



EMPLOYMENT TRIBUNALS

Claimant: Mr L O'Flaherty

Respondent: Mr S Timmins

HELD at Sheffield

ON: 10 June 2024

BEFORE: Employment Judge Miller

REPRESENTATION:

Claimant: In person

Respondent: No attendance

JUDGMENT having been sent to the parties on 12 June 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

1. The claimant was employed by the respondent from 21 September 2021 as a personal assistant on a 20 hour per week contract paid at £23.41 per hour. The claimant covered extra shifts and worked on average 25 hours per week.
2. The job involved supporting the respondent with his physical and social needs, amongst other things. The claimant is deaf and communicates with BSL and, as I understand it, the respondent for whom the claimant worked also communicates with BSL.
3. The respondent is supported by his sister, Alison Fisher who also has lasting power of attorney for the respondent.

4. The claimant was concerned about the conduct of two of the other personal assistants, Sarah Needham and Sarah Smith. He informed Ms Fisher about his concerns in June 2022 – he said that they were trying to control the respondent and that they were taking him for fast food when he was supposed to be eating healthily to lose weight. Ms Fisher was unhappy with how the respondent was being treated by the other PAs and told the claimant to inform social services.
5. The claimant had some difficulty identifying the correct social worker but did manage to speak to them. He told them that the respondent was unhappy with Ms Smith and Ms Needham – they were “messaging about”, not turning up on time, taking him for unhealthy food and his care needs that he was receiving direct payments for were not being met.
6. There was an informal meeting with the social worker, but no formal action was taken as far as the claimant was aware.
7. Ms Needham then went on maternity leave in August 2022 but Ms Smith continued working.
8. On 13 January 2023, the claimant was asked to come into work and he agreed even though he was on leave at the time. Ms Smith and Ms Needham were also there. The claimant was asked to go into the kitchen with Ms Fisher (not with Ms Needham and Ms Smith) and was summarily dismissed with no explanation. The claimant asked for an explanation afterwards and received a text which said that the reasons for his dismissal were:
 - a. Not providing personal care even though it was recorded in the book as being done;
 - b. Accepting a football shirt from the respondent (which the claimant agrees);
 - c. Not checking the respondent's legs between nurse visits;
 - d. Not visiting or taking the respondent out on a Monday evening despite it being recorded in the book
9. Except for the shirt, the claimant says none of this is true, he was on leave at the relevant times.
10. It is also relevant to note that Sarah Smith's mother, Rachel Kelly, manages the direct payments from the council (that fund the personal assistants), and one of the other personal assistants is Sarah Needham's sister. They are all good friends with Ms Fisher. Since the claimant was dismissed, he understands that these are the people who have been providing personal assistance to the respondent and he has also continued to be in contact with Sheffield council who have said that the PAs will be replaced.
11. The claimant was affected by the decision to dismiss him and described having a mental breakdown so that he was not well enough to start looking for work again until December 2023. The claimant started work on a 20 hour per week

contract at 23 per hour from 24 January 2024. The claimant was in receipt of Universal Credit in the meantime.

12. The claimant makes a claim for automatically unfair dismissal on the grounds that either he made protected disclosures under s 103 A (which says)

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.

13. or for raising health and safety concerns under s 100 (1) (c) which says, as far as is relevant to this claim

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

...

(c) being an employee at a place where—

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

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

14. As the claimant has less than two years' service, the burden of proof is on him to show that the sole or main reason for his dismissal was either that the claimant made a protected disclosure or raised health and safety concerns.

15. A protected disclosure is defined in section 43 B ERA and says, as far as is relevant.

(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) 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, or is likely to be deliberately concealed.

16. It must be the disclosure of information, rather than opinion, and the claimant must at the time reasonably believe that the health and safety of an individual was at risk and that he was making the disclosure in the public interest.

17. A protected disclosure is a qualifying protected disclosure if it is disclosed to a person in accordance with section 43C of the Employment Rights Act 1996. This says:
- (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—
- (a) to his employer, or
- (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
- (i) the conduct of a person other than his employer, or
- (ii) any other matter for which a person other than his employer has legal responsibility,
- to that other person.
- (2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.
18. In my judgment, the communications to Ms Fisher and social services in June 2022 both amount to qualifying protected disclosures. It was the disclosure of information – namely that specific care was not being provided. The claimant said in evidence that he was concerned for the welfare of the respondent. It was obvious from the claimant's evidence and demeanour that he believed this was in the public interest. It is important that vulnerable people receive the care that is being paid for from public funds. There was certainly no suggestion of the disclosure being for personal interest.
19. It was also obvious that the claimant believed that the health and safety of respondent was at risk.
20. The first disclosure was made to the respondent as employer. As the person with Lasting Power of Attorney, Ms Fisher was in an agency relationship with the respondent so that disclosure to her was disclosure to the respondent.
21. Disclosure to the social worker was in my judgment disclosure to a person who, under section 43C (above), has legal responsibility, under their safeguarding duties, to the respondent and the alleged conduct was not being done by the respondent but by his carers. In any event, Ms Fisher as the respondent's representative or agent authorised disclosure to social services in accordance with section 43C (2).
22. Both disclosures to Ms Fisher and social services were, therefore, protected disclosures.
23. I also find that by telling Ms Fisher about his concerns about the carers, the claimant was bringing to the respondent's attention (again, through the agency

relationship) circumstances connected with his work which he reasonably believed were harmful to the health and safety of the respondent.

24. In my judgment, having regard to the relationships between Ms Needham, Ms Smith, Ms Kelly and Ms Fisher, and in light of the lack of response from Ms Fisher to the claimant's concerns, Ms Fisher, acting as agent for the respondent, was unhappy with the claimant causing trouble for her and her friends by reporting them to social services. She therefore decided to dismiss the claimant. I find that this was the real reason for the claimant's dismissal.
25. I have considered that Ms Fisher was initially happy for the claimant to report matters to social services, but the fact that Ms Needham and Ms Smith were present in the respondent's home when the claimant was dismissed, and apparently when Ms Needham was still on maternity leave, without explanation suggests that they had an influence on Ms Fisher's decision. They had reason to be upset with the claimant reporting them and for these reasons I find that the reason for the claimant's dismissal was that he made a protected disclosure to social services. The claimant was therefore unfairly dismissed.
26. I do not find that the disclosure of health and safety concerns to Ms Fisher was a reason for the claimant's dismissal. In my view it was the disclosure to social services that was the reason for the claimant's dismissal, not the disclosure to Ms Fisher.
27. I consider remedy.
28. The claimant is entitled to a basic award. The claimant was aged 39 at his date of dismissal and his gross weekly earnings were 25 (his average weekly hours) x £23.41 (his hourly rate) = £585.25 per week. At the time this was capped at £571 per week under section 227 Employment Rights Act 1996. The claimant had one year's continuous service so is entitled to a basic award of £571.
29. In my judgment, the claimant has taken reasonable steps to find employment. He was out of work for 54 weeks because he was unwell. He is earning slightly less than he was and is slowly building back up. In my view it is reasonable for the claimant to be working extra hours to take his earnings back to where they were within 6 months of starting his new job. That takes it to 23 July 2024.
30. Doing the best I can the claimant's net wage while working for the respondent was likely to have been £480 per week. I therefore award compensation up to the start of the claimant's new job of £25,920. (That is 54 weeks at £480 per week).
31. From then until 23 July 2024, the difference between the claimant's old net earnings and new likely net earnings is £87 per week. I therefore award a further 26 weeks at £87 per week, which is £2,262.
32. The claimant was working for less than two years so I do not award anything for loss of statutory rights.

33. I make a compensatory award of £28,182.
34. There was clearly no suggestion that the respondent followed the ACAS code of practice on disciplinary proceedings at all. I therefore award the total maximum uplift of 25% under section 207A of the Trade Unions and Labour Relations (Consolidation) Act 1992 making an additional £7,045.50.
35. I therefore make a total compensatory award of £35,227.50.
36. As the claim is for automatically unfair dismissal there is no cap on the award, but injury to feelings is not payable for a claim of unfair dismissal.

Employment Judge Miller

Date 08 July 2024

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