



EMPLOYMENT TRIBUNALS

Claimant: Mrs Myrlette Hall

Respondent: Ms U Farooq, t/a Anchor Lodge Retirement Home

Heard at: East London Hearing Centre (Cloud Video Platform)

On: 25 – 27 August 2020

Before: Employment Judge Housego
Members: Mrs M Legg
Mr M Wood

Representation

Claimant: In person
Respondent: Ms P Hall, of Peninsula

JUDGMENT

The unanimous decision of the Tribunal is that the claim is dismissed.

REASONS

Summary

1. The Respondent runs a retirement home, regulated by the Care Quality Commission, on the sea front at Walton on the Naze, Essex. It has up to 14 residents, and 8 employees. The Claimant worked there as a carer from 10 May 2018 to 24 April 2019, when her employment ended at the expiry of a week's notice (which she was not required to work). The reasons given included the Claimant shouting at staff and residents, such that other staff members would not work with her. This is either conduct or some other substantial reason. The Claimant says that she was dismissed because she continually raised health and safety matters, which were public interest disclosures, and that was the reason for her dismissal. If so that would be an automatically unfair dismissal. The Claimant cannot claim ordinary unfair dismissal as she had not worked there for the necessary 2 years).

The law

2. The relevant section of the Employment Rights Act 1996 (“ERA”) is S103A. There is no claim for pre-dismissal detriment. That section provides:

“Protected disclosure.

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.”

3. The burden and standard of proof applicable is set out in Kuzel v Roche Products Ltd [2008] EWCA Civ 380.

4. It is for the employer to put forward the reason for dismissal, here conduct or some other substantial reason. The Tribunal must first make its primary findings of fact. It must then decide what was the reason or principal reason for the dismissal, the burden being on the employer to show it was as asserted. If the employer does not do so, then it is open to the Tribunal to find that the reason was that asserted by the employee. But the Tribunal does not have to do so. It does not follow that if it was not for the reason given by the employer it must have been for the reason advanced by the employee. The true reason may have been another reason. An employer may fail to show a fair dismissal, but that does not mean that the employer must fail in disputing the case put forward by the employee. But it is not for the employee to prove that the dismissal was for a public interest disclosure reason.

5. This was summarised at paragraph 30 of Royal Mail Group Ltd v Jhuti [2019] UKSC 55:

“Section 103A is an example of what is often called automatic unfair dismissal. It is to be contrasted with the provision in section 98, entitled “General”, under which, if pursuant to subsection (1) the employer establishes that “the reason (or, if more than one, the principal reason) for the dismissal” is of the kind there specified, the fairness of the dismissal falls to be weighed by reference to whether it was reasonable in all the circumstances pursuant to subsection (4). The application of subsection (4) to section 103A is excluded by section 98(6)(a). So there is no weighing by reference to whether the dismissal was reasonable in all the circumstances: under section 103A unfairness is automatic once the reason for the dismissal there proscribed has been found to exist. In Kuzel v Roche Products Ltd [2008] EWCA Civ 380, [2008] ICR 799, the Court of Appeal addressed the location of the burden of proof under section 103A. It held that a burden lay on an employee claiming unfair dismissal under the section to produce some evidence that the reason for the dismissal was that she had made a protected disclosure but that, once she had discharged that evidential burden, the legal burden lay on the employer to establish the contrary: see paras 57 and 61 of the judgment of Mummery LJ.”

Evidence and hearing

6. The Claimant encountered some difficulty in entering the CVP hearing. The Tribunal was able to assist her in doing so, but this took some time. The Respondent had collated into a bundle the various documents provided by both parties. The Claimant had not seen this until the day before the hearing. The Tribunal had not been provided with papers prior to the hearing. The Tribunal adjourned at 11:05 until 14:00 so that the papers could be read and the Claimant familiarise herself with the bundle, which contained no new documents. The procedure was explained, and in particular the difference between evidence questions and submissions. At 14:00 the hearing commenced and the Claimant's evidence concluded by the end of the day. The Respondent's 3 witnesses gave evidence on the second day of the hearing. They were Uzaira Farooq, the proprietor of the home, a senior carer/cook and carer at the home, who had been a care assistant for the last 14 years at the home. They are referred to in this decision as "the cook" and "the carer". The carer had great difficulty with CVP and there was an adjournment over lunch when she took a taxi to the home and logged on at a computer there when she gave evidence on the second day of the hearing.

7. Ms Hall for the Respondent made submissions which accepted that the Claimant had indeed made all the public interest disclosures she claimed to have made, and that they were qualifying and protected disclosures, made in good faith, save the last, which was said to be made as a hook for this claim as the Claimant was said to have expected imminent dismissal for conduct reason. However, she submitted, the public interest disclosures were not in any sense a cause of or reason for the dismissal. The reason for dismissal, she said, was solely the actions of the Claimant towards her colleagues and residents over the 3 weekends before her dismissal, which was said to amount to gross misconduct. She pointed out that there had been many disclosures by her and others but the Claimant did not allege any detriment arising from any previous disclosure.

8. The Claimant's submissions were brief. She felt the whole process was unfair, and that she had raised serious health matters was the reason for her dismissal. In so far as she was at fault that was because the Respondent had failed in its duty of care towards her after she had been assaulted by patients, which had affected her badly given a history of anxiety and depression.

Approach to findings of fact

9. The Tribunal made the findings of fact which follow. There were many matters raised which were not relevant to the issue the Tribunal had to decide. That issue (as the Claimant was reminded throughout the hearing) was whether the (sole) reason, or a principal reason, for her dismissal was the public interest disclosures she had made.

10. The Claimant felt that the whole process was unfair. As she had not 2 years' service she cannot claim unfair dismissal, and so that is not relevant, unless it be that the whole process was so unfair that the conduct allegation was a pretext to dismiss for a hidden reason of public interest disclosure detriment.

11. The Claimant felt that she had not been properly supported in respect of

disability related issues, specifically anxiety and depression, that these had been caused or exacerbated by being assaulted by one or more residents with dementia, which had contributed to the way she acted at work. This was not a disability discrimination claim, and those matters do not have relevance, other than that the cross examination by the Claimant of the Respondent and her witnesses was predicated on the matters alleged against her being substantially true.

Assessment of witness evidence

12. The Claimant has a real sense of grievance, and has genuinely raised matters of public interest disclosure. While she challenged some of the evidence of the Respondents, this was mainly as to detail, not substance. Her evidence was for the most part reliable. The witnesses for the Respondent gave clear evidence which was consistent over time, consistent with one another and with contemporaneous documentation. It was plausible and credible, and the Tribunal accepted it as accurate. Where there was a conflict of evidence about factual matters the Tribunal preferred the evidence of the Respondent and her witnesses.

Findings of fact

13. The home has had some difficulties with standards and was at one time below its present CQC level of *"requiring improvement"*. That indicates that there were at that time some serious matters needing attention. There was a different manager in place then, whom Ms Farooq demoted, and she became a carer. The Claimant started work soon before the previous manager was demoted. The previous manager was a person who complained about the Claimant, and the Tribunal took her past record into account in assessing the evidence, but that she was not a good manager does not mean that she was a poor carer or unreliable in her reports to Ms Farooq. Given that these decisions are public documents she is not named in this judgment. It is against this background that the public interest disclosures are to be assessed. The Claimant also has food hygiene certification, and so has a knowledge base about such matters.

14. The Claimant lives about 1½ hours away from the home, in Kent. She worked Friday to Monday and had the use of a room to sleep in. Ms Farooq lives in London, also about 1½ hours away from the home (and in the opposite direction. It is the only home she owns. She visits it only about once a month, and relies on a manager. There are 8 staff in all.

15. Ms Farooq interviewed the Claimant for her role, and the Claimant was open about her past mental health difficulties, which the Claimant then thought were behind her.

16. After a short time the Claimant was assaulted by a resident with dementia, which she found distressing. She says this contributed to a deterioration in her ability to cope with work. So did sleeplessness by reason of children, and migraines, and disruption to sleep while at work.

17. The Claimant got on well, for the most part, with her colleagues, and was regarded as a good carer until the latter part of her employment with the

Respondent, particularly the last 3 weeks.

18. The Claimant made several suggestions for improvement to the new home manager, (who did not give evidence to the Tribunal), and to Ms Farooq. Others did the same. None of these resulted in any detriment to the Claimant (and nor did the Claimant say anyone else suffered any detriment as a result of a disclosure).

19. The Claimant said that there was no evidence in relation to some of them of effective action by the Respondent. The primary concern in respect of one of them appeared to be to secure deletion of photographs taken by the Claimant from her phone (after they were sent to Ms Farooq) rather than to address the underlying issue. The CQC monitor the home, and this was not a central issue for this case. The Tribunal makes no finding of fact. Ms Farooq is correct in saying that there was no need to put in any documentation about such matters because they are not germane to the issue to be decided. It is referred to only because the Claimant felt (whether correctly or not) that she was not taken seriously. There is no finding of fact other than that the Respondent did not feed back fully to the Claimant about any action taken by management by reason of her disclosures. The Claimant was frustrated about this perceived lack of response or feedback.

20. The Claimant was struggling with the demands of work and home life. She accepted as much and a text message of 23 December 2018 from her to her manager is symptomatic of her difficulty *“Sue just let me go out for a walk. My anxiety is sky high at the moment because of [the former manager]. I am not looking forward to staying tonight. I have headache from hell... Sorry to bother you but I have had just about enough of the spiteful attitude of her.”*

21. On 20 January 2019 the Claimant emailed the manager complaining about the previous manager, at that time a carer.

22. Various colleagues, including the the cook and the carer at the home who gave evidence and the former manager, complained about the Claimant, first to the home manager. These were about two distinct matters. First her attitude to them, and then her attitude to residents.

23. The Claimant’s colleagues found her increasingly brusque with them. The Claimant intimated that she is a very direct South African and that cultural reasons might have been in play. The Tribunal does not find that this was the case. The two witnesses who gave oral evidence were clear that they either liked or were able to get on perfectly well with the Claimant until late on. It was the Claimant whose approach changed by March and April 2019.

24. On 30 March 2018 the cook was in the kitchen when she heard a thud. It was a resident who had fallen over in his room trying to get to the toilet, which he could not do without assistance. She went upstairs as quickly as she could to help him. She told the manager that she shouted for the Claimant, who came, and that the Claimant shouted at the resident for trying to go to the toilet unaided. She also reported that the Claimant shouted at him on other occasions, for example saying that his playing with buttons on his phone irritated her.

25. On 31 March 2018 the cook saw the Claimant walking with an air freshener spray when the Claimant encountered a resident with dementia. The

cook reported to her manager (the same day) that the Claimant then shouted at the resident telling her to sit down, and then let off the air freshener such that it went upwards and sprayed the resident including to her chin. The cook's report to the manager was that when she remonstrated with the Claimant she was shouted at.

26. On that day the Claimant's family were in the home for an extended period, causing the cook some difficulty as the Claimant cooked some scones but the cook had to clear up to get the residents' dinner, which caused irritation to staff, as families should not be in the home in this way. (The Claimant's account that she had consent to have a 2 hour lunch for Mothering Sunday, and that the children were permitted to come in to use the lavatory is accepted by the Tribunal as truthful, but does not address the issue of increasing conflict between staff and the Claimant).

27. She would shout at them and swear at them. On one occasion (06 April 2019) she came into the breakfast room with the medicine trolley, and swore about it loudly, calling it "*this fucking trolley*" and referring to the home as "*this fucking place*", and when the carer went upstairs after telling her not to swear in front of residents. The Claimant followed her and shouted at her. Also on that day the cook reported that the Claimant had shouted at another carer when the residents were having their lunch, and in their earshot. The Claimant accepts that on 08 April 2018 the manager spoke to her about her conduct.

28. On 13 April 2019 the carer and another carer (the former manager) could not find the Claimant working midway through a shift, and found her asleep in her designated room. The carer put it succinctly: it wouldn't have been a problem if she said she was very tired and not feeling well and could she have a short nap, but it wasn't on for her just to disappear and not tell us, leaving us to do all the work.

29. The carer also (at this time) reported to her manager that the Claimant told her that she (the Claimant) had an anxiety problem and it made her angry much of the time. The carer reported to the manager that this was taken out on colleagues and residents.

30. On 14 April 2018 the Claimant got very angry with the cook about food hygiene matters. She said that the cook was preparing vegetables on the worktop, and not on the correct coloured board (different boards for raw meat, cooked meat and vegetables are a requirement) and that the cook had part cooked a joint of pork to reheat the next day. (The cook accepted the non use of a veg board for potatoes, saying that she had sprayed the worktop with anti bacterial spray, but said that the pork was cooked, then sliced, refrigerated and reheated with gravy the next day, and its temperature checked with a probe).

31. The Claimant got angry and the cook left, saying that she would report all this to the manager. The Claimant shouted after her that she, the cook could get her (the Claimant) sacked, and she (the Claimant) would not care if she was. The manager prevailed upon the cook to finish her shift.

32. Also on 14 April 2018 The Claimant reported to Ms Farooq the same issues as she had raised with the cook.

33. That disclosure also stated that there had been “*another outbreak of diarrhoea*” on 13 April 2019. This was not so. There had been two cases of loose stools for residents. This is hardly surprising with residents with dementia who will need medication including laxatives. Diarrhoea is not, if connected with food, short lived to a single occasion for each resident. In her cross examination of the cook, the Claimant laid stress on the non-use of separate boards making it harder to rule out cross contamination if there was an outbreak of food poisoning, which is correct, but a rather different matter to there being an outbreak, or even a second outbreak, of diarrhoea. This was an inaccurate report to Ms Farooq, but remained a disclosure because of the non-use of food preparation boards.

34. Also on 14 April 2019 the cook sent in a lengthy written complaint to the manager about the Claimant, including a report of a row about the Claimant accusing her of making everyone ill.

35. The manager then involved Ms Farooq. She thought it might just be a falling out between staff members, but considered that she needed to look into matters fully.

36. Accordingly on 16 April 2019 Ms Farooq telephoned all the members of staff involved – the cook, the carer, the manager and the former manager. There were written complaints dated 14 April 2019 from 3 of them. Ms Farooq also spoke to the two residents and to members of their families, and to others. Ms Farooq made notes, so compiling a report. The notes are a brief, but succinct, analysis of the matters 4 members of staff raised. There were only 8 members of staff, so 7 and the Claimant. The Claimant worked only weekends so would not encounter those who worked only weekdays. Ms Farooq spoke to the Claimant last, putting to her what the others had said.

37. On 17 April 2019 the Claimant was dismissed by Ms Farooq, in a telephone conversation which lasted an hour, confirmed by an email on the same day. This set out the reasons: there had been a number of verbal and written complaints about her from colleagues, about her conduct towards them and shouting at residents. Also it was said that the quality of her work had fallen and she was to be found in her room, and on occasion her family had spent an extended time in the home.

38. The Respondent’s representative submitted that that the Claimant saw her dismissal coming and put in the last disclosure to try to improve her negotiating position afterwards. The Tribunal did not judge the Claimant to be manipulative in that way, but rather that this was symptomatic of the deterioration in the behaviour of the Claimant towards her colleagues and her employer.

39. The Claimant sent a further email to the manager on 17 April 2019 at 17:22 raising another issue.

40. It is difficult to recruit good carers and the Claimant was not replaced for some time. The two witnesses who were colleagues of the Claimant were clear that the atmosphere in the home was markedly better after the Claimant left.

Conclusions

41. The evidence before the Tribunal, documentary, and oral from the Respondent and her witnesses, and from the Claimant both in her oral evidence and in her questioning make it clear that the Claimant was finding it hard in the months before her dismissal. Her anxiety was increasing, and she had an anger response that was becoming troubling to those around her. She has high standards of hygiene, and does not suffer fools gladly. She took her colleagues to task in a way that was not conducive to good relationships. She became very tired, and that made matters worse, to the extent that she no longer possessed the enormous patience required to care with sympathy and empathy towards the residents of the home, particularly those with dementia. After her colleagues had raised matters with their manager several times the issue was passed to the owner of the home, who dismissed the Claimant after asking 9 people and the Claimant about the matters raised by the Claimant's colleagues.

42. The questions asked by the Claimant of the Respondent and her witnesses asserted that the Respondent had failed in its duty of care to her arising from her underlying and declared anxiety and depression. She said this had been made worse by an assault on her by a resident some 10 months before she was dismissed. While she some of the allegations, she also said that this had been the cause of the behaviour of which her colleagues complained, and that it was therefore not fair to dismiss her.

43. Even if true, that is unrelated to the pleaded basis for the claim, which is that the Claimant was dismissed for making public interest disclosures.

44. The other problem with this is that it is to accept the veracity of the thrust of the complaints (if not their detail). These were not fabricated complaints against her. Also they were from people with no axe to grind, and no reason to act in concert, and who had, before the last month or so got on with, or tolerated, the Claimant. They were also from a substantial proportion of the workforce.

45. The Claimant feels strongly that the process of dismissal was unfair. Again that is not relevant to the issue, which is whether the reason, or principal reason, for the dismissal was the public interest disclosures made by the Claimant. The Tribunal observes that even if so, the application of *Polkey*¹ and contribution² would probably leave the Claimant without remedy. The process was so flawed as to suggest that it was a sham or pretext to disguise a dismissal for another reason. The Claimant had not 2 year's service, and while it might be best for an employer to follow the Acas Code anyway, she was not bound to do so. There was enquiry of all the people who might be relevant, and the Claimant was offered the opportunity to have a say. There was no statement that the Claimant could be accompanied and no appeal, although since only Ms Farooq could decide on dismissal, it is hard to see how there could be any independent appeal. It was not that Ms Farooq seized the opportunity to dismiss someone who kept complaining. She took steps to find out what people were complaining about, and took into account what the Claimant had to say.

46. Previously there had been a series of public interest disclosures by the

¹ *Polkey v AE Dayton Services Ltd* [1987] UKHL 8

² S122(2) and S123(6) of the Employment Rights Act 1996

Claimant (and others) and none had resulted in any detriment. As the home needed improvement there is every reason to think that the manager and Ms Farooq would welcome suggestions for improvement and the identification of points if there were failures. There is no reason to think that the disclosure of 14 April 2019 was a "*last straw*" for Ms Farooq.

47. The disclosure of 14 April 2019 immediately preceded the dismissal. The row the Claimant had with the cook about the same subject matter was the subject of a complaint by the cook to the home manager. That complaint precipitated the dismissal. The best point for the Claimant is the proximity in time between the last disclosure and the dismissal. However the altercation was why Ms Farooq investigated the Claimant's behaviour. The investigation by Ms Farooq was discussion with those who had complained about the Claimant. It makes it clear that they all had serious issues with the Claimant, to the extent that the manager was finding difficulty in getting people to work at weekends with the Claimant (when there would be only 3 on duty). The Claimant does not dispute that her colleagues felt this way.

48. Ms Farooq is the owner of the home, but there only seldom – about once a month. There is no reason for her to think other than that the complaints of the Claimant's colleagues were genuine. The colleagues had complained to their manager about the way the Claimant was towards them, but now these complaints extended to treatment of residents.

49. Given that the home was needing to improve, and with a further CQC inspection likely, no effective home proprietor could ignore such concerns. The matters raised were entirely sufficient to warrant summary dismissal.

50. In all these circumstances, and given the approach of the Claimant herself in the hearing, the Tribunal concludes, and finds, that the public interest disclosures made by the Claimant were not the reason, or a principal reason for the dismissal. The reason for dismissal was solely Ms Farooq's response to the complaints of the Claimant's colleagues about her interaction with them, and the way she had recently been behaving towards residents.

51. Accordingly the claim must be dismissed.

Employment Judge Housego
Date 27 August 2020