



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MJ Downs
Ms C Edwards
Ms Cristofori

BETWEEN:

Claimant

Jennifer Forder-Green

AND

Respondent

Independence Homes Ltd

ON: 10th 11th 12th & 13th December 2018

APPEARANCES:

For the Claimant: Mrs C McCallum

For the Respondent: Ms L Hatch

JUDGMENT

The reserved judgment of the Tribunal is that:-

The claim for Automatic unfair dismissal for making a protected disclosure pursuant to Employment Rights Act 1996 section 103A is not well founded

REASONS

1. By way of an originating application presented on 9th August 2017. The Claimant brought complaints of automatic unfair dismissal for making protected disclosure. The Claimant says that she was dismissed on 29th March 2017 when she observed that the health and safety of service users that she was responsible for was in danger. The Respondent defended the claims. In essence they arise as a result of the Claimant's

dismissal which she says was a consequence of making protected disclosures.

2. The issues which fall to be determined by the Tribunal were agreed at a preliminary hearing before Employment Judge Martin on 29th January 2018 and are set out below. The Directions were made by the Tribunal on that day and evidence was prepared on that basis.

Public Interest Disclosure Claim

3. The Claimant relies on three oral disclosures as set out in her ET1 in December 2016, January 2017 and February 2017
4. In any or all of these was information disclosed which in the Claimant's reasonable belief tended to show one of the following:
 - 4.1 A person failed to comply with a legal obligation to which he was subject
 - 4.2 The health and safety of any individual put at risk
5. If so, did the Claimant reasonably believe that the disclosure was made in the public interest?
6. Public Interest unfair dismissal complaint
Was the making of any protected disclosure the principal reason for dismissal?
 - 6.1 The Claimant has less than two years' service with the Respondent and so the burden is on the Claimant to prove that the reason or, if more than one the principal reason for the dismissal was the protected disclosure
7. In her originating application the Claimant alleges that:
 - 7.1 In December 2016 she told Amal that one of the support workers [E] had gone home and left a vulnerable service user, K sitting in her own urine. The Claimant said that her colleague Alison had witnessed this. The Respondents agree that this comment was made by the Claimant in December 2016 and it was acted upon in that the staff member was spoken to.
 - 7.2 The Claimant said that she raised a complaint publicly at a staff meeting with Amal. In her originating application she said that this was in January 2017. The minutes and witness evidence that we have heard would suggest that, in fact, this meeting took place on 21st February 2017. Her originating application said that she had objected to all the support workers going outside to smoke leaving her alone with six vulnerable service users. The Respondent agreed that this was a topic that had been raised in the staff meeting in February 2017 but contend it was by the Deputy Manager, Mr Kostas Poulos. The Claimant appeared to support this plea at the meeting by making reference to an incident in which the previous week three

members of staff had gone out for a smoke five times in one hour.

7.3 The Claimant complained to Amal that a support worker [E] was getting a service user, K out of bed and frequently dressing her without bathing her. In her originating application, she says that this took place in February 2017. The Claimant says that Sasha was a witness to this. The Respondents agree that this comment was made by the Claimant and it was acted upon in that the staff member was spoken to. E left the home on 17th January and did not work there again. This must put the incident earlier and it appears that it took place in December or early January 2017.

8. The respondents maintain that the Claimant was dismissed for misconduct.

Evidence

9. The Tribunal heard from the Claimant. Her witness statement covered other matters as if they were the disclosures. This raised the question as to whether the Claimant should be entitled to amend her claim to encompass these new allegations. The Claimant had identified the disclosures by her in her originating application and that they had been the subject of two case management order and that disclosure and witness evidence had been arranged accordingly. On that basis the Tribunal did not agree to any amendment and it was agreed by the Claimant that other matters that she raised would be treated by the Tribunal as background.

10. In addition, the Tribunal heard from:

- (i) Ms Sarah Sexton, a Registered Manager employed by the Respondent who was in charge of the investigation.
- (ii) Mr Roy Christie, who was the Operations Manager for supported living services and who chaired the Disciplinary meeting.
- (iii) Mr Daniel Hemsley, who conducted the appeal (and ultimately dismissed the same) who was an Operations Manager for the Respondent.

11. The Claimant also relied upon a witness statement from Mr Thomas Lacey who was employed as a supervisor for the Respondents in the home.

12. The Tribunal had the benefit of an agreed bundle of evidence. On the second day of the hearing, it was apparent that the Respondents had not disclosed statements from another care worker and the Deputy Manager. They were admitted but arrangements made that the Claimant be given an opportunity to give evidence on them and Mr Christie likewise (by being recalled) so as to avoid any unfairness.

13. At the beginning of the third day of the hearing the Respondent disclosed

to the Claimant yet further documents at Tribunal by way of meeting their disclosure obligations. They conceded that there had been a gross failure to comply with common law obligations of disclosure and the Directions of the Tribunal. The question arose as to whether they should be admitted or not into this hearing. On balance the Respondents said they should be admitted as they provide a more complete picture of the evidence. It was apparent that this development upset the Claimant. She argued that they should not be admitted at this late stage. The Tribunal decided not to admit these documents at such a late stage. They did not appear to add that much, it would be difficult to admit them and still ensure fairness in the proceedings and it appeared unlikely that a failure to admit them would cause prejudice to either party.

Findings of Fact

14. The Claimant was employed first by the Respondent on 8th June 2015 as a Support Worker. The Claimant worked at AB – a care home throughout her employment. This provided 24 hour access to care for those living at AB but not 1:1 support and monitoring.
15. The Respondent is a limited company which specialises in the provision of care services to vulnerable adults who have epilepsy and other complex physical and neurological needs. It is a medium sized concern dealing with a difficult area.
16. The claimant's background was as a head housekeeper in a commercial setting. She set high standards but she was inexperienced as a carer. While in post (for the respondents) she had very positive appraisals with the one concern being the difficulty she sometimes had in communicating with her peers and, in particular, getting her point across without becoming condescending. In her oral evidence, she told the Tribunal that her co-workers disliked her because of her work ethic.
17. The Claimant was provided with a letter of engagement which was evidence that her employment was full-time. She was given terms of employment which made reference to its employee conduct policy. The Respondent Company had a disciplinary policy which included in its definition of gross misconduct, "any form of abuse of service users or failure to ensure their well-being." Additionally there was a Safeguarding Adult Protection Policy and Procedure. This was said to be "driven" by the care Act 2014, the MCA 2005, the SVGA 2006 and the HSCA 2012 as well as the CQC's Guidance about compliance, fundamental standards of quality and safety, Regulation 13, safeguarding service users from abuse and improper treatment. It goes on to say that it is the legal and moral responsibility of all employees to respect the rights of service users and to protect them from physical or mental harm at all times. Types of abuse mentioned, include neglect. Additionally the safeguarding part of the policy said that all staff are responsible for the

- safety and protection of all service users. Further, the Respondent Company had a whistleblowing policy. This noted, in particular, that the decision to report a concern can be a difficult one and the company will not tolerate harassment or victimisation of the employee as a result if they raise a complaint in good faith. The policy specifies that it is better if complaints are made in writing.
18. The Claimant's line manager was the Registered Manager of the Home, Mr Amal Karunaratne. He is an experienced worker in social care. It is striking that he found the Claimant to be a hardworking individual who worked well with service users and was a helpful member of staff who was willing to go above and beyond her role completing all the household chores such as cooking, laundry and cleaning to a very high standard. He believed that the Claimant had good relations with residents and could persuade individuals to get up etc... (the implication being that this was when they were reluctant to do so).
19. We formed the view that the Claimant and Mr Amal Karunaratne had a good working relationship – the foundation of which was mutual respect. It is apparent that the Claimant had a number of "chats" with Mr Amal Karunaratne who observed that the Claimant had high standards e.g. about cleanliness (a particular preoccupation of hers). Mr Amal Karunaratne had offered advice the Claimant about was, "about how we communicate with each other – how we voice our opinions." His advice was that if there were to be difficult conversations with other staff members then it was better if they were left to him. This picture of the Claimant is quite close to that painted by Mr Thomas Lacey when he said that the Claimant was a bit boisterous (the Claimant's self-description was, "loud") and told people what she thought.

First Complaint about E

20. On an unspecified day in December 2016 the Claimant told Amal Karunaratne, the Registered Manager of the Home that one of the support workers [E] had gone home after her shift had ended and left a vulnerable service user sitting in her own urine sat on a chair. Mr Amal Karunaratne found it difficult to evaluate the seriousness of this as it was not apparent that K had been left sitting in her own urine for some time. It is only if the Service User were there for a long time that health issues might arise,
21. Mr Amal Karunaratne spoke to E who confirmed that the resident was not incontinent on that occasion (albeit she can be). E told him that she always completed the resident's care to a good standard and she did not leave the resident in her own urine when she left her shift. She was given advice. Mr Amal Karunaratne did not just take her word for it (i.e. the denial) but rather asked another member of staff to monitor E closely to see that there was no substandard care. Mr Amal Karunaratne said that this was the first time any issues of this kind were drawn to his

- attention about E and he took the decision that this was the appropriate response having taken all the factors into account.
22. Despite the Claimant and Mr Amal Karunaratne having a good relationship, the Claimant did not complain to him about a clique being operational in the home. Mr Amal Karunaratne had spoken to Human Resources about the relationship between the Claimant and E and they advised they were borne of a personality clash. At some time after Christmas 2016 (maybe in January 2017) the Respondents arranged mediation between the Claimant and E.
23. The matters raised by the Claimant were not initially committed to writing. This is not uncommon in the Respondent's business but, in these cases, this type of allegation – if serious would normally be expected to be recorded in writing by management in due course. That did not happen here. This is because the Registered Manager, in his professional opinion, had formed the view that it did not amount to a significant issue and certainly not one that represented a safeguarding concern.
24. The Tribunal concludes that what the Claimant was complaining about was an example of poor care standards (as she perceived it). The reason why she made this complaint is that she did not feel that E was meeting the care standards she felt was required. At this stage this was a one-off complaint and did not amount to an allegation of neglect and it was not, in her reasonable belief, a matter of public interest.

Second Complaint about E

25. While the Claimant maintains in her originating application that she complained again about E in February 2017 – this seems unlikely as E stopped working at the home on 17th January 2017.
26. This was discussed in the course of the hearing and we have proceeded on the basis that the discussions are likely to have taken place in late December/early January 2017 the Claimant told Mr Amal Karunaratne that E was getting a service user out of bed and frequently dressing her without bathing her on all occasions. The Claimant says that another support worker was a witness to this. What was never dealt with satisfactorily by the Claimant was whether there was an element of autonomous decision-making by E here i.e. she did not always wish to wash when she first got up. Additionally, the Claimant had complained to Mr Amal Karunaratne that E was not good at tidying rooms and assisting residents to clean after mealtimes – leaving cups and plates and generally being inactive so the kitchen was untidy. This is an indication that the Claimant was not always good at working out what was important and what less so.
27. The Tribunal accept that Mr Amal Karunaratne had a meeting with the

- staff member, E to speak to her about this concern. It is understood that K had no particular history of skin problems or pressure sores nor was she the subject of particular concern about her hygiene.
28. Mr Amal Karunaratne listened to the Claimant and dealt with the matter appropriately and the Claimant appeared to accept that he acted as such.
29. It is striking that Mr Amal Karunaratne, who is very sympathetic to the Claimant did not perceive there to be a clique or cabal who disliked or resented the Claimant. He told the Tribunal that he was not aware of any "conspiracy" against the Claimant. The Tribunal accepts his evidence and interprets it to mean that he had no knowledge that staff members held any concerted negative views on the Claimant.
30. The Support Worker, E left AB on 17th January 2019 to work in another home and subsequently left the employ of the Respondent.

Smoking

31. The Claimant says that she objected publicly at a staff meeting attended by the manager to all the support workers going outside to smoke leaving her alone with six vulnerable service users. We have established that this staff meeting actually took place on 21st February 2017.
32. The Tribunal has quite a bit of written evidence about this meeting – including a statement by a Team Supervisor who the Claimant trusted - and we can be sure that the topic of smoking was raised at the meeting by the Deputy Manager, Mr Kostas Poulos with the support of Mr Amal Karunaratne. He was concerned that those support workers who smoke should only go out a half at a time, should alert the others they were going and should ensure that there is a staff member with the service users so they are not unattended. This was minuted.
33. The Claimant contributed to this discussion at the meeting by saying words to the effect of, that she was, "in the lounge by herself the previous week, three members of staff kept going out for fags, they went five times in one hour."
34. What the Claimant did not do is complain that she was left alone with six residents/service users i.e. this was not a question of residents being left unmonitored but rather the Claimant was complaining that Staff members who smoke get a break or an occasion for the same that was not available to her as a non-smoker and therefore unfair. Mr Amal Karunaratne gave evidence, that we accept, that the home provided care for people with a variety of disabilities including epilepsy but its provision was 24 hour access to care. This was not equivalent to the provision of 1:1 supervision. Additionally, the home was not open-plan but the manager's office was on the ground floor and he would be available to

intervene as required. Mr Amal Karunaratne was previously a support worker himself and was available if there was a problem. He did not see the issue that the Claimant was raising as a health and safety issue. During the day, it was very unlikely that all the service users would be present as they would be undertaking activities. It is also unlikely – despite what the Claimant said, that she would have been left alone indoors in the home while other support workers were smoking.

Other concerns of the Claimant

35. The Claimant made claims in her witness statement that a service user had not been encouraged to get out of bed until she herself had achieved this at 1.00 pm and that in another case a service user had been taken out by a care assistant who had insufficiently discouraged that individual from eating burgers (which did not agree with him) and he was sick subsequently.
36. It is difficult to evaluate this information. These did not appear to be safeguarding concerns. On the one hand they might be seen as evidence that that Claimant asserted while she worked at AB that she could care for the service users better than other care workers (and would tell them so). On the other hand, there is at least the suggestion that the Claimant was slightly less attuned to the express wishes of the service users and more concerned with what was (in her view) in their best interests. These are sensitive matters of balance but it is relevant to mention once more that the Claimant was not particularly experienced as a care worker.

Complaints against the Claimant

37. On 27th February 2017 a new member of Bank Staff reported incidents regarding the Claimant to the Deputy Manager. She dictated her statement to him. In essence these related to the Claimant having a rude and disrespectful approach to service users. It is interesting that if there is a theme to the complaint it was that she is accused of going too far to secure the compliance of service users to what she felt was right e.g. getting service users to come in from the garden, leave the kitchen, get up from the sofa or drink liquids.
38. The member of bank staff said that the Claimant tried to isolate and cold-shoulder her when she detected that she disapproved of her methods.
39. This was followed by a complaint by another member of staff the following day – in writing. This included a series of complaints that the Claimant had overstepped boundaries in trying to get residents to comply with the Claimant's requests but it also touched upon language, attitude and competence. Both these allegations were made by relatively new members of staff and were treated as "serious" by the Respondents and the Claimant was suspended on 1st March 2017. The Claimant does not actually deny that she faced allegation – which if made out – were of

serious abuse and that the Respondents had been entitled to suspend her.

The investigation

40. Ms Sexton was appointed to conduct an investigation. She was outside the conventional management chain. Ms Sexton had a structured and minuted meeting with the two supervisors separately. Both of them related that the Claimant changes her behaviour when managers are around. One said that the claimant had fallen out with all her co-workers and refuses to talk to them and the other expressed reservations about her inappropriate language and caring (which did not appropriately respect the autonomy of a service user – referred to as privacy, dignity, independence and choice in the safeguarding policy).
41. The Claimant was invited to a fact-finding meeting on 17th March 2017. Ms Sexton said that she looked for written materials that might support or undermine the claims made against the Claimant (including appraisals and disciplinary records – although it would appear that these were not actually reviewed as part of the disciplinary process). We could not be sure if this material had been found and reviewed and the one document that was produced – a risk and behaviour report form actually dated back to 28th January 2017 and appeared to undermine any accusation that might relate to a resident's fall (it did not appear to be connected to the Claimant). Nevertheless the Respondents surmised this was a date on which a resident suffered bruising in an incident and about which the Claimant was asked questions in the meeting. In fairness, to Ms Sexton, she did appear to record on the form itself that it did not mention the Claimant.
42. The Claimant was informed that the allegation related to professionalism – and in particular about one service user. The Claimant immediately began talking about the relevant resident (this being the clue that the Claimant had a pretty good idea what the concern was) and the difficulties in motivating her and how easily she bruises (and hence can't be tugged or pulled). As concerns another service user, she recalled one incident where she had changed their clock to get a resident to go to bed early. When asked about her relations with other staff she said, "I am not going to big myself up. I go to work to work. It gets to me seeing staff on their phones and not doing anything." The implication of this is that some of her co-workers were lazy. She added that she had spoken to the manager about this and said, "I get myself in trouble for saying stuff."
43. This was a somewhat generalised complaint if it could even be described as the same. Towards the end of the 40 minute meeting she said that most recently she had raised an issue about E spending all day on her phone and added, "someone like K is always neglected." After the meeting she emailed management with a very detailed account of an incident the previous summer when she said she had been threatened by the husband of a worker who had worked in the setting for a single

shift – because she had accused that worker of being unprofessional for being on her phone all day. This shows that the Claimant was capable of composing a detailed and sophisticated email setting out her concerns about a specific incident. It is striking that she did not set out her concerns about the three incidents she now relies upon.

The Disciplinary Meeting.

44. The Claimant was invited to a disciplinary meeting by letter of 23rd March 2017. The allegations she faced were rather generalised but were explicitly said to amount to gross misconduct. The Claimant was given witness statements where names were replaced by initials.
45. The Disciplinary Meeting was held on 24th March 2017 and was chaired by Mr Christie. He was very experienced in social care – albeit he was not working in the residential homes side of the business at that time. Like Ms Sexton, he came with the advantage that they did not know the Claimant – and hence would not come with any preconceptions.
46. The meeting took twenty minutes. The Claimant's approach was to say that she knew she had enemies and immediately made reference to E – but this was predicated on the fact that E had previously made an allegation against the Claimant that was dismissed and not the other way round. Later on, she added, "things I have said they have not liked. I am not going to shut my mouth. I have made complaints to Amal (who it is established was on annual leave at this point). Maybe that's why they are ganging up on me. Sometimes I go in and I don't talk to the support workers. I'm there for my job. If I see anything wrong I report it." She spoke about bringing matters to the attention of the manager but they are not recognisably the same as the allegations relied upon in these proceedings. Mr Christie sums up the Claimant's case as being, "they are lying and there is an atmosphere at [the home] and that they are trying to get you out." He tells the Claimant that she is facing very serious allegations and that he will want to make further enquiries. He cautions her that the respondent has had to inform the CQC.
47. From the oral evidence that we have heard it is apparent that very early into the meeting Mr Christie concluded that the Claimant was an abuser. In his oral evidence he said, "She could be a hard worker but does not mean they are not an abuser." We find that he did not like her attitude and found her rude (in the meeting) albeit he said he did appreciate that people's emotions may be riding high when faced with losing job.
48. He asked for further statements to be acquired. The chaotic processes followed by the respondents are such that it is difficult to know the extent to which this was done and at what stage. However, we do know that the Respondents obtained a statement from Mr Lacey which was pretty positive about the Claimant and concluded that she was caring to all users and also had a great work ethic. It added, "Jenny tends to be a

- little loud and has no problem confronting people who she feels are not performing their job roles.” There were also witness statements from a support worker (positive) and the Deputy Manager (broadly negative). It is difficult to be clear that they were seen and taken into account by Mr Christie.
49. By 29th March 2017, Mr Christie concluded that the Claimant should be dismissed and a letter notifying her of her summary dismissal was sent to her that day. This appeared to rely on a previous active final written warning. When the Claimant pointed out the error about the pre-existing final written warning, she was informed that this had been a mistake and this was corrected and a new letter sent to her the same day. It was not argued in front of the Tribunal that Mr Christie was meant to know about the complaints made by the Claimant against E and her co-workers in the staff meeting (about smoking).
50. Mr Christie put a lot of store by the Claimant’s manner/demeanour at the meeting and concluded that she was an abuser based on his experience of other cases. The Tribunal has its misgivings about this. Had this been a case of conventional ordinary unfair dismissal we would have examined this more closely.

Appeal

51. On 10th April 2017, the Claimant submitted an appeal against her dismissal.
52. The Claimant set out in her appeal notice the three protected disclosures in her ET1, namely: (i) where she made the point in the staff meeting about an incident where all the support workers who were smokers rolled cigarettes and went outside to smoke, leaving the Claimant alone with six vulnerable users; (ii) On a separate occasion three months before she told the Manager (who she conceded was still in Sri Lanka at the time of her appeal) that a support worker had gone home leaving a resident in her own urine; and (iii) lastly that a support worker got a service user out of bed and dressed without bathing on many occasions.
53. The Appeal took place on 3rd May 2017 which allowed the Claimant to be accompanied. The Appeal raised the issue of public interest disclosures. The Claimant complained that she had not been given sufficient disclosure. She added that she had a history of exemplary appraisals and supervision reports which she attached. She not unreasonably complained about the reference to the final written warning (which was untrue).
54. The heart of her appeal however was based on the line in her disciplinary meeting where she said, “why do you think they are making up things you do to service users? I replied ... I made complaints to Amal ... if I see something wrong I report it.” The Claimant says that this

- should have alerted the respondent to the fact that the reason for the false allegations against her were that she had made protected disclosures to management in the past and staff wanted to take revenge on her. She believed that it was this that should have triggered the obtaining of the additional statements that she wished to see and which led to Mr Christie concluding that the investigation was only half-completed.
55. In advance of the Appeal meeting, the Respondents took statement from a relevant Team Supervisor, the Deputy Manager and the Manager, Mr Amal Karunaratne between 11 – 13th April 2017 and obtained a further contribution from Mr Thomas Lacey by email on 17th April 2017.
56. All three managers confirmed that it was the Deputy Manager who had raised the issue of smoking in the course of a staff meeting to which the Claimant contributed a story about being on her own in the lounge in the previous week and where three members of staff kept going out for fags and went five times in one hour. What the Claimant did not complain about was how many service users she was left to care for.
57. They recalled the Claimant complaining about E and the Manager had spoken to her. Mr Lacey said that it was just E that the Claimant had complained about, this was reported to the Registered Manager and he spoke to her.
58. The Appeal was allocated to Daniel Hemsley – an operations Manager with a background in facilities management but one who had little experience of undertaking appeals. An appeal meeting was held on 3rd May 2017 at which the Claimant was accompanied by a work colleague (a supervisor who had provided a statement in the proceedings). At the beginning of the meeting, the Claimant agreed that she had been given the relevant disciplinary documents that she felt she had been missing before (albeit in the somewhat chaotic way this case developed, the Claimant subsequently said she had not got the risk report). In her oral evidence the Claimant conceded that she found it rather painful to read the documents that she had been given. This is understandable. In reality it meant that she had not read and digested them and it therefore meant that she did not really address the case against her in the process with any particularity.
59. The Claimant was concerned that she just couldn't let matters pass without making comment if she felt that a support worker was not doing their job properly. She was aware that people found it difficult to take criticism from her – she gave the example of her telling another support worker to give a service user a biscuit when he was supposed to have a gluten and wheat free diet. The Claimant was also frustrated with a perceived imbalance in that when she complained about E she felt that no action was taken – save that she was allowed to move workplace

- whereas the Claimant had been dismissed. In the course of discussing this, the Claimant appears to acknowledge there had been attempt to manage the relationship between E and herself but in the end the Claimant didn't want to meet her.
60. In the course of the meeting the Claimant summed up her case as follows, "yes I have got a big mouth, yes I speak my mind, no I don't sit around and drink tea and get on with it ... these are false allegations."
61. On 15th May 2017 a letter was sent to the Claimant notifying her that her appeal against dismissal had been unsuccessful. The letter explained the reasoning of the Respondents. It was very reliant on the contention that the Claimant had not provided any new evidence, new mitigating material which would allow the previous decision to be set aside and that issues raised with the Registered Manager were dealt with appropriately.
62. As mentioned above, Mr Daniel Hemsley came with the not insubstantial advantage that he didn't know the Claimant – so he could be objective but he did not engage with the granular detail of this appeal as some others might have done but the Claimant did not assist him in that regard also. However, he came to the very clear conclusion that there was no connection between any complaints made by the Claimant against E (most especially) and the claims made about the Claimant by the new staff members at a later date.

Applicable Law

63. The Tribunal were primarily concerned with Employment Rights Act 1996, section 43A
- "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."
64. Additionally, Employment Rights Act 1996, section 43B
- "(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—
- ...
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- ...

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

65. This was a claim of automatic unfair dismissal for making a protected disclosure engaging section 103A Employment Rights Act 1996

“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.”

66. The Claimant relied on Care Act 2014, section 42 (this is approached with some caution as in essence it emerged as an issue in the oral evidence of Mr Roy Christie

“(1) This section applies where a local authority has reasonable cause to suspect that an adult in its area (whether or not ordinarily resident there)—

(a) has needs for care and support (whether or not the authority is meeting any of those needs),

(b) is experiencing, or is at risk of, abuse or neglect, and

(c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.

(2) The local authority must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case (whether under this Part or otherwise) and, if so, what and by whom.”

Disclosure of Information

67. As may be reasonably anticipated, both parties addressed the Tribunal about the distinction between information and an allegation as discussed by Mrs Justice Slade in *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, EAT. However, the subsequent case law has qualified this – most recently in the Court of Appeal in *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436. This was discussed in Harvey at C 111 [21].

68. However, the most direct reaction came in *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436 where one of four alleged protected disclosures was ruled out by the tribunal under the *Cavendish* approach, as falling into the category of 'allegation'. In the EAT ([2016] IRLR 422) Langstaff J said at [30]:

"I would caution some care in the application of the principle arising out of *Cavendish Munro*. The particular purported disclosure that the Appeal

Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point.'

On further appeal to the Court of Appeal, the unsuccessful claimant argued that *Cavendish* did in fact favour a bright line distinction between allegation and information and was wrongly decided, but the court (in a judgment given by Sales LJ) held that such a reading of the case was wrong – what it decided was that whatever is claimed to be a protected disclosure must contain *sufficient* information to qualify under the ERA 1996 s 43B(1). Agreeing with Langstaff J, the position is that in effect there is a spectrum to be applied and that, although *pure* allegation is insufficient (the actual result in *Cavendish*), a disclosure may contain sufficient information even if it also includes allegations. Moreover, the very term 'information' must grammatically be construed within the overall phraseology which continues 'which tends to show ...'. Ultimately, this will be a question of fact for the ET, which must take into account the context and background. At [41] the judgment puts the point neatly by adapting the famous example given in *Cavendish* itself. The contrast was made there that if a nurse says to the management that 'the ward is filthy and there are sharps left about' that can be information, whereas if he or she simply says 'You are breaking health and safety law' that would be mere allegation. To this, the judgment adds that if the nurse made the latter remark *while pointing to sharps lying around*, that should be sufficient.

69. The authors of Harvey at C111 [55] – [59] contends that two obligations are established in law,

"As a matter of procedure, case law has established that s 43B places two obligations on the employee. **First**, the disclosure of information in question must have identified to the employer the breach of legal obligation concerned: *Fincham v HM Prison Service UKEAT/0991/01 (3 December 2001, unreported)*. It was, however, said there that this need not be 'in strict legal language'. Moreover, it has also been held that the context of the communication(s) must be borne in mind; in particular, this requirement is also met if the breach complained of is perfectly *obvious*. In *Bolton School v Evans [2006] IRLR 500, EAT* (upheld by the Court of Appeal, see para [22] above, and cited in *Western Union Payment Services UK Ltd v Anastasiou UKEAT/0135/13 (21 February 2014, unreported)*) Elias J said:

"It is true that the claimant did not in terms identify any specific legal obligation, and no doubt he would not have been able to recite chapter and verse at the time. But it would have been obvious to all that the concern was that private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to a potential legal liability.' (emphasis added)'

However, care may be needed with this point and it may be that this 'obvious breach' category is actually the exception rather than the rule. In *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416, EAT, Judge Serota said that, outside that category, 'the source of the obligation should be identified and capable of certification by reference for example to statute or regulation'. This was cited and approved by Slade J in *Eiger Securities LLP v Korshunova* [2017] IRLR 115, EAT, where it was particularly important because (as seen at para [52] above) it was not clear whether the claimant's disclosure concerned any legal obligation at all.

Second, an employee wanting to rely on the whistleblowing protection before a tribunal bears the burden of proof on establishing the relevant failure. In *Boulding v Land Securities Trillium (Media Services) Ltd* UKEAT/0023/06 (3 May 2006, unreported) Judge McMullen said:

"As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following:

- (a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on.
- (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

Failure to comply with a legal obligation

70. In *Eiger Securities LLP v Korshunova* [2017] IRLR 115, EAT Slade J said as follows:

[46] The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgment the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached.

71. In *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] IRLR

346, the EAT found that a reasonable belief of the relevant wrongdoing was sufficient and Wall LJ said,

"Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence — is, in my judgment, sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute."

72. This is on the basis of the facts as understood by the worker at the relevant time and not as are subsequently found to be the case (*Darnton v University of Surrey* [2003] IRLR 133).

73. Since 25th June 2013, the statute was amended to include provision for "necessary belief that the disclosure is in the public interest." The "public interest" is not defined. This was considered by the Court of Appeal in *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979, [2018] 1 All ER 947. The Judgment of Underhill LJ contained the following:

"The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

Against that background, in my view the correct approach is as follows. In a whistleblower case where

the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.... The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but [counsel for the employee's] fourfold classification of relevant factors which I have reproduced ... above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

74. The four factors adopted are as follows:

- "(a) the numbers in the group whose interests the disclosure served;
- (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
- (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
- (d) the identity of the alleged wrongdoer – as [counsel for the employee] put it in his skeleton argument, “the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest” – though he goes on to say that this should not be taken too far."

75. Subsequently the EAT in *Parsons v Airplus International Ltd UKEAT/0111/17* pointed out that the determination that in law a disclosure does not have to be either wholly in the public interest or

- wholly from self-interest does *not* prevent a tribunal from finding on the facts that it was actually only one of them. Thus, where the claimant made a series of allegations that in principle *could* have been protected disclosures but in fact were made as part of a disciplinary dispute with the employer which eventually led to her dismissal for other reasons, the tribunal was held entitled to rule that they were made *only* in her own self-interest and so her claim of whistleblowing dismissal was rejected.
76. The authors of Harvey point out at C111 [49], the judgment of the EAT makes two subsidiary points of interest in a case such as this: (1) the fact that in these circumstances a claimant *could* have believed in a public interest element is not relevant; and (2) a case of whistleblowing dismissal is not made out simply by a 'coincidence of timing' between the making of disclosures and termination.

Causation and Burden of Proof

77. The Respondents cited to us a passage from the authors of Harvey at C111 [121] as to the burden of proof,
- “In a case of automatic unfairness such as under s 103A, the burden of proving the reason or principal reason remains on the employer *unless* the claimant lacks the qualifying period of employment (and therefore needs to show that the tribunal has jurisdiction to hear his or her claim) in which case the burden of proof lies on the employee on ordinary principles: *Maund v Penwith District Council* [1984] IRLR 24, [1984] ICR 143, CA, applied in the whistleblowing case of *Kuzel v Roche Products Ltd* [2008] EWCA Civ 380, [2008] IRLR 530, [2008] ICR 799.
78. The EAT in *Eiger Securities LLP v Korshunova* [2017] IRLR 115, determined (see [6]) that, “Different tests are to be applied to claims under ERA ss.103A and 47B(1). Thus for a claim under ERA s.103A to succeed the ET must be satisfied that the reason or the principal reason for the dismissal is the protected disclosure whereas for a claim under ERA s.47B(1) to be made out the ET must be satisfied that the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's detrimental treatment of the claimant.”

Submissions by the parties

79. The Tribunal received written submissions from both parties which were exchanged. The parties then commented orally on each other's documents. We were exceptionally grateful for all the assistance we received.

Submission on behalf of the Claimant

80. It was submitted on behalf of the Claimant that the disclosures were made in the context of the Care Act 2014 and she noted the guidance by the London Borough of Croydon that it was the responsibility of every individual who witnesses an abusive or potentially abusive situation to

- report it and in the case of a worker in a care setting, the appropriate person was their manager.
81. The Claimant addressed us on the three alleged (oral) protected disclosures. In each case, the Claimant says that her disclosure was based on what she saw and was made in the public interest on the basis that all service users had the right to high standards of care free from abuse.
 82. As concerns the first disclosure about E, the Claimant says that the Health and Safety of K was engaged on the basis that she was a vulnerable person and could have been left in danger of skin and other infections and ultimately skin breakdown and pressure sores. On that basis it was serious. The Claimant says that it was a failure that was continuing and likely to recur and that the referral was made to the Claimant's manager.
 83. On the second disclosure about E – in her final submissions this was still said to have occurred in February, despite the fact that the Tribunal had heard unchallenged evidence that E did not work at AB after 17th January 2017. The Claimant says that cleanliness is vital to the service user's health and freedom from disease and infection. The Claimant said that it was agreed that the Respondents were encouraging K not to wear incontinence pads at night so the dangers were greater as was the threat to K's dignity. The Claimant says that the disclosure was of a continuing failure or of neglect of K over time and was truthful.
 84. The Claimant made submissions on the "smoking disclosure." She concedes that the Claimant's memory of the exact words she used was not precise but that the nub of the complaint was leaving vulnerable service users unsupervised/without adequate protection from danger and adequate care. The Claimant says that the disclosure was made to her managers in a staff meeting and was serious about a recurring practice of neglect and that it was effectively true.
 85. It was submitted on behalf of the Claimant that the reason or principal reason for her dismissal was the protected disclosures made by her which would have been known to everybody because of the way that, "everyone got together and knew one another." The faulty investigatory and disciplinary procedure established by the Respondent ignored her complaints and it is possible that this is because they wanted to cover them up.
 86. Specifically it was alleged that the Claimant had made allegations against two employees (including E) and these two got together to fabricate malicious allegations against her. The Claimant argued that if she had not made the protected disclosures she would not have been dismissed.

Submissions on behalf of the Respondent

87. On behalf of the Respondents it was said that neither of the “disclosures” made by the Claimant against E were qualifying disclosures pursuant to section 43B ERA 1996 in that the Claimant had not identified any breach of legal obligation by E or the Respondent beyond a generalised contention that they had not looked after the service user. The Respondent contends that this is an example of the Claimant’s complaints about her co-workers working practices and that the Claimant did not believe that K’s health and safety was endangered.
88. The Respondents say that the Claimant did not have a reasonable belief that the disclosures were in the public interest. The complaints about E were part of a dispute between them that was personal and the Claimant lacked a reasonable belief that the disclosure was of demonstrable benefit or advantage to the public generally or even to a significant part of the public.
89. The Respondents add that they would contend that the Claimant effectively conceded in cross-examination that her disclosures about E did not have anything to do with her dismissal (E had left the home on 17th January 2017 in any event (i.e. a month before the allegations of misconduct were levelled against the Claimant by her now co-workers. They would say that there is no causal connection with her subsequent dismissal.
90. As concerns the matter of smoking, the Respondents say that the evidence suggests that the complaint made by the Claimant was that her co-workers were going out for cigarette breaks for up to 5 times an hour – not that she had been left alone with six service users. In any event, the Claimant conceded that either there was another care worker present in the home at the relevant time and additionally the evidence was that it was unlikely that there were six residents present at that time because of other activities going on during the day outside the home.
91. In any event, what was alleged did not constitute a “qualifying disclosure” – the Claimant did not disclose information, she merely voiced her concern that her colleagues who smoked too much and who seemed to get more breaks than non-smokers like herself (i.e. it was not equitable). She did not suggest at the time that the health and safety of the service users was endangered/compromised. They would say that it was only right that she did not make such a complaint because of the proximity of other staff to where the remaining residents were. They say that the complaint was made in the Claimant’s private interest as a “non-smoker” who did not have as many breaks as smokers.
92. Ultimately, the Respondent would say there was no connection between any complaints made by the Claimant and her dismissal and anything

the Claimant relied upon in this regard was speculation.

Application of facts to the Law

93. The Claimant relies on three oral disclosures. One of the problems with these being delivered orally is that the Tribunal have had to establish what it is that the Claimant has said – as this was in dispute.
94. With the complaints about E, there is a fair amount of agreement about what the Claimant said to the registered Manager. This does not apply as concerns what was said in the staff meeting on 21st February 2017 but we were assisted by a number of contemporaneous written statements and were able to make findings above. The context is important here. The Registered Manager and his Deputy were raising in the staff meeting the issue of ensuring that there was sufficient staff to cover duties. We can conclude that what the Claimant provided was information but what the Claimant was complaining about was the unfairness that she was working whilst smokers had the occasion for additional breaks.
95. On the basis of our findings of fact above, this not a case where the Claimant had a reasonable belief that her “disclosure”/what she said was in the public interest. This was a complaint by her about how the workplace was organised and, in her opinion it was not fair to her. This was not a case where the Claimant had a reasonable belief that her disclosure of information tended to show that the Respondents had failed to comply with a legal obligation (it was very unclear what that would be in any event) nor that the health and safety of service users were put at risk (because of the proximity of all the staff and the Registered Manager or Deputy).
96. The next issue that we turn to is the first complaint about E – namely her comment to the Registered Manager in December 2016 that E had gone home at the conclusion of her shift and left a vulnerable service user sitting in her own urine.
97. In our view, in a care home, these problems are ones of fact and degree. In the context of the work undertaken by the care workers in AB, this was a disclosure of information by the Claimant but she did not have reasonable belief that this amounted to neglect or that the health and safety of K was endangered. We find that the Claimant did not feel that E was meeting the care standards she felt was required and she brought that to the attention of management. At this stage, there was every reason to suppose that this was a one-off lapse (denied in any event). The evidence appeared to be that this arose from something the Claimant noticed at the time, so there is no suggestion of neglect nor that the health and safety of K was being or was likely to be damaged – because the Claimant was in a position to rectify it as a care worker in AB.

98. As an issue of an alleged one-off failure to meet care standards raised by the Claimant, the Tribunal find that the Claimant did not have a reasonable belief that this was in the public interest. Additionally, there is an element of the impulse behind the disclosure that was based on a dispute between the Claimant and E that necessitated mediation between them. When the one-off nature of the complaint is weighed into the balance, this is a further reason why the Claimant could not be said to have a reasonable belief that her disclosure was in the public interest.
99. Lastly the Tribunal turns to the incident of the alleged failure to wash K frequently before she was dressed. The Respondents agree that this comment was made by the Claimant to the Registered Manger and it was acted upon in that the staff member was spoken to. It would appear to be a disclosure of information and not a complaint.
100. The Tribunal find that the Claimant was disclosing information which in her reasonable belief tended to show that the Respondent (through one of its workers) was failing to comply with a legal obligation – namely neglecting a service user. Furthermore as the Claimant was raising a complaint of potential neglect of a service user by a fellow support worker, there was an element of public interest as to this (this is because, in part, the disclosure was of a more serious lapse than the previous incident). By this stage, this was not simply a personal problem between the two workers.
101. There was just insufficient information that the Claimant had a reasonable belief which tended to show that the health and safety of K was or was likely to be put at risk.
102. We next turn to the issue of legal obligation. It is appreciated that this is not entirely straightforward. It is not apparent that the Claimant hit upon the Care Act as the possible source of a legal obligation until very recently. Even then, the framework of the Act is such that it is not clear what the precise nexus is that might encompass a disclosure by the Claimant about the care provided by another care worker of a service user.
103. However, with a view to applying the Judgment of Slade J in *Eiger Securities LLP v Korshunova* [2017] IRLR 115, we remind ourselves that the Claimant is not obliged by law to be that precise but her claim goes further than a mere belief that certain actions are wrong/immoral/undesirable or in breach of guidance without being in breach of a legal obligation. Her belief that the neglect of K was a safeguarding issue was objectively reasonable in all the circumstances of the case.
104. When compared with the first incident concerning the care of K by

- E, this was of a different order because it was said not to be a one-off. It is for that reason also that the Tribunal comes to the conclusion that the Claimant had a reasonable belief that making this disclosure was in the public interest. It was certainly not connected with the Claimant's own contractual issues and was concerned with a service user.
105. All of the above is not to say that K had actually come to harm by neglect by E. That is a different matter which the evidence before us was not equipped to answer. For example, it may well have involved inspecting the relevant care records of K.
106. The last issue was whether the making of the protected disclosure was the reason or principal reason for the Claimant's dismissal.
107. The Tribunal finds that the reason why the Claimant was dismissed is because of the belief by the Respondent that the Claimant was guilty of misconduct. It is important that we point out that we are not making findings that the Claimant perpetrated any misconduct. That is not our remit in this case.
108. The Respondent felt that they had to address the complaints made by the care workers. They formed the view that the issues that they raised were significant. They felt that the matter had been properly investigated and the Claimant given a chance to address the allegation. Standing back, we now understand a bit more about why the Claimant may not have addressed the allegations in any significant way at the time (this was borne of her feelings of shock and shame about these allegations which meant that she found it painful to even read the allegations) but that was not communicated to the Respondents at that time.
109. By the time of the Appeal hearing, the Claimant was able to communicate the basic tenor of her argument that she had been dismissed because she couldn't not speak out because she felt that other staff were just not doing their jobs properly and that she had made complaints about her colleagues not meeting her high standard of care and that she, "speaks how she sees." It needs to be noted that the Respondents did make some effort to investigate the Claimant's arguments before rejecting her appeal on 15th May 2017.
110. The reality is that there was nothing beyond assertion to suggest that there was a connection between the complaints made by the relatively new members of staff against the Claimant on 27th and 28th February 2017 and the disclosure of information by the Claimant about E which took place sometime in late December 2016/early January 2017 against E. The connection looked that much more remote when one takes into account the fact that E had left AB by 17th January 2017. The Claimant alleged that others had, "ganged up" against her but there is no

specificity to this claim. In fact the disclosure by the Claimant against E was made to the Registered Manger who was away at the time of the disciplinary procedure and dismissal.

111. We remind ourselves that a case of whistleblowing dismissal is not made out simply by a 'coincidence of timing' between the making of disclosures and termination. In this case, there is not even that much by way of coincidence of timing as the events of the disclosure and the complaints against the Claimant are weeks apart.
112. We conclude that even if we were wrong and the first disclosure concerning E was a protected disclosure along with the Claimant's contribution to the staff meeting, then there is still no connection between protected disclosure and dismissal. This is because the Claimant's dismissal was because the Respondent Company had concluded that she was responsible for conduct that they considered to amount to misconduct – indeed serious or gross misconduct. It was not because the Claimant had made a series of disclosures.
113. The contribution by the Claimant to the staff meeting was particularly inconsequential. Even if the Claimant was right and she did mention that she had been left alone with six service users, she raised the matter after the Deputy Manager, in the presence of the Registered Manager, called for reform in the staff meeting that would obviate her purported concerns. Even if this discussion in the staff meeting were to have taken place in the presence of the two staff members (we don't even know if they were smokers) who complained about the Claimant, it is highly unlikely to have prompted their concerns about her work.
114. If the Claimant made two rather than just one disclosure about the work of E, there still appears to be no connection to her own dismissal. These disclosures were made many weeks before and E had already left AB by 17th January 2019. Even if members of staff spoke to each other about matters such as this, it is improbable that this would inspire two relatively new members of staff to raise concerns about the work of the Claimant to the management of AB. There is no evidence of a "conspiracy" against the Claimant. This is effectively just an assertion by the Claimant.
115. By reason of the above, the claim against the Respondent is not well founded.

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116. We found that allegations were made against the Claimant by two of the Claimant's co-workers and there is no substantial evidence that would impugn their motives. It is to the credit of the Respondents that they sought to take proper statements and supplementary statements

from staff members about this as well as gather evidence and hold hearings. However, we did not find that a forensic approach was adopted to the evaluation of allegations – hindered as they were by the chaotic administration of the process – even up to the Tribunal itself.

117. Despite the findings of the Tribunal above, there is still left unanswered the question as to whether the claimant did any of the act alleged against her. We don't have to make that finding and we do not. It is not within our remit and would have been quite difficult because of the administration of the process.

Employment Judge MJ Downs

Date: 26 July 2019

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.