



EMPLOYMENT TRIBUNALS

Claimant: Mrs G Hayton

Respondent: Impact Housing Association

HELD AT Carlisle **ON** 6-8 February 2017

BEFORE Employment Judge Tom Ryan

Appearances

Claimant: Miss J Wilson-Theaker, Counsel

Respondent: Mr A Webster, Counsel

JUDGMENT having been sent to the parties on 10 February 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim presented to the Tribunal on 10 March 2016 Mrs Gillian Hayton brought a complaint of unfair dismissal against her former employers, Impact Housing Association. That claim form was rejected for failure to comply with procedural matters.

2. At a preliminary hearing on 25 May 2016 the rejection was revoked and the claim was accepted. However, it was then out of time and at a further preliminary hearing time was extended to permit the claim to proceed and leave was given to amend the claim to bring a complaint of unfair dismissal contrary to section 103A of the Employment Rights Act 1996 based on the claimant alleging that the reason or principal reason she was dismissed was because she had made protected disclosures.

3. By its response of 24 August 2016 the respondent joined issue with the claimant in all aspects of the case.

4. At the outset of the hearing I discussed the issues with counsel - in particular the issue of protected disclosure dismissal. There was a discussion as to the form in which the claim was to be advanced. Counsel for the claimant told me it was based upon the involvement of Ms Rogers, the claimant's line manager, who was aware of the protected disclosures and the part played by Ms Nicola Guthrie, now Ms Nicola Byrne (but I refer to her throughout as Ms Guthrie).

5. In the event, after consideration of the possibility of the claim being advanced on a basis akin to that in the case of **Jhuti v Royal Mail**, that was not pursued and it proceeded simply on the basis of whether the protected disclosures operated on the minds of those involved in the decision to dismiss, namely Ms Julie Monk, the Director of Assets who took the decision to dismiss, and Mr Michael Muir, the Chief Executive Officer of the respondent who rejected the claimant's appeal against dismissal.

6. In the event, by the conclusion of the respondent's evidence, Miss Wilson-Theaker did not pursue the complaint of protected disclosure dismissal, and it was withdrawn and dismissed.

7. I heard evidence from Ms Monk and Mr Muir as I have indicated. I saw witness statements also from Mr Steve Holiday, the HR Director; Ms Nicola Byrne, the Service Manager for the particular service with which the claimant's employment was engaged and Ms Sarah Boyle, Social Enterprise Manager.

8. In the event it was agreed that Ms Boyle, who had dealt with the claimant's earlier grievance giving rise to the disclosures, it not being disputed that such disclosures were made, did not give evidence. Both Mr Holliday and Ms Guthrie gave evidence, as indeed did the claimant in accordance with her witness statement. I have seen a bundle of documents of over 500 pages. I refer only to some of them.

9. The case, absent issues of protected disclosure, is a classic case of unfair dismissal. The statutory basis of such a claim is section 98 of the Employment Rights Act 1996.

10. Although I have not been addressed in terms on the law, I remind myself of the appropriate test. I do so at the outset by reference to the judgment of the Court of Appeal in **Turner v East Midlands Trains [2013] IRLR 107**. Lord Justice Elias said this:

"It is now a firmly established principle of unfair dismissal law that when an Employment Tribunal has to determine whether an employer had acted fairly within the meaning of section 98 of the Employment Rights Act 1996 it applies what is colloquially known as the band of reasonable responses test. In other words it has to ask whether the employer acted within the range of reasonable responses open to a reasonable employer. It is not for the Tribunal to substitute its own view for that of the reasonable employer."

11. That principle has been enunciated in the line of cases beginning with **British Home Stores v Burchell [1978] IRLR 379** and affirmed in cases such as **Post Office v Foley [2000] IRLR 827**; **Sainsbury's Supermarkets v Hitt [2003] ICR**

111; **London Ambulance Services NHS Trust v Small [2009] IRLR 563**; and more recently **Orr v Milton Keynes Council [2011] ICR 704**.

12. I note in addition especially the warning given by Lord Justice Mummery in the **London Ambulance Service** case, quoted by Lord Justice Moore-Bick in paragraph 50 of **Orr v Milton Keynes**, the last mentioned of those cases in that paragraph. He said this:

“It is not the function of the Employment Tribunal to place itself in the position of the employer. Mummery LJ with whom Lawrence Collins and Hughes LJ agreed, said this (paragraph 43):

‘It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question: whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal.’”

13. I remind myself in addition to those remarks that the band of reasonable responses applies to the sanction as established in the earlier case of **Iceland Frozen Foods v Jones**, as it does to the procedure or investigation (as it is referred to in the Act), and the authority for that is the case cited by Lord Justice Elias of **Sainsbury’s Stores v Hitt**.

14. I made the following findings of fact.

Findings of Fact

15. The respondent, a social housing provider, provides a service known as Let Go Safe Space. That provides refuge housing and related support to women and children who are victims of domestic abuse and who as such tend to be generally very vulnerable. That service has now terminated but at the time the housing provision was at premises in Carlisle.

16. The claimant was employed by the respondent as an independent living worker, from January 2004 until the effective date of her termination on 19 November 2015. Her employment was subject to a contract of employment dated 26 August 2004 and the respondent’s disciplinary, capability and grievance procedures. There are other policies and procedures which were referred to in the disciplinary process that took place.

17. The claimant had raised concerns with the respondent’s HR department. They amounted, and there was no dispute, to qualifying protected disclosures. It is not necessary for me to recite them. They were listed, helpfully, by Miss Wilson-Theaker at the outset of the case. They had originally dealt with it informally. The claimant then raised a grievance. Some of the claimant’s claims were upheld and the respondent agreed to take action.

18. As part of the outcome the respondent accepted that there had been a breakdown in relations between the claimant and Ms Guthrie and, at the claimant's suggestion, the respondent agreed to provide mediation between the claimant and Ms Guthrie. It was undertaken by ACAS and concluded on or around 6 August 2015.

19. However, from May of that year, it appears to be common ground, Ms Anne Rogers became the claimant's line manager. In that capacity she conducted a meeting with the claimant on 4 August 2015 and the subject matter of the discussion was recorded by her (259). A lot of the claimant's concerns expressed to her manager concerned the work of her co-worker, Lynne Jeffrey. The claimant and Lynne Jeffrey were the only two people providing keyworker support in this particular service at this time.

20. The claimant raised a number of matters, but so far as the subsequent events are concerned the germane ones were that Lynne Jeffrey was working excessive hours and there were generally communication problems between Lynne Jeffrey and the claimant and their relationship had also broken down

21. Ms Rogers recorded this:

"Gill is aware that Lynne has started work at 7.40am and finished at 21:52 on the same day. Lynne also doesn't put on the handover the correct time that she leaves. Once Gill leaves Lynne stays, tidies, cleans up etc. Gill also feels she is providing support to the evening for Gill's residents so Gill's support hours are declining.

...Anne and Gill talked about Gill's reasons for being concerned. Gill has been told by residents they need a break from Lynne and they feel watched. There are also H & S issues [health and safety] linked to Lynne being in the building outside her normal hours including lone working, etc. Anne and Gill discuss Gill recording Lynne's hours and watching CCTV to confirm Lynne's working hours and how this would make Lynne feel and how it would affect how she feels about her job and her relationship with Gill if she was aware of it, although Gill feels that she isn't aware of it."

In a further paragraph:

"Anne and Gill talked about the potential for this to be interpreted as bullying behaviour by Gill as Lynne could state that Gill's behaviour was making her feel uncomfortable at work."

22. In further passages the claimant told Ms Rogers that she felt uncomfortable with the way that Lynne spoke to residents. She gave an example of Lynne breaking confidentiality; that when challenged Lynne always has reason for what she has done, and at a passage she said:

"Gill doesn't want to be the person who tells the residents to make a complaint against Lynne."

23. The claimant is recorded as having said that Lynne was becoming "far too involved in the residents' issues" and she had not complied with processes or

accounted for her hours. Under the heading "Action" it was suggested that there should be reference to the staff handbook. Under the heading of "Resolving problems at work" the first stage expected would be a face to face discussion and Ms Rogers recorded:

"Gill doesn't feel confident to do this as she knows that her actions/words/body language would be misconstrued as confrontational/critical and Gill doesn't know how to behave in a different way, she's just being herself and she doesn't intend to come across like that. Gill has had feedback from residents that she can come across as being straight and sometimes intimidating, but they acknowledge that once they get to know her they understand that she is honest and to the point."

24. At this stage no question of a disciplinary procedure had been raised.

25. However, on 26 August 2015 Ms Guthrie who was still responsible for the service was contacted by the claimant in order to discuss the concerns of a service user, JH, as relayed by the claimant. It is common ground that Ms Guthrie was in Ulverston. She came back to Carlisle at the behest of the claimant and conducted a meeting with JH. Notes of that were taken by Ms Guthrie (262-263).

26. It appears, according to Ms Guthrie at least, that the reason for the meeting was because there were said to be problems in the refuge and women were not happy, in particular JH, and the claimant told Ms Guthrie that JH had requested a meeting with her as she was so very upset. Nine separate points were raised in which JH expressed concerns or made complaints about Ms Jeffrey, but under the sections numbered 1, 4, 7 and 10 the claimant was referred to as "being undermined", "Lynne is pushing Gillian out", "Gillian is being left out of the loop" and JH said "Gillian had become quiet and she was losing her confidence." At this stage JH became really tearful and said, "I don't want to get Gillian into trouble but she said if things go on like this she will go off sick", and then JH explained that she would have no-one if Gillian went off sick and she said she did not know how she would cope. JH then became increasingly upset and asked if all of the things she had said might mean she would lose her house.

27. Ms Guthrie asked JH if there had been a change within the service, as at a meeting that had taken place on 22 June 2015 of the residents JH had spoken very highly of the support provided by both the support workers, that is Ms Jeffrey and the claimant, and JH's response was that she felt she needed to speak out.

28. Having received this information Ms Guthrie thought the claimant had in effect fed information to JH and she reported her concerns to this effect to her own management and to the claimant's line manager, Ms Rogers.

29. The respondent took the view that the matter warranted investigation since the feeding of personal information about the claimant's position to a resident would be considered a breach of policy, and the claimant was suspended on 2 September 2015.

30. The claimant was issued with a letter (264) signed by Mr Holliday, the HR Director, which noted that the suspension would be on full pay and contained the following condition:

“During the period of your suspension which initially lasts for a maximum of 28 days you should not make contact with any Impact member of staff, excluding your trade union representative or volunteer nor with any Impact service user or partner agencies who we work with without my prior approval.”

31. Ms Rogers was appointed to investigate the allegations. Her investigation included interviews with Ms Guthrie, Ms Jeffrey and the claimant. The last interview took place on 20 September 2015.

32. Ms Rogers prepared a report (371-381). As the claimant's line manager, she was also aware of things that had been said at the meeting with the claimant, referred to above, approximately three weeks before Ms Guthrie's meeting with JH.

33. In her report Ms Rogers formulated a number of disciplinary allegations. First, that the claimant engaged in bullying behaviour towards an Impact colleague in breach of Impact's bullying at work policy, namely through viewing a CCTV security cameras and recording times of arrival and departure. Second, that the claimant disclosed confidential information about a colleague to a resident of Safe Space in breach of policies and procedures, namely Confidentiality, Whistle-blowing, Integrity and Accountability. Third, an allegation of the claimant engaging in what she called “psychological abuse” against a service user through the use of controlling behaviour aimed at trying to manipulate the service user to make a complaint against a work colleague.

34. The factual position concerning the CCTV security cameras and the viewing of those is not a matter that I needed to consider in detail because when that charge was put before Ms Monk it was not upheld as a bullying allegation.

35. The disclosure of confidential information was the correlation, as it appeared to Ms Rogers between the comments made by JH to Ms Guthrie and the claimant's voluntary comments to Ms Rogers in the line management meeting of 4 August. Ms Rogers described this in a rhetorical question: did GH disclose confidential information about LJ and information from the handover CCTV in lone working procedures? She found that JH had knowledge of the contents of the handover sheets and of footage on the CCTV and it raised Impact's own health and safety policies as concern. She concluded this could only have come from a member of staff. It was unlikely from her enquiries that the information was communicated to JH by a member of the night team, and the correlation between JH's problems, issues with Ms Jeffreys and those expressed by JH to Ms Guthrie were extremely similar in nature and language. She recorded that the claimant had also said, according to JH, that unless the situation was resolved with Ms Jeffreys she [that is the claimant] would go off sick., albeit the claimant had denied it.

36. There had been a subsequent event on 13 October. That concerned a meeting that the claimant had with two other residents in the street in Carlisle where it was alleged that she had urged them to make a complaint, and that, Ms Rogers thought, reinforced a pattern of behaviour.

37. That allegation, concerning the other residents, and to an extent the allegation against JH, resulted in the third allegation of psychological abuse. The evidence, according to Ms Rogers, supported the allegation that the claimant did share confidential information with JH and the question was therefore: did she abuse the position of power to instigate a complaint against Ms Jeffrey from a resident by playing on her vulnerability and fear of losing support. The notes of the meeting with Ms Guthrie showed the effect upon JH on 26 August 2015. The sharing of confidential information about her own state of mind suggested, according to Ms Rogers, that it was done with the intention to upset JH sufficiently to instigate a complaint against another member of staff.

38. On 13 October the additional matter was raised as a concern by two residents – LC, who did not previously know the claimant, since the claimant had not been working at the refuge when she became a resident, and JB who did know the claimant.

39. The matter came to light when LC wrote (368) a “To Whom It May Concern” letter. She identified the member of staff by giving the name, Gillian, and she said, “who me and J, another hosteller, had bumped into her and she was talking really badly about Lynne, at [sic] member of staff. I can’t remember what she was saying but it was about her not getting on with Lynne and the boss” and she just kept telling us to complain on the website.

40. Ms Rogers interviewed both LC and JB on 22 October(369 and 370). LC said that the conversation started when JB began to talk to a woman with pinky/purple hair who LC initially assumed was a former resident. She was then surprised to find that she was a worker and she said that she remembered Gill doing all the talking. LC kept trying to leave but Gill just kept going on. Ms Rogers asked how long they were talking. LC said it had been a good half an hour. She said this:

“Gill was criticising and complaining about Lynne, the way she worked, the things she does. Gill was also saying that Lynne and the boss [no name] have got it in for her and were working together to get her [Gill] into trouble. Gill said that she wouldn’t let this matter lie stating it was a big conspiracy between the boss and Lynne.”

41. LC said that Gill was constantly trying to get JB and her to put in a complaint on the website, even telling them how to do it.

42. JB confirmed that she was shopping with LC in Carlisle when she had spotted the claimant and shouted over to her. They walked up the street together. She asked when she was back at work and Gill said she could not come back, and she then said they talked about what was going on at Safe Space, there were some difficulties and conflicts between the residents, one woman had been asked to leave. Gill was blaming Lynne for this. JB stated that Gill was generally badmouthing Lynne. She stated that Lynne likes everything her own way and that she is too regimented and residents should put in a complaint. Gill also mentioned that they should “go somewhere” to complain. Ms Rogers asked if JB could remember more but she could not remember the place name Gill had mentioned. She recorded that Gill repeatedly told them to make a complaint and also talked at length about how they could make a complaint via the website. JB said that she and LC were just trying to

get away from Gill because what she was saying was making them feel uncomfortable, but Gill just kept going on about Lynne and the boss working together to get Gill into trouble. JB could not remember the name of the boss. JB stated she knew what Gill was doing was wrong and she was unhappy to be part of that conversation as she was happy with the service she received.

43. This complaint led to an allegation which was described by Ms Rogers (380) as “trying to manipulate the service user to make a complaint against a work colleague in breach of the safeguarding policy and the positive impact professional boundaries guidance”.

44. The consequence of this report and these allegations was that on 30 October 2015, there was a disciplinary hearing. An earlier invitation to a disciplinary hearing was issued concerning the original allegations and then further allegations were added after the two residents, LC and JB, made a complaint. The letter sent to the claimant (285-287) signed by Ms Stainton, HR Manager, sets out:

44.1.1. The bullying allegation, being the reference to inappropriate viewing of CCTV security cameras and recording times of arrival and departure;

44.1.2. The disclosure of confidential information, and there are references there to confidentiality and whistle-blowing policy, integrity and accountability policy.

44.1.3. The manipulation allegation, described there as trying to manipulate the service user (in the singular, I note, although it is clear that the investigation report refers to services users in the plural).

44.1.4. That the claimant had failed to comply with the conditions of her suspension by speaking to service users and had further trying to manipulate them into making complaints against the Service Manager and Lynne Jeffrey.

44.1.5. That the behaviours had brought or may bring Impact into disrepute or otherwise destroy the essential relationship of trust and confidence.

45. To that letter were appended 15 separate documents or groups of documents. They included at appendix 1 the notes of the meeting between JH and Ms Guthrie; at appendix 5 the notes of line management meetings including that on 4 August 2015, copies of the policies on Integrity and Accountability, Confidentiality and Whistle-blowing, Preventing bullying and Safeguarding, and, at appendix 8 the Positive Impact Professional Boundaries Guidance. I refer to three of them since they were the three that were ultimately germane to the findings in the case.

46. The Integrity and Accountability policy contains (312) under the heading “Balancing confidentiality and openness” and the subheading “Confidentiality” the following paragraph:

“You equally need to be aware of which information must be kept confidential. Personal information about residents, applicants for housing, your colleagues

or other individuals may only be released outside the organisation with the written consent of the individual concerned.”

47. The Confidentiality policy (325) says in one of its introductory paragraphs:

“In the course of their employment with Impact staff members have the authority to retain and disclose personal data but they must not use their position to obtain or disclose information of personal nature for any other purpose than their day-to-day work or risk management.”

48. The claimant and others had received what were called “Professional Boundaries Service Expectations” and in the disciplinary outcome letter there were references to paragraphs 1, 3, 4, 8, 9 and 20 of those service expectations. I notice that at the head of the page (360) where these are found there is a paragraph which describes there being no “single all encompassing definition of what constitutes professional boundaries. The intention was to achieve a shared understanding of acceptable and unacceptable practice. The guidance applies to all contact with customers and should be incorporated into day-to-day practice”. The relevant paragraphs continue:

- “(3) Staff will take care not to influence customers with their own beliefs and personal values. Staff should also be aware of their potential to influence vulnerable and/or impressionable customers.
- (4) Staff will be seen as approachable, open to fair challenge and criticism and available to engage in meaningful dialogue. They should not be seen as intimidating or inaccessible people.
- (8) Staff will respect customers’ rights to privacy and be sensitive and responsive to any different person and cultural needs for privacy that may arise.
- (9) Staff must not divulge any personal information about themselves or other staff members.
- (20) Gossip or hearsay should not feature as an aspect of service culture and should be actively discouraged among both staff and customers. Staff must never discuss other staff members with customers and issues relating to housing management and/or support work.”

49. The claimant was advised of her right to be accompanied by a colleague or trade union representative and it is right that she was represented by her trade union representatives throughout the process that followed.

50. On 19 October the representative had asked for the proceedings to be postponed to allow the claimant to prepare a defence. Mr Holliday, on 27 October, granted a postponement of two weeks and three days rather than the four weeks that were asked for. As I have said, on 30 October the letter containing all the allegations was written to the claimant (285).

51. The hearing took place on 13 November. Ms Monk conducted the hearing. Mr Morris, the shop steward, acted for the claimant. Ms Rogers presented the

management case and Ms Stainton attended, and I understand the notes were taken by her.

52. The meeting started at 10.00am and continued until 4.00pm with breaks. It was a long meeting and it went through matters in detail. Ms Rogers outlined the allegations. The claimant accepted that she had every opportunity to respond. She disputed, or her union official disputed with her afterwards, that the notes were fully accurate. Mr Muir was to refuse to permit the claimant at appeal to adduce further notes of the meeting at the appeal stage for reasons to which I will come.

53. So far as factual matters are concerned, the first matter that is dealt with of relevance is the conversation that JH was reporting to Ms Guthrie. There is a record (413) that the claimant said that she had had a meeting with Ms Rogers on 21 September, not 20 September. She had no idea what she had done or was being accused of so it was difficult to answer the questions. She explained that when she went to the house JH had said "you look awful". She had said if she was not well she would go off sick but she was fine so there was no need for JH to worry. She stated "it could be a problem with service users as they latch on to something and blow it up". Her factual account concerning that was different to that which was being alleged against her.

54. The issue of confidentiality was raised. There was a discussion between Mr Morris and Ms Rogers (423). He suggested that both Ms Jeffrey and the claimant had said residents had access to the office and residents discussed staff amongst themselves. Ms Rogers replied, "Yes, I'm sure they do". He suggested if the door was unlocked sometimes the residents could see the unprotected CCTV. Ms Rogers responded, "They would be able to see what was on the CCTV then and there but they could not scroll back and see previous footage without training", the relevance of that being that that unless one scrolled back you could see what the CCTV had earlier recorded. In other words you could not get from the CCTV, unless you knew how to use it, what time somebody attended for work or left in the evening.

55. Ms Hayton at page 434 repeated her account effectively of what happened between her and JH which had led to her version of that conversation. Her account in relation to the meeting in Carlisle, given at page 441, was that she heard her name being shouted whilst in Carlisle, "Gillian, is that you?". She did not initially recognise the lady then realised it was JB. JB had said Safe Space was a nightmare and she hated it. She asked what would happen to her. The claimant said she was going to meet her friend at Matalan so she kept walking but the two women followed her. They said they had been given notice and that somebody else had an issue, and asked if the claimant wanted her number. The claimant, according to her own testimony, said no. JB asked when she was coming back to work. The claimant said she did not know. She kept walking all the time but they followed her from WH Smith to B & M. JB asked how she could complain so I told her "on the website". Ms Monk asked "what was the issue?". The claimant said, "Not sure, it all happened very fast". In a later passage she said that she only explained to them how they can complain based on the information they told her.

56. The claimant was asked by Ms Monk (page 443) why the two women would say what they did. The answer that is recorded is "does not know. It feels that

they're trying to get her into trouble. They kept telling her things and offering Kelly's number for GH to call her".

57. Both parties summed up at the conclusion of the meeting. The meeting ended about 4.00pm.

58. Ms Monk said she wanted to consider the matter; that she would either call them back to give a decision or more likely write to the parties. She did write.

59. The outcome letter (455-457), unhelpfully, although drafted by Ms Monk with the help of HR, does not use the same numbering as the numbering of the allegations, so I will refer to them by the nature of the allegation.

60. Concerning the allegations, Ms Monk said that she was satisfied the following allegations were substantiated to her satisfaction:

60.1. The claimant, had disclosed confidential information about a colleague to a resident of Safe Place in breach of confidentiality, whistle-blowing and integrity and accountability, and that, although the letter does not say so, was referring to the claimant telling JH about the times that LJ attended work.

60.2. The claimant had failed to comply with the conditions of suspension by speaking to the service users without permission, and furthermore had attempted to manipulate them into making complaints against work colleague, Lynne Jeffrey. Ms Monk described that as directly interfering in an ongoing investigation, a further breach of the integrity and accountability policy and the positive Impact professional boundaries guidance.

60.3. "I determined that on the information that was presented to me that you breached the Impact professional boundaries guidance in a number of key areas". Under paragraph 1 of the guidance she found there was no trust or respect between the team members by the claimant's own admission; under paragraph 3, that there was evidence of attempts to influence customers; under paragraph 4, that the claimant had admitted that residents can find her style intimidating; under paragraph 8, the claimant had said that she told new residents they must tell her everything as well as telling Lynne; and then under paragraph 20, the gossip prohibition, "this was breached in your discussions with [JH] and with the two residents you met in Carlisle".

60.4. She concluded that the overriding allegation that the behaviours destroyed the essential relationship of trust and confidence was also made out.

61. Ms Monk then wrote:

"The other allegations were not fully substantiated to my full satisfaction so my decision is based purely on the above four issues. Taken individually they would not in themselves justify a dismissal decision, but when considered together they demonstrate a clear breakdown of relationships between yourself and work colleagues and an ongoing undermining approach with

regards to your relationship with others sufficient for me to conclude that they have led to a clear breach of the relationship of trust and confidence between yourself and Impact Housing.”

62. With regard to the outstanding allegations she said, “I believe that issues 5(a) and 5(b) did occur” (that is the viewing of the CCTV cameras and recording the times of arrival and departure). She said, “Having listened to your explanation I accept that you were doing this in response to genuine health and safety concerns about others and not as a form of bullying”, so the bullying allegation was rejected in its entirety. Insofar as item 3 was concerned, she had found that was not a breach of the safeguarding policy. The result was that the claimant’s employment ended with immediate effect on that day.

63. The claimant submitted an appeal as she was entitled to do on 29 November 2015 (463). Mr Smith, a caseworker, submitted further grounds of an appeal under Unison headed paper on 30 November 2015 (465).

64. Mr Holliday wrote to the claimant on 8 January 2016 seeking to arrange an appeal hearing for 18 January and identified a complete set of all the documents that had been sent originally, and then added in appendices 21-28, the dismissal letter, notes of the disciplinary hearing, the appeal, the Unison appeal letter, and some emails with the claimant and Dave Smith, and copies of disciplinary invitation letter of 30 October 2015.

65. An earlier hearing of the appeal had been delayed and the reason for that was that the respondent had said that the appeal would be by way of a re-hearing. That was consistent, as the claimant now, I think, accepts, with the respondent’s disciplinary policy. At page 106, under the heading “Appeals” the policy provides as follows:

“The appeal shall be by way of re-hearing and shall follow the same procedure as the disciplinary meeting. The employee shall have the same right of representation as at the disciplinary meeting.”

66. While I am dealing with the question of disciplinary policy, objection was taken by the claimant, both before and in these proceedings, that Ms Rogers should not have been the investigating officer, because it was Ms Rogers who had, according to the claimant, found that she was bullying in a line management meeting on 4 August 2015. At page 108 the policy provides under the heading “Investigating Officers/Managers”:

“All staff are responsible for the supervision of other staff. Normally this will be the immediate line manager of the person to be investigated. In some circumstances this may be inappropriate or there may be a time issue and then another line manager may be asked to undertake an investigation.”

67. The appeal hearing was rescheduled for 1 February 2016. Both at this hearing and indeed before the claimant accepted that she had every opportunity to state her case. She did not, I think, dispute the notes of the appeal hearing. I have to say that, as with other correspondence prepared in this case, the notes of the appeal hearing are not always entirely clear as to either who is speaking or what was being

said. I recognise that taking notes is a difficult task and a number of matters arise from these notes.

68. Mr Muir, the Chief Executive, conducted the hearing. Mr Holliday was there to advise him and took the notes. The claimant was again represented by Ms Morris, and both Ms Monk, who had taken the original decision, and Ms Rogers attended: Ms Monk to explain her reasoning and Ms Rogers, as I understand, to rehearse the management case, for that is what she did.

69. There was a reference in the papers, and it was raised again, that there had been an earlier question of confidence, although the claimant does not accept there was a breach of confidence in this case, about a student who was on placement. It was clear from the way it was referred to that it was what might be described as a "background fact", and it certainly was not an allegation in respect of which the claimant was disciplined. Mr Muir agreed that he did not read the original documents in relation to the recording of the claimant's coming and going. He did not in fact uphold that allegation at the appeal stage, but the notes shows that he had, as he confirmed he had, found the facts that Ms Rogers had asserted.

70. Ms Rogers suggested that on 13 October the claimant was encouraging the two women she had met in Carlisle to make a complaint. Again that was disputed by the claimant and her representative. In his final submissions Mr Morris identified the 7 allegations that were said to amount to professional boundaries issues and relied on as breach of trust and confidence. He was obviously clear that the manipulation allegation was being made both in relation to JH as well as the two other residents, as he refers to three residents (496).

71. Ms Monk summed up the basis of the case and Mr Morris summarised the response.

72. On 1 February 2016 Mr Muir at least signed an outcome letter, but I believe it was written for him by HR,(500-502) by which the appeal was dismissed. He said this:

"I have determined that I uphold the dismissal decision. With regard to the first of the three allegations I determined that you had disclosed confidential information about a colleague to a resident of Safe Space. With regard to the second of the three allegations that we considered I determined that you failed to comply with the conditions of your suspension by speaking to service users without any permission to do so. This is directly interfering in an ongoing investigation, a breach of the policies. With regard to the third of the three allegations we considered I determined that the above behaviours destroyed the essential relationship of trust and confidence between the employee and Impact and its service users. [This was the manipulation allegation.] I determined that it had destroyed the essential relationship of trust and confidence. I was not as sure that your behaviours had brought Impact into disrepute as prior to your dismissal there had been no involvement with outside bodies about your behaviour and the specific allegation."

73. Mr Muir repeated, and it is accepted that this was cut and pasted from the earlier letter, the seven subparagraphs under the heading of the breach of Impact professional boundaries guidance. He concludes by saying this:

“Taking account of the three substantiated matters in their totality it is my view that the decision to dismiss was appropriate and I therefore do not uphold your appeal.”

Submissions

74. The parties made submissions. No submissions were advanced by Miss Wilson-Theaker in substance on the issues of genuine belief or reasonable grounds. She identified at the outset of her submissions that her submissions were focussed on the question of whether there was a fair procedure and whether the sanction was within the range of reasonable responses.

75. She broadly accepted that the respondent had complied with its procedures, but she said that this was a lady who had a long period of work from 2004; she was proud of her work. Prior to 2015 she was of good character and she was entitled to expect a fair procedure. I say at once have no difficulty with that submission at all. However, I do not think it is just limited to those who satisfy those or any requirements like them: all employees are entitled to a fair procedure where they have a right to complain about procedure under the statutory protection afforded by the Act.

76. Miss Wilson-Theaker submitted a number of matters go to the fairness. Firstly the extent and role of previous allegations. She referred to the student worker allegation. She said that Ms Rogers had overstated the number of concerns. Ms Monk had conceded that the student issue was relevant and it was the only historic complaint she was aware of. There was another historic complaint alluded to briefly where the claimant had, I think, written a letter to the police but that does not appear to have featured in the disciplinary process at all. Ms Monk was not aware of any previous disciplinary hearing but she confirmed that if there had been something she would have been notified about it and on that basis treated the claimant by inference as not having been subject to any previous disciplinary hearing.

77. Miss Wilson-Theaker submitted that the student breach of confidentiality that was earlier said to have occurred was taken into account but was not raised at the disciplinary hearing. The claimant should have been given an ability to comment on that as it was relevant to sanction. She referred to how Ms Monk resolved the evidential conflicts. With regard to the CCTV she reached a decision by reference to corroborative evidence and the correlation between the management notes and Ms Guthrie's notes of the interview with JH.

78. With regard to the service users Ms Monk's evidence was slightly less clear, she submitted. Initially she said that she believed the service users but she also said that she could not reject the claimant's account. She could not resolve that in her own mind and she was satisfied that the breach of the suspension conditions was made out on the facts of the conversation itself. She submitted that that went to the severity of the offence.

79. On procedural matters she submitted that JH should have been, as it were, re-interviewed. That was put to the respondent's witnesses. The respondent's case was that service users are vulnerable and the policy and practice is that they should not be interviewed by them since it can only serve to exacerbate stress and anxiety.

80. Putting her submission in a more nuance way, the claimant's counsel submitted that the claimant should have been told more clearly why it was that JH should not have been re-interviewed. Whilst that might be her case before me, it was not the case that Mr Morris was putting forward, as I understand it, at the disciplinary hearing. Be that as it may, it is a matter upon which the claimant relies before me.

81. Miss Wilson-Theaker then raised the question about whether it was a breach of the procedure for Ms Rogers to be the investigating officer. She submitted it was unfair because of her previous involvement in the line management discussion with regards to the bullying allegations. She accepted on an objective reading of the line management notes that it could not be seen as Ms Rogers saying that the claimant or alleging that the claimant had indulged in bullying procedure, and the language of the note on an objective view supports that view.

82. As to the question of whether the appeal was by way of a re-hearing, she referred me to the disciplinary procedure (277) and accepted that the claimant was sent a copy of the disciplinary procedure in that letter from Ms Stainton on 16 October. This was the first letter prior to the service users in Carlisle incident had been raised, and after the list of appendices she drew my attention to the fact that Ms Stainton wrote in that letter, "In addition I also attach a copy of our disciplinary procedure for your information", and she accepted, therefore, that by implication that if the claimant had read that she would have understood the need for a re-hearing.

83. The claimant dealt with this point in evidence, and I deal with that. She said that she was confused about the nature of the appeal. She thought, she said to me, that she should have an appeal not a re-hearing. I can understand why an individual employee might not be familiar with the way these processes work and might think that that was something different. The fact that she had union representation suggests to me that it is not entirely clear why the union should have had any confusion about the nature of the hearing. Mr Morris complained about it. It was eventually dealt with and it was affirmed it was going to be a re-hearing and that is how it took place. She referred to the fact that at the appeal hearing Mr Muir said he did not take into account the different approach to the patterns of behaviour and did not take the student incident into account.

84. With regard to Ms Monk's finding that the manipulation of JH was by the implied threat that the claimant would go off sick if things did not improve with Lynne Jeffrey, Mr Muir did not reach his decision on that ground. It is clear, however, that he did reach a decision based upon the tone of the disclosure of JH to Nicola Guthrie and the degree of upset that clearly JH was suffering, and that it was clear that he accepted Anne Rogers' reasoning in his conclusions, and his conclusions were clearly about all three service users not just the two in the street in Carlisle.

85. In submissions Miss Wilson-Theaker submitted that the claimant conceded that each of the allegations separately, if they were substantiated, could amount to

gross misconduct. She submitted that on the subject of mitigation the claimant was entitled to have all matters considered and weighed in the balance, including: the fact there had been no complaints by residents against her; no breach of confidentiality had ever been alleged against her before by a resident; no disciplinary sanctions had been applied to her. She added that no complaints from outside companies or agencies had been raised, but accepted that that was not something that had been raised in the evidence.

86. It is common ground between counsel that all those matters were put to the respondent's witnesses, and it is quite clear that whilst nothing is said about length of service in the disciplinary outcome, the evidence of Ms Monk is that she took it into account. The evidence of Mr Muir is that he did not consider that. He said, in answer to counsel, that because they amounted to gross misconduct dismissal at his level was the only sanction that could be imposed and for that reason he rejected the appeal.

87. A number of other matters were raised by Miss Wilson-Theaker as matters that should have been taken into account: that there were several line managers afforded to the claimant that would have an impact on working relationships; the upset of a service user which arose out of the conflict between the claimant and Lynne Jeffrey could not be laid solely at the claimant's door because the conflict would not be all of the claimant's making, it would be perhaps shared between her and Ms Jeffrey and she said that both Ms Monk and Mr Muir accepted that. This, she said, had a knock on effect going to the severity of the conduct alleged as regards those matters. The claimant's ability to work and her determination to serve should be weighed in the balance in her favour. She accepted that Ms Monk did weigh all these things, although they are not in the dismissal letter or the witness statement, but Mr Muir did not consider them at all. She said this goes to the procedure itself but also to whether the sanction was outside the range of reasonable responses. The procedure, she stated, was not fair.

88. In response Mr Webster dealt first with the claimant's submissions. He submitted that the claimant's counsel was wrong: the student issue was raised in the disciplinary hearing (408) and it was plainly in Ms Rogers' report. It is correct it is not in the outcome letter from the disciplinary hearing according to Ms Monk's evidence: it was part of a pattern of behaviour but it was not an allegation to go to the disciplinary hearing. She said it is common for employers to look back when they deal with disciplinary matters. It does not follow that the claimant was dismissed for that. It is part of the contract and the boundaries issue. It was neither discussed nor the cause of the claimant's dismissal. She said that whilst it is right that at page 372 Ms Monk conceded that she had wrongly referred to a number of concerns being previously raised, that concession itself was wrong because Ms Rogers' document clearly in the report identified a number of concerns, and in any event Mr Muir said he did not take those matters into account.

89. With regard to JH not being interviewed, he noted that in cross examination the claimant accepted that it was entirely understandable and within the range of reasonable responses given the vulnerability of the service users.

90. On the subject of whether Ms Rogers should not have conducted the investigative process, he pointed out that whatever interpretation Ms Hayton placed

on the line management record, she accepted it was a reasonably accurate record and it is perfectly clear, he submitted, that the potential for it to be interpreted as bullying was raised and it was a moot point because the policy provides in any event that the line manager should have conduct of the investigation as the investigatory manager. Overarching all that, whatever that criticism, it is clear that Ms Rogers was not in any sense the decision maker.

91. As to re-hearing, he submitted the policy was clear. He doubted whether in fact a re-hearing appeal policy was disadvantageous. It might have been if all the allegations were reconsidered. This referred to the fact that Mr Holliday had written a letter identifying all the allegations that were originally levelled as to be subject to the appeal decision, even though some of them had not been upheld by Ms Monk. However, at the outset of the appeal hearing it is common ground that it was clarified that it was only those allegations that were found against the claimant that were being considered at the appeal.

92. As to the cumulative approach he submitted that Ms Monk had said she had treated it cumulatively but if she had considered it individually she would still consider them to be gross misconduct but not necessarily result in dismissal. She said the breach of suspension may not have resulted in the dismissal. He referred to Mr Muir's evidence on totality as being appropriate to characterise them in that way and he noted that Mr Muir said, "I never considered them in isolation". He did not consider alternatives. He regarded the three issues together as sufficient. He therefore submitted that the evidence of the two officers was very similar, both leave open the possibility of the claimant being dismissed.

93. On the subject of mitigation he submitted that Ms Monk did consider the points that were put. The outcome letter does not make the points. It is clear that Ms Monk did not write it. It is a question for me as to whether I accept her evidence on this and he submitted what reason do I have to disbelieve Ms Monk?.

94. As to differences of approach to the allegations taken by the two officers, he submits it is not surprising that two separate managers would come to different conclusions and it adds weight to the strength of the appeal, he submitted, that they did so. He submitted that Mr Muir had looked at the differences between the accounts of JH and the claimant, but he noted that the Mr Muir said that he relied upon Ms Rogers, and it was enough, he submitted, for Mr Muir to do so.

95. He submitted overall that if the only criticism of Mr Muir was that he did not have regard to the firsthand accounts in relation to that issue rather than Ms Rogers, then it was not sufficient to render what was otherwise a fair procedure into a flawed procedure.

96. It is sufficient to say that in his submissions Mr Webster took me through the allegations, identifying the relevant passages to which I have already referred of the policies, the correlations between documents where they are applied as showing there were reasonable grounds, although reasonable grounds is not a particular line of attack or line of attack at all in fact of the claimant.

97. As to Mr Muir not considering mitigation, Mr Webster referred me to the **London Borough of Harrow** case which refers to loss of length of service and lack

of disciplinary warnings as being unlikely to be of great significance in a decision involving gross misconduct, because of the policy underlying it that gross misconduct can irretrievably destroy the relationship of trust and confidence.

98. Conceptually, of course, there can be situations in which an act of gross misconduct does not do that, but the test is not whether Mr Muir has committed some separate procedural breach by not considering length of service, but whether that taken with other matters renders the dismissal unfair in accordance with the appropriate test.

Conclusions

99. It is clear that in considering the fairness of the dismissal it is an error for the Tribunal to focus unduly on a particular point of process unless it is of such grave significance as to undermine the entire basis of the respondent's procedure or a particular element of the decision. What I have to do is stand back and look in the round at the investigation and say whether I am satisfied that the criticism has been made out.

100. It cannot be argued that there was not a genuine belief in the respondent that the claimant was guilty of the conduct alleged, indeed she does not assert to the contrary now.

101. It is clear that in relation to each of the allegations, that is the ones that were made out, that the claimant had disclosed confidential information in the sense that the evidence before the respondent, if they accepted it in the way that they did, could reasonably entitle them to draw that conclusion.

102. By the same token, whether one approaches it in the way that Ms Monk did or as Mr Muir did, there was evidence, if they accepted the accounts of the service users in the street in Carlisle, LC and JB, that there was evidence of an attempt to manipulate them into making complaints against the claimant's work colleagues. It is clear that the claimant was saying on the one hand that she did not do it, and they were saying that they did. In my judgment Mr Webster is right to submit that the significant piece of evidence in this case is when asked by Ms Monk why should they say this, in particular LC who did not know the claimant, the claimant had no answer.

103. On that basis, to say there were not reasonable grounds for the belief simply cannot be sustained.

104. As to the manipulation of JH, one can arrive at that decision whether one again follows the reasoning of Ms Monk or the reasoning of Mr Muir. If either of them either believe that the claimant has said "I will go off sick if things don't get better" or you accept the analysis given by Ms Rogers and take into account the nature of the distress and, as Mr Muir said, the failure to minimise the distress, either of those can be seen in my judgment as entitling the respondent reasonably to believe that that was an attempt to manipulate not just the two service users but also JH, and it is clear, as I think it was pointed out by counsel in final submissions, that on page 501 there was reference to breach of confidence both in relation to discussions with JH and the two residents. Taking that into account the second bullet, evidence of

attempts to influence customers, in my judgment certainly entitles the Tribunal to say it was reasonable for the respondent to believe that was made out.

105. The two principal criticisms of the procedure, in my judgment, are asking Ms Rogers to be the investigating officer and the failure to interview JH separately.

106. The test in terms of the procedural breaches is the same. Do those procedural breaches, along with the other matters raised by the claimant's counsel, take what is otherwise accepted to be a fair and reasonable and compliant procedure outside the range of reasonable procedures that a reasonable employer could adopt?

107. In my judgment the answer must be "no". It is clear from the sheer volume of documents that this was an employer that was diligently seeking to raise issues and give the claimant a chance to answer them.

108. There is nothing in the argument concerning Ms Rogers. Although the claimant believed that she was being accused of bullying, it is clear that from the note which the claimant accepts was accurate that at the line management meeting on 4 August 2015 no such allegation was being made. Even if it were, it would need something more in my judgment to make the appointment of Ms Rogers as investigating officer so wholly unreasonable or outwith the range of reasonable actions as to render the process unfair. But even if that was an error, in my judgment Mr Webster's submission is to the good, namely Ms Rogers was not the person who was making the decision.

109. The allegation concerning whether JH should have been re-interviewed in my judgment is also without merit. Given the context of this entire employment and the entire service it cannot be said that it lay outside the range of reasonable responses to make a policy decision not to interview service users because of vulnerability. It seemed to me that when Mr Morris raised it, I think in a later stage, it was put that Ms Guthrie had not got JH to sign the notes. Very often such notes are not signed. It was a matter for Mr Muir at his stage and earlier Ms Monk to decide whether they accepted the account as recorded by Ms Guthrie or not. Clearly in their own ways each of them did. In those circumstances I am unable to find that the procedure was outwith the range of reasonable responses.

110. Was it open to a reasonable employer to conclude that these allegations, either taken together or one by one but in reality taken together, amounted to gross misconduct? If it is reasonable for Ms Monk, as in my judgment it is, acting as a reasonable employer, and it would be reasonable for a reasonable employer to say "Yes, each of these matters amounts to gross misconduct because of the identifiable breaches in the policy", then the decision is not outwith the range of reasonable responses.

111. If that is right, although a finding of gross misconduct is not necessary for there to be a finding of fair dismissal, what is the effect then on the failure of Mr Muir at the appeal stage to consider the question of mitigation in terms of sanction? At best it results in a flaw in the procedure. That this is so is because where there is even a single act of very serious misconduct, that of itself may justify a dismissal, however long the employee has served, however diligently or faithfully or well they

have performed their duties and however minimal or absent are the complaints about them, either internally or externally.

112. The essence of conduct of such severity is that it undermines the duty of trust and confidence and the employment contract is irretrievably broken to a point where the employer is entitled to say, "Up with this we will not put - you must leave now."

113. In those circumstances it seems to me that whilst she has advanced as well as she might everything that can possibly be said on behalf of the claimant, Miss Wilson-Theaker's argument based on mitigation is simply not made out. The pity of the claimant's dismissal in these circumstances and the sympathy one has for somebody who after long service, and in particular working with vulnerable adults, cannot be understated, it is always regrettable. But that is not the basis upon which I have to make the decision.

114. I cannot say on this evidence that the dismissal was anything but fair, and for those reasons I dismiss the claim for unfair dismissal.

Employment Judge Tom Ryan

16 May 2017

REASONS SENT TO THE PARTIES ON

17 May 2017

FOR THE SECRETARY OF THE TRIBUNALS