



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs E Grady

v

Alina Homecare Limited

Heard at: Amersham

On: 20 and 21 November 2019

Before: Employment Judge Chudleigh

Appearances

For the Claimant: Mr Carn, FRU Representative

For the Respondent: Miss Moss, Counsel

JUDGMENT

1. By consent, the claimant was given leave to amend her claim to add a complaint of automatic unfair dismissal contrary to s.103A of the Employment Rights Act 1996 ("ERA").
2. The claimant's complaints of automatic unfair dismissal contrary to s.103A of the ERA and of ordinary unfair dismissal contrary to s. 94 of the ERA are not well founded and are dismissed.

REASONS

1. In a claim presented on 4 July 2018, the claimant complained of ordinary unfair dismissal.
2. At the outset of the hearing the claimant applied to amend her claim so as to add (1) a complaint of automatic unfair dismissal contrary to s. 103A of the ERA; and (2) a complaint pursuant to Regulation 7(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006. Mr Carn subsequently revised the application to amend to confine it to a complaint contrary to s.103A of the ERA. Miss Moss consented on behalf of the respondent to this amendment.
3. The tribunal was comprised only of an Employment Judge sitting alone, the written consent of the parties was required for the case to continue following the amendment. That written consent was obtained.

The issues

4. The issues before the tribunal were as follows:

4.1 Whether the statement made by the claimant in the disciplinary hearing on 25 May 2018 that

“We have often spoken about this between ourselves, even with the Senior Care Worker. I still think it’s not the best place as she is not incontinent and therefore would need to call for assistance. She hasn’t got the chance to call us and she is on her own overnight, I don’t think it’s in her best interest”

was a qualifying protected disclosure within the meaning of sections 43A to G of the ERA?

4.2 The tribunal was required to consider whether:

- 1) Was this a disclosure of information?
- 2) The claimant reasonably believed that the disclosure was made in the public interest?
- 3) The claimant reasonably believed that the information tended to show that the health or safety of any individual has been, is being or is likely to be in danger?

4.3 If the claimant made a protected disclosure, was the disclosure the sole or principal reason for the dismissal of the claimant contrary to s.103A ERA?

4.4 Whether the claimant was dismissed for a reason capable of being fair within the meaning of s.98 ERA, namely her conduct.

4.5 Whether the dismissal was fair or unfair having regard to all the circumstances of the case within the meaning of s.98(4) of the ERA.

4.6 If either of the claims succeeded:

- 1) Whether, regardless of any procedural errors in the disciplinary process the claimant would have been dismissed anyway;
- 2) To what extent any blameworthy or culpable conduct on the part of the claimant contributed to her dismissal; and
- 3) whether and to what extent the disclosure made by the claimant was not made in good faith.

5. At the hearing I heard evidence from Ms Saidykhan, who is employed by the respondent as an Operations Manager and who made the decision to dismiss, Kisha Tancock, who is employed by the respondent as an Operations Manager and who made the decision on appeal, and from the claimant.

The facts

6. I made the following findings of material fact:
 - 6.1 The claimant was employed by the respondent as a Care Worker. She was employed from 15 October 2004 until 4 June 2018 when she was dismissed.
 - 6.2 The respondent was in the business of the provision of home care. Its clients included people who are vulnerable such as the lady whose care was the subject matter of these proceedings (BC).
 - 6.3 The respondent took over the functioning of the residential units where BC lived on 1 June 2017. Shortly after that date the claimant was given a copy of the respondent's Code of Conduct. That Code of Conduct made clear that service users should be treated with respect and courtesy and that employees should at all times behave in a way that upholds the service values, integrity and good reputation. It also stated that employees must at all times work within professional boundaries.
 - 6.4 I have no doubt that the claimant, as an experienced Care Worker was aware of the standards required of her and that the individuals with whom she was working were vulnerable.
 - 6.5 On 2 May 2018 it came to the attention of Leigh Divey, the Branch Manager, that an incident had occurred between the claimant and a service user that day. (I shall refer to the service user as BC to protect her identity.)
 - 6.6 The claimant told Ms Divey herself that BC had kicked her out of her home. Leigh Divey offered to go back in to the service user's home with the claimant to see BC. The claimant told Leigh Divey that she was tired of her job and she did not know how much longer she could do it. Leigh Divey told the claimant that she would go to see BC and the claimant said that she would go with her to apologise.
 - 6.7 When Ms Divey spoke to BC in the claimant's presence, BC alleged that the claimant had been rude and rushed with her and she said that the claimant had pulled the bedsheets off her in a rough manner, waved a bedpan in her face and told her to use it. She also alleged that when she asked what she should be doing, the claimant said she should know by now.

- 6.8 The claimant made clear that she did not agree with BC's account of events. BC then elaborated and said that the claimant had pulled the bedsheets up over her head when she was bringing the blanket back over her. The claimant denied this, and told BC that she was lying and saying that things were not true. According to Leigh Divey in the statement she later prepared, the claimant said this in a raised voice.
- 6.9 Leigh Divey then asked the claimant to leave. The claimant made a comment about BC making things up as she always does, and left the flat whilst slamming the door behind her.
- 6.10 Leigh Divey apologised to BC for the claimant's manner.
- 6.11 Later, the claimant threatened that she would not go back into BC's flat. Leigh Divey said that she could not refuse to go into the client's home as BC required a double handed visit and she was one of two carers available to her from 3pm onwards.
- 6.12 In the circumstances, the respondent decided that an investigation should be undertaken.
- 6.13 Leigh Divey compiled a witness statement as did Natasha Farrell, the Care Worker who had also been in BC's flat at the material time on 2 May 2018. Natasha Farrell's statement contained the following:
- "At approx 15.45 on 2/5/18 myself and Erica entered (BC's) flat. I went through to the kitchen. Erica went into the lounge where (BC) was in bed. I filled the kettle and switched on. I could hear raised voices between (BC) and Erica. (BC) shouted to Erica that "She was in a good mood until you walked in Erica, you always upset me when you come in here".*
- 6.14 It also alleged that BC then said, *"Don't throw that blanket at me, that hurt me"*. Ms Farrell said that BC *"started crying and Erica left, after I told her I would do the call alone"*.
- 6.15 A statement was also taken from BC herself. The statement ran to some 6 pages and was set out in the bundle at pages 47 to 49. In the statement BC detailed the events of 2 May 2018 from her perspective.
- 6.16 BC said that she was ordered by the claimant to sit on the bedpan and that the claimant waved it right under her nose, and asked her "Why aren't you using it yet?". BC said that the claimant's face was like thunder and that she said, *"Why was you in hospital all them months to go home worse than you were again?"* . She also said: *"Erica was still moaning away suddenly went to the bottom of the bed, grabbed hold of the double duvet, without any warning threw it over the whole length of my head down to toes, I am very scared of*

her now. Please don't send her into me again. I suffer from asthma and other health issues and feel too weak for all this upset".

- 6.17 BC then added to her statement her account of an incident involving the claimant that had occurred on a previous occasion. She said that she had been constipated and that *"Erica insisted on pressing all around my rectum slowly for about 10 mins, a new Carer has started that day and she still kept on although tears were coming down my cheeks"*. She also said that the next morning the claimant kept insisting that she should do it again.
- 6.18 The claimant was invited by Samantha Lewis, the Registered Manager of the facility, to attend an investigatory meeting on 8 May 2018 (although it eventually took place on 11 May). The claimant was asked to say what happened on 2 May 2018. Samantha Lewis recorded the following:
- "Erika said she went in to BC and asked her to use the bedpan. Erika said BC got upset and said I don't know how to use it, Erika replied that you used it when in the hospital so you must know how to use it, Erika undid the pad and asked her to use the bedpan Erika asked BC to roll onto her side and BC started crying and shouting saying you are hurting me at this point I asked Erika if she asked Betty what was wrong and why she was crying she said no she was just shouting at me and would not let me speak so pulled the quilt over BC she was still shouting telling me to leave her flat."*
- 6.19 On 21 May 2018 the claimant was invited to attend a disciplinary hearing to discuss allegations regarding the way she conducted herself at a service user's home and speaking about a service user and imposing her personal views on their situation in a way that was deemed by the respondent to be inappropriate. She was supplied with the Code of Conduct, the witness statements and the minutes of the meeting on
- 6.20 At the disciplinary meeting the claimant denied that she had raised her voice but admitted that she had performed a procedure on BC to enable her to go to the toilet following a period of constipation. She suggested that she was acting in BC's best interests.
- 6.21 Ms Saidykhan accepted the evidence of Ms Farrell who had overheard the claimant speaking in a raised voice on 2 May 2018. Furthermore, she considered that the claimant's view that BC should be in a care home had impacted on her professional boundaries that day and that she had not treated BC in a dignified and caring manner. Overall, she considered that the claimant's verbal behaviour had been inappropriate and amounted to gross misconduct.
- 6.22 Ms Saidykhan also concluded that the claimant's physical behaviour in throwing the duvet over the whole length of the service user was not the manner in which the respondent would expect its staff to

conduct themselves with vulnerable adults and the claimant's conduct in this regard was gross misconduct.

- 6.23 Finally, the conclusion was that the procedure performed by the claimant to help BC go to the toilet was a completely unacceptable action for a Care Worker to take. This too amounted to gross misconduct.
- 6.24 Ms Saidykhan concluded that the claimant's conduct toward BC amounted to gross misconduct and that there was no other option other than summary dismissal. The decision to dismiss was communicated to the claimant in a letter dated 4 June 2018.
- 6.25 The claimant appealed. She submitted grounds of appeal in a letter dated 6 June 2018. Those grounds of appeal were as follows:

"The grounds that I appealing this decision are on the following points:

- 1. My hand-written statement as well as my replies to the two separate minutes issued by Alina Homecare (where I have been allowed to agree or disagree) have not been taken into consideration, and appear not to have been used as part of the decision process for this matter.*
- 2. The statement from Betty Campbell (BC) has not been discussed at the disciplinary hearing in which several points needed to be highlighted, which are inaccurate.*
- 3. The statement from Natasha has comments saying 'hearing the raised voices of both me and BC', but only states what BC said, and doesn't mention anything I said.*
- 4. I did not perform a 'procedure' on BC and the exact details and reason for my action is mentioned in my statement, which clearly indicates that this was the only way to deal with the matter at hand, and I had consent from the client to do this. This actually took place several months ago, which was not mentioned or reported at the time by BC.*
- 5. The only think I have admitted to and regretted were my actions of covering BC's lower torso before leaving her flat.*
- 6. My good working relation with all residents for five years and staff doesn't appear to be taken into account."*

- 6.26 An appeal hearing took place on 19 June 2018. The claimant accompanied by Joyce Nwa. The hearing was presided over by Mrs Tancock. Each of the allegations were discussed. Ms Tancock was

concerned that the claimant believed that she had done the right thing when touching BC's bottom and she discussed this concern with the claimant. The claimant at first agreed that she had had sleepless nights about the matter but then said, "*I did what I had to do*". She did not demonstrate to Ms Tancock that she recognised that in touching the service users bottom she had done something that she should not have done. To the contrary the claimant was clear that she would have done the same thing again.

6.27 Furthermore, the claimant agreed that what she had done with regard to the duvet could be perceived as an act of aggression. However, she said she did not intentionally do it. Her case was that it was a human reaction.

6.28 Having heard the appeal, Ms Tancock dismissed each of the grounds of appeal and formed a view that the decision to dismiss was the correct one. She said that she had serious concerns that should the claimant return to work, she could repeat the actions she took on that day. The claimant had failed to see that what she did was unacceptable and inappropriate with regard to touching the area around the service user's anus. Furthermore, the claimant had refused to accept responsibility for her actions concerning her aggressive behaviour towards a vulnerable service user and, in the circumstances, the view was that it would be inappropriate to allow her to return to work.

Submissions of the parties

7. On behalf of the claimant Mr Carn relied on written submissions which he supplemented orally. He maintained that the statement the claimant had made at the disciplinary hearing was a protected disclosure. He argued that the dismissal must have been principally because of the protected disclosure because the respondent's witnesses were unable to state which one of the reasons for dismissal was the principal reason and that the other two reasons were not potentially fair reasons for the dismissal.
8. Mr Carn argued that in relation to the constipation incident that in practice Care Workers did occasionally touch intimate areas of service users during toileting and bathing so what the claimant had done was not unreasonable and he also argued that the investigation in to this matter had been inadequate.
9. Further, Mr Carn argued that the claimant was ambushed by the constipation incident and that the respondent had adopted a slapdash, book-ticking approach to the process.
10. On behalf of the respondent, Ms Moss argued that the claimant had not made a protected disclosure and that in any event, if there had been a protected disclosure, it was not the reason for the dismissal. The reasons for dismissal were set out in the dismissal letter and dismissal was well within the range of

reasonable responses. She argued that there were no serious procedural irregularities and that the claimant had had an adequate opportunity to defend herself.

The law

Automatic unfair dismissal

11. S 43A of the ERA provides that “*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*”.

12. S 43B (1)(d) provides:

“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—

.....

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

13. If the claimant did make a protected disclosure then it falls to the tribunal to consider whether the reason (or, if more than one, the principal reason) for the dismissal was that the claimant made a protected disclosure.

Ordinary unfair dismissal

14. The burden is on the respondent to show that misconduct was the reason for dismissal. There is a three-fold test - the respondent must show that it believed the claimant was guilty of misconduct, on reasonable grounds, following a reasonable investigation.

Conclusions

15. The statement made by the claimant at the disciplinary hearing which was alleged to be a protected disclosure was:

“We have often spoken about this between ourselves, even with the Senior Care Worker. I still think it’s not the best place as she is not incontinent and therefore would need to call for assistance. She hasn’t got the chance to call us and she is on her own overnight, I don’t think it’s in her best interest”.

16. I concluded that this was a protected disclosure within the meaning of s.43 of the ERA. It was agreed by Ms Moss on behalf of the respondent that the statement contained information. Furthermore, in my view, the claimant reasonably believed that the disclosure was in the public interest and that

the information tended to show that the health or safety of BC was being or was likely to be endangered.

17. There was no dispute that the disclosure was made to the employer.
18. However, in my view, that statement made by the claimant at the disciplinary hearing was not the reason for dismissal. The claimant was dismissed because of her conduct towards BC, a vulnerable service user, not because of the statement she made at the disciplinary hearing.
19. The claimant's case on automatic unfair dismissal hinged on what was said in the first bullet point on page 2 of the dismissal letter about the views expressed by the claimant that BC should be in a care home. The argument being that that statement was a protected disclosure and it was the principle reason for the dismissal on a proper construction of the letter. However, what Ms Saidykhan was saying in that section of the letter was that the claimant's verbal behaviour had been inappropriate and it seemed to her that the claimant's view that BC should be in a care home had impacted on her conduct on 2 May 2018. The claimant was not dismissed for making the statement in question, she was dismissed because of how she treated BC.
20. S 103A of the ERA requires the protected disclosure to be the sole or principal reason for the dismissal. Mr Carn argued that the dismissal must have been principally because of the protected disclosure because the respondent's witnesses were unable to state which one of the reasons for dismissal was the principal reason and that the other two reasons were not potentially fair reasons for the dismissal. I did not agree. Firstly, I considered that each of the other reasons for dismissal was a potentially fair reason – acting in a physically aggressive way and touching the area around BC's anus. Secondly and in any event, the protected disclosure was not the reason for dismissal – the reason was the claimant's conduct towards BC, not the statement that she should be in a care home..
21. In all the circumstances, the protected disclosure was not a reason for the dismissal and certainly not the sole or principle reason. Accordingly, the claim pursuant to s 103A ERA is not well-founded.
22. As to ordinary unfair dismissal, I was satisfied, having heard the evidence of the respondent's witnesses that the conduct that gave rise to the decision to dismiss was:
 - 1) The claimant's verbal conduct towards BC, in particular the conduct in BC's home on the two occasions on 2 May 2018, detailed by Natasha Farrell and Leigh Divey in their evidence against the claimant;
 - 2) Her conduct in aggressively or abruptly, throwing a duvet over BC's body and head on 2 May 2018; and
 - 3) The claimant's conduct on a previous occasion in feeling the area around BC's anus. This was not a procedure she had been trained in

and it was disrespectful to the dignity of the service user for the claimant, who is not a medical professional, to have undertaken it.

23. There was evidence which justified the conclusion that the claimant had behaved verbally inappropriately in the service user's home. Based on Ms Farrell's evidence as to what she overheard, Ms Saidykhan was entitled to find that the claimant had raised her voice. Furthermore, during the incident when Leigh Divey was in attendance, Ms Saidykhan was entitled to find based on Ms Divey's evidence that the way that the claimant spoke to and about BC was inappropriate.
24. The second element of the decision to dismiss was the claimant's physical behaviour during the visit on 2 May 2018 in throwing the duvet over BC aggressively – as BC put it "*over the whole length of my head down to toes*".
25. In the dismissal letter Ms Saidykhan referred to the evidence that BC had given on this issue and she was entitled to rely on that evidence. Ms Saidykhan said that the behaviour was not what would be expected of a member of staff working with vulnerable adults. Furthermore, the claimant admitted that she had thrown the duvet over BC.
26. Mr Carn argued that it was unrealistic to expect Care Workers to be permanently in charge of their emotions, but I considered that it was reasonable for the respondent to expect service users to be treated with respect at all times and to have found that the matter in question was unacceptable aggression.
27. The third element of the findings related to what Ms Saidykhan called "performing a procedure on a service user to enable them to go to the toilet following a period of constipation". Ms Saidykhan found that BC had not consented to the procedure and stated that it was irrelevant whether she had consented or not because an invasive procedure such as that performed by the claimant was a completely inappropriate action for a Care Worker to take with or without consent. By this Ms Saidykhan was referring to the actions that the claimant had admitted, namely that she had felt around BC rectum with her hand in order to determine whether there were more faeces waiting imminently to emerge from BC's bowel.
28. Mr Carn argued that in relation to the constipation incident that in practice Care Workers did occasionally touch intimate areas of service users during toileting and bathing so what the claimant had done was not unreasonable. I did not agree that it was appropriate to extrapolate from accidental contact (whilst holding toilet paper or a wash cloth) to justify the claimant's actions in feeling around BC's anus. Furthermore, I did not agree that the investigation in to this matter had been inadequate – the claimant had admitted the matter in question.
29. In all the circumstances, I concluded that the respondent genuinely believed that the claimant had been guilty of misconduct. That finding was on reasonable grounds following a reasonable investigation.

30. Turning to the question of whether the dismissal was in the range of reasonable responses. In my view, it was. The claimant was a Care Worker, working with vulnerable adults. I considered that it was in the range of reasonable responses for the respondent to dismiss the claimant for behaving as she did despite her long service and other mitigation.
31. Furthermore, I considered that the dismissal was not procedurally unfair. When considering the question of the procedures, I took in to account that the range of reasonable responses test applies just as much to the process as to all other elements of the decision to dismiss.
32. Whilst I accepted that the invitation to the dismissal hearing did not include reference to the constipation issue, that issue was included within BC's witness statement and the claimant addressed it at some length in the statement that the claimant produced for the purpose of the disciplinary hearing. Furthermore, the claimant addressed it at the hearing itself. Accordingly, although that matter ought properly to have been referred to in the invitation letter, the fact that it was omitted did not make the process unfair.
33. In addition, whilst it is true that the claimant was given a short period of time to respond to the minutes of the investigation meeting and that some aspects of the process were not particularly slick, in my view, the process adopted was within the range of reasonable responses. The claimant was supplied with the evidence in advance and was given an opportunity to state her case both at a disciplinary hearing and on appeal.
34. I could not detect any significant procedural irregularities. The dismissal was fair within the meaning of s 98(4) ERA.
35. In the circumstances, the claims both fail.

Employment Judge Chudleigh

Date: 23 January 2020

Sent to the parties on: 29/01/2020

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For the Tribunal Office