery. She would be fit within three to four weeks.

49. On 31 May 2022 the ICO reported back to the respondent. The ICO was satisfied that it did not need to take further action because of various factors including the fact that the respondent was investigating the matter, had asked for deletion of the emails and was considering use of its disciplinary policy.

50. On 22 July 2022, the claimant was informed that her sick pay would move to half pay in line with her contractual entitlement.

51. Ms Francis-Myles met with the claimant on 18 and 25 July 2022 to discuss her grievance. She held some further investigatory meetings with other employees on 21 July and 2 August 2022. She provided a written outcome on 15 August 2022.

52. One of the areas of complaint by the claimant was the use of WhatsApp discussions by colleagues. She was concerned she had been discussed in a negative manner in these groups. Because the WhatsApp group in question was not on work devices, it was not possible to establish what might have been said. Ms Francis-Myles investigated and reported on a total of 32

issues raised by the claimant. Ms Francis-Myles made recommendations about ensuring the claimant had adjustments she required for her disability and that a specific risk assessment was carried out prior to the claimant's return to work.

53. The claimant appealed the grievance outcome and her appeal was completed in two parts. Ms H Bass, workforce director of MacIntyre Care, was appointed to hear the appeal and held a meeting on 22 September 2022. The claimant's union representative had asked for the meeting to be adjourned due to the claimant's health which resulted in Ms Bass only being able to consider some of the points of appeal as Ms Bass herself was leaving the employment of MacIntyre Care shortly after that date. At the claimant's request the grievance appeal was also adjourned whilst an occupational health assessment of the claimant was carried out to investigate what adjustments the claimant might require. These adjustments were then identified and implemented.

54. On 13 December 2022, the claimant wrote to Ms Deehan to enquire about the outcome of 'the investigation that you opened against me as follows…[she then included the 9 May 2022 email]'.

55. On 14 December 2022, the claimant emailed Mr Rodger and Ms Deehan to say that she had been told by Oxfordshire County Council that their investigation had been concluded. She said that she had deleted the 22 emails the subject of the alleged data breach.

56. On 15 December 2022, Ms Deehan wrote to the claimant thanking her for confirming that the emails had now been deleted and saying: 'I wish to clarify that we did not conduct a disciplinary investigation in relation to the matter, nor were you at any time suspended or subject to further disciplinary action'.

57. Ms Deehan gave evidence that she decided not to proceed with a disciplinary investigation because, whilst she considered that the claimant had incorrectly sent personal data of service users to her personal email account and that this was a data breach, she accepted that the claimant had misunderstood and believed she could use her personal account in that way.

58. Ms Deehan accepted in evidence that she had failed to ensure the claimant understood that this was the case nearer to the time she made her decision, which I understood to have been in May 2022.

59. An independent HR consultant, Ms G Craik, had been appointed to hear the remainder of the claimant's grievance appeal and she met with the claimant on 29 November, 7 and 9 December 2022. She sent the claimant a grievance appeal outcome on 12 January 2023 running to some 31 pages.

60. On 27 February 2023, Ms Bastock wrote to the claimant asking whether the claimant was in a position to attend a meeting to discuss a return to work. Earlier occupational health advice had suggested the grievance needed to run its course before the claimant would be fit to attend work.

61. The claimant said that Ms Bastock, in sending this email, was seeking to get her arrested. She said that she could be arrested if she attended work because of what had been said in the grievance outcome about the data breach.

62. On 7 March 2023, the claimant emailed the respondent saying that she was resigning with immediate effect and that she had been constructively dismissed. She set out a number of reasons for that assertion. She complained about the ongoing use of a 'platform' (understood to be a WhatsApp group) which she said constituted a serious ongoing data breach. The claimant had been shown this platform on 20 February 2023. She also said that she had been victimised as a result of her whistleblowing.

63. The claimant gave evidence that she had in fact resigned on 12 December 2022 when she contacted ACAS. She denied that the discovery of the platform was the principal reason for her resignation. She said that discovery was just confirmation of what she had been saying previously.

64. On 8 March 2023, Ms Bastock acknowledged the claimant's resignation. She said that the respondent was disappointed that the claimant had resigned and she invited the claimant to get in touch before 14 March 2023 if she changed her mind.

Claimant's disclosures to Oxfordshire County Council and LADO

65. No documents to Oxfordshire County Council or the local authority designated officer ('LADO') dated 22 February 2022 were ever disclosed. There were documents ultimately provided which showed that the claimant had raised the issue with OCC and Ofsted on other dates.

66. The claimant had raised concerns anonymously with Ofsted in September 2021 which led to an interaction as a consequence of which some recommendations were made, Mr Rodger thought, around medication. The communications to OCC were in April and May 2022.

Investigation into WhatsApp group

67. The claimant said that there were data breaches in respect of the staff WhatsApp group which were not treated in the same way as the data breach relating to the emails she sent to her personal email account.

68. Mr Rodger said he did not himself see any WhatsApp messages and did not understand that there were messages in which there was a serious data breach. He was not involved in investigating that issue. The issue in respect of the WhatsApp group as he had understood it was about inappropriate use of the respondent's ICT not a data breach relating to children.

Other evidence about the WhatsApp group

69. Ms Gardner gave evidence that she had been joined to a WhatsApp group when she worked at Endeavour House.

Law

Protected disclosures

70. Section 43B(1) ERA 1996 defines a qualifying disclosure as a disclosure of information which in the reasonable belief of the worker making the disclosure is in the public interest and tends to show one of a number of types of wrongdoing. These include '(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject' and '(d) that the health and safety of any individual has been, is being or is likely to be endangered.'

71. To be a protected disclosure, a qualifying disclosure must be in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

72. Guidelines as to the approach that employment tribunals should take in whistleblowing detriment cases were set out by the EAT in Blackbay Ventures (trading as Chemistree) v Gahir (UKEAT/0449/12/JOJ):

72.1 each disclosure should be identified by reference to date and content

72.2 the basis upon which the disclosure is said to be protected and qualifying should be addressed

72.3 if a breach of a legal obligation is asserted:

each alleged failure or likely failure to comply with that obligation should be separately identified; and

the source of each obligation should be identified and capable of verification by reference for example to statute or regulation

72.4 the detriment and the date of the act or deliberate failure to act resulting in that detriment relied upon by the claimant should be identified

72.5 it should then be determined whether or not the claimant reasonably believed that the disclosure tended to show the alleged wrongdoing and, if the disclosure was made on or after 25 June 2013, the claimant reasonably believed that it was made in the public interest.

73. There is a number of authorities on what a disclosure of 'information' is. It must be something more than an allegation; some facts must be conveyed:

Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325. There is no rigid dichotomy between allegations and facts. A statement must have sufficient factual content and specificity such as is capable of showing one of the matters listed at s 43B(1): Kilraine v Wandsworth LBC [2018] ICR 1850.

74. The burden of proof is on the worker to show that he or she held the requisite reasonable belief. The tribunal must look at whether the claimant subjectively held the belief in question and objectively at whether that belief could reasonably be held. The allegation need not be true: Babula v Waltham Forest College [2007] IRLR.

75. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made: Darnton v University of Surrey [2003] IRLR 133.

76. Factors relevant to the issue of whether a worker reasonably believed that a disclosure was in the public interest include:

76.1 the number in the group whose interests the disclosure served (the larger the number, the more likely the disclosure is to be in the public interest)

76.2 the nature of the interests affected (the more important they are, the more likely the disclosure is to be in the public interest)

76.3 the extent to which those interests are affected by the wrongdoing disclosed (the more serious the effect, the more likely the disclosure is to be in the public interest)

76.4 the nature of the wrongdoing disclosed (the disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing)

76.5 the identity of the alleged wrongdoer (the larger and more prominent the alleged wrongdoer, the more likely the disclosure is to be in the public interest)

(1) Chesterton Global (2) Verman v Nurmohamed [2017] IRLR 837.

Constructive dismissal

77. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

78. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach (or breaches) of contract by the employer; (ii) the breach(es) must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

79. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another way, whether the breach played a part in the dismissal. In United First Partners Research v Carreras 2008 EWCA Civ 1493 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons.

80. In this case the claimant claims breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important. Conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause.

81. It is irrelevant that the employer does not intend to damage this relationship, provided that the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it: Woods v Car Services (Peterborough) Limited [1981] ICR 666. It is the impact of the employer's behaviour (assessed objectively) on the employee that is significant - not the intention of the employer (Malik v BCCI [1997] IRLR 462. It is not however enough to show that the employer has behaved unreasonably although "reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach": Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445.

82. The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In Omilaju v Waltham Forest LBC [2005] ICR the Court of Appeal said that the final straw may be relatively insignificant but must not be utterly trivial: "The test of whether the employee's trust and confidence has been undermined is objective."

83. A breach of the implied term of trust and confidence is necessarily a repudiatory breach of contract: Ahmed v Amnesty International [2009] ICR 1450.

84. In Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978 the Court of Appeal listed five questions that it should be sufficient ask in order to determine whether an employee has been constructively dismissed;

a. What was the most recent act (or omission) on the part of the employer which the employee says cause, or triggered, his or her resignation?

b. Has he or she affirmed the contract since that act?

c. If not, was that act (or omission) by itself a repudiatory breach of contract?

d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed together amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of the previous possible affirmation).

e. Did the employee resign in response (or partly in response) to that breach?

85. Under section 103 A Employment Rights Act 1996 an employee is unfairly dismissed if the reason or principal reason for the employee's dismissal is that the employee made a protected disclosure.

Submissions

86. The respondent prepared written submissions and both sides made oral submissions which I have taken into account.

Conclusion

Issues 1. Protected disclosure

1.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

1.1.1 Did the Claimant send a communication to HR on 29 January 2022?

1.1.2 Did the Claimant made a disclosure to LADO (Local Authority Designated Officer) on 22 February 2022?

1.1.3 Did the Claimant made a disclosure to OCC (either Oxfordshire County Council or Oxford City Council?) on 22 February 2022?

1.2 In each case

1.2.1 Did she disclose information?

1.2.2 Did she believe the disclosure of information was made in the public interest?

1.2.3 Was that belief reasonable?

1.2.4 Did she believe it tended to show that:

1.2.4.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;

1.2.4.2 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

1.2.5 Was that belief reasonable?

1.3 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

or

1.4 If the claimant made a qualifying disclosure, was it made:

1.4.1 To a prescribed person pursuant to section 43F, in which case:

1.4.1.1 did the Claimant reasonably believe that the relevant failure fell within any description of matters in respect of which the prescribed person was so prescribed; and

1.4.1.2 did the Claimant reasonably believe that the information disclosed and any allegation contained in it were substantially true.

1.4.2 To another person pursuant to section 43G, in which case:

1.4.2.1 did the Claimant reasonably believe that the information disclosed and any allegation contained in it were substantially true;

1.4.2.2 did she not make the disclosure for purposes of personal gain;

1.4.2.3 at the time of making the disclosure she reasonably believed she would be subject to a detriment if she made a disclosure to her employer or a prescribed person; or if there was no prescribed person evidence would be concealed or destroyed if she made a disclosure; or she had previously made a disclosure of substantially the same information to her employer or to a prescribed person.

1.4.2.4 in all the circumstances it was reasonable for her to make the disclosure;

1.4.2.5 did the Claimant reasonably believe that the relevant failure fell within any description of matters in respect of which the prescribed person was so prescribed; and

If so, it was a protected disclosure.

87. The email of 29 January 2022 contains information about the care provided for AB, for example that he showed signs of digestive discomfort and in the claimant's view required a different diet with which he was not provided. There is information about the claimant's observation of AB's episodes of pain and what she considered a failure to administer pain medication. There is

information about the incident when CD was confined to his room and an assertion that this was a deprivation of liberty. There is other information but the gist of all of the information is that a duty of care, whether common law or statutory, to the young people is not being complied with.

88. It was apparent to me from the claimant's communications of concern about these issues to the respondent and to outside bodies and from her evidence to the Tribunal that she was genuinely and passionately concerned about what she perceived to be failings by the respondent in respect of the young people. Although these concerns were not in the main upheld by the investigation which took place, the claimant was not cross examined to the effect that she did not reasonably believe the information she disclosed tended to show the relevant failures. Given the matters she described in her disclosures and in the absence of evidence to the contrary, I concluded that the claimant did have a reasonable belief that the information she disclosed tended to show failures in the respondent's duty of care towards the young people.

89. The respondent did not make any submissions on whether the claimant reasonably believed the disclosure was in the public interest, relying essentially on Employment Judge Hodgson's observations on the claimant's interim relief application as to whether the claimant was likely to establish that there was a disclosure of information which tended to show one of the relevant types of wrongdoing.

90. It seemed to me that the claimant did have a reasonable belief that her disclosures were in the public interest given that they concerned the treatment of highly vulnerable young people in a school / care home environment run by a respondent with responsibilities for a large number of such young people.

91. So far as the other alleged disclosures were concerned, there was simply no evidence that there were any disclosures to Oxfordshire County Council on the dates set out in the list of issues. There were emails in the claimant's supplementary bundle to Ms Deehan copied to individuals at Oxfordshire County Council dated 12 April 2022, 14 April 2022 and 1 May 2022. If I had had to consider these, I would have concluded that they also were protected disclosures. It was not necessary to consider whether they were protected as having been made to a prescribed person in the appropriate circumstances as they were in any event also addressed to the respondent.

2. Unfair dismissal

2.1 Was the claimant dismissed?

Issue: 2.1.1 Did the respondent do the following things:

2.1.2 Did that breach the implied term of trust and confidence? The

Tribunal will need to decide:

2.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.1.2.2 whether it had reasonable and proper cause for doing so.

2.1.3 Did that breach any other term of contract? It will be for the Claimant to identify this in her witness statement

2.1.4 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.1.1.1 Commence a disciplinary investigation against the Claimant in May 2022 in relation to alleged data breaches;

92. I was satisfied on the evidence that no disciplinary investigation was ever pursued in relation to the data breach. The claimant was warned that such an investigation might be commenced but was ultimately told that it had not been.

93. There was an unfortunate delay in informing the claimant that a decision had been made not to pursue any disciplinary investigation.

94. I was not persuaded that, as the claimant argued, the matter was a safeguarding issue and that she automatically became subject to a disciplinary investigation once the allegation was made. I could see nothing in her contract or the statutory guidance which would have had that effect.

Issue: 2.1.1.2 Take nine months to deal with the Claimant's grievance between April 2022 and January 2023;

95. It did take nine months to determine the claimant's grievance. Was that a breach of contract in all the circumstances? I considered that it was not. Some of the delay was due to the claimant's health. The rest of it appeared to be the result of employing external people to consider the grievance and the thoroughness with which they conducted that exercise. In all of those circumstances the delay was not excessive.

Issue: 2.1.1.3 Withhold money from her pay during suspension.

96. The claimant was never suspended from the respondent's employment. She was off sick for a long period with stress and ultimately her pay was reduced in accordance with her contract of employment to half pay and then no pay. Again I could see no contractual or other provision which led to the conclusion advanced by the claimant that she was automatically suspended once the email of 9 May 2022 was sent to her.

97. None of this behaviour, taken separately or together, constituted a repudiatory breach of the implied term of trust and confidence. The delay in telling the

claimant that there had been a decision not to pursue a disciplinary investigation was in my view the most detrimental treatment she was subject to but, in the context of the claimant's other treatment by the respondent did not reach the threshold of repudiatory conduct, even had she relied on this matter as a breach of contract.

Issue: 2.1.5 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.1.6 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

98. I did not have to consider this issue as I concluded that there was no breach of contract.

Issues: 2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?

2.3 Was it a potentially fair reason?

2.4 Was the reason or principal reason for dismissal that the claimant made a protected disclosure (an automatically unfair reason)?

2.5 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

98. I did not have to consider any of these issues given that I found there was no breach of contract.

99. Had I found that there was a constructive dismissal, I would not have found that it was due to the claimant's protected disclosures. I was satisfied that the reason for raising the data breach with the claimant in the way that Ms Deehan did was because the matter was rightly viewed as serious. I could see no evidence linking the progress of the grievance to the protected disclosures. It was clear to me that the claimant's pay was ultimately reduced simply because the respondent was operating its contractual sick pay procedures.

Conclusion

100. I have not upheld the claimant's claim for unfair dismissal for the reasons set out above. This has been a difficult and painful case for the claimant and for the respondent's witnesses. The matters at the heart of the claimant's disclosures have clearly touched her and the respondent's witnesses deeply. It is a matter for regret that she felt she had to resign from her employment but I have concluded that her perception of her treatment by the respondent, whilst sincere, was a distorted one.

Employment Judge Joffe

16 April 2025

Sent to the parties on:

24 April 2025

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For the Tribunal Office:

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