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# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs E Skinner**

**Respondent:** **Ardtully Retirement Residence**

**Heard at:** **East London Hearing Centre**

**On:** **31 October and 1 November 2018**

**Before:** **Employment Judge Jones**
**Members:** **Mr T Burrows**
**Mr L O'Callaghan**

**Representation**

Claimant: In person (with assistance from Ms E Ingram, Lay representative)

Respondent: Mr M Howson (Consultant)

## JUDGMENT

**The unanimous judgment of the Employment Tribunal is that: -**

1. **The complaint of detriment following the making of protected public interest disclosures fails.**

2. **The complaint of automatic unfair dismissal under section 103A of the Employment Rights Act 1996 fails.**

3. **Both claims are hereby dismissed.**

## REASONS

1 The Claimant brought complaints of unfair dismissal and detriment following the making of protected public interest disclosures when she presented an ET1 complaint form to the Tribunal on 19 April 2018. The Respondent submitted its response on 24 May 2018 disputing her complaints. The matter came before this Judge at a preliminary hearing on 16 July 2018. At that hearing, the Claimant gave details of three protected public interest disclosures she allegedly made on 20 June, 22 June

and 17 July. As a result, the Respondent was given leave to amend its response and submit it on 30 July. The Respondent accepted that the Claimant had raised issues with Ms Palladino, the Respondent's Operations Manager, who took action as a result. However, at that hearing the Respondent denied that any action was taken in respect of the concerns the Claimant raised.

2 The Tribunal settled the list of issues that had to be determined at this hearing. The Tribunal will refer to that list of issues at the end of this judgment.

***Evidence***

3 In the final hearing, the Tribunal had a bundle of documents from the Claimant and another bundle of documents from the Respondent. It transpired at the start of the hearing that neither party had seen the other's bundle of document before today, despite the Tribunal having made orders that both parties were to co-operate with each other to create a joint bundle of documents. The Tribunal adjourned the hearing for a short while, so that the parties could consider each other's documents. When we resumed the hearing, we asked both parties whether they were ready to proceed and they both agreed that they were.

4 The Tribunal heard from the Claimant on her behalf and from Ms Palladino, Operations Manager and dismissing manager; and, Ms Chapman, Accounts Manager and the person who heard the Claimant's appeal; on behalf of the Respondent.

5 The Tribunal made the following findings of fact from the evidence before it. The Tribunal has not made findings of fact on every aspect of this case but only on those matters that relate to the issues in this case.

***Findings of fact***

6 The Claimant was employed by the Respondent as a Care Assistant and began working for the Respondent on 21 March 2016. The Claimant may have been employed by the Respondent at a different home earlier in her career. It is her evidence that she has worked as a Care Assistant for different employers for approximately 18 years. At the start, the Claimant's contract was for 28 hours per week.

7 The Respondent runs four residential homes under the Amba care group. Ardtully Retirement Residence is a care home in Ingatestone in Essex. It was agreed between the parties that the Claimant lives relatively short walking distance from this home. The Respondent had no issue with the Claimant's performance and the evidence was that she was a good care assistant.

8 On 20 June 2017, the Claimant worked the night shift. An incident occurred on that shift, which she spoke to Ms Palladino about on 22 June, which was the next time that she was in work. The Claimant believed that a resident had fallen as a result of poor manual handling practice of an untrained care assistant. Ms Palladino was the Respondent's Operations Manager having worked for the Respondent since 16 December 2016.

9 Ms Palladino's responsibilities included overseeing the operations of the home and ensuring that the service provided meets regulatory compliance and financial targets. She was also the line manager for the home manager, Ms Stapley. Ms Palladino had previously worked for the CQC, the main regulatory body relevant to the Respondent's business.

10 The Claimant met with Ms Palladino and reported that on 20 June, her colleagues, HB and EA, had not followed safe manual handling procedures in relation to an incident with a resident referred to as WW. She reported that EA had not had any manual handling training. She also reported there was a lack of communication and that staff did not know how WW should be mobilised. The Claimant informed Ms Palladino that she believed that as a result of poor practice by a care assistant a resident had fallen and had sustained a skin tear. She confirmed that she had not done an incident report as the more senior person on the shift should have done so.

11 It was agreed that Ms Palladino said to the Claimant that she should leave the matter with her and that she would *"sleep on it".* The Claimant's case was that she had also spoken to the shift manager about this on 20 June 2017, which was the day of the incident. This was not challenged by the Respondent.

12 We find that although she did not tell the Claimant what she was going to do about it, Ms Palladino did respond to the information and concern that the Claimant expressed to her. We find it likely that on the following day, she visited the home, checked the training records for all the care assistants, reviewed the resident's care plan and set out clearly, how she should be mobilised in future. Not on that day but over the next period she ensured that the home manager arranged for the care assistant EA to be given up-to-date training on the practical and theory of manual handling. She arranged workshops for the manager of the shift, HB as well as EA and anybody else who needed it. All the relevant documents were updated. The manual handling plan and bed rail assessment were also fully reviewed. Further coaching and support were given to the senior care assistant who, although not new to the home was new to the role of senior care assistant.

13 Having not had any feedback from Ms Palladino, the Claimant considered that nothing was being done. She escalated the matter and raised her concerns with the CQC. The CQC is the Care Quality Commission. It is responsible for regulating the care industry. The CQC contacted the home manager, Ms Stapley with bullet points relating to the concerns that had been raised. The CQC did not tell the home manager that the Claimant had been the person who had raised the concerns. The home manager, sent the information to Ms Palladino who telephoned the CQC inspector and stated that the concerns and bullet points seemed to cover similar issues to the concerns raised with her by the Claimant on 22 June. She sent the CQC inspector, a note of her meeting with the Claimant which we had on page 50 of the bundle of document. The CQC referred matters to the local safeguarding team at Essex County Council who conducted an investigation.

14 We find that Essex County Council's safeguarding team visited the Respondent on two occasions, one of which was unannounced. Ms Stapley, the Home Manager kept Ms Palladino informed as to what was happening. The Claimant believes that the CQC and/or the safeguarding team made recommendations as a result of those visits.

We find it likely that if that was done, the Respondent complied with those recommendations.

15 Although the CQC did not name the person who had reported the matter to them, Ms Palladino and it is likely Ms Stapley both assumed that it was the Claimant who had done so. Ms Palladino confirmed this in her letter to Essex's safeguarding manager dated 18 August.

16 In that letter, she also set out the actions that she took following her investigations of the concerns. The safeguarding manager then consulted her manager and eventually, on 27 September she confirmed that the Council was not going to progress this concern any further. The safeguarding team at Essex Council and the CQC were satisfied with the progress that the Respondent had made in addressing the concerns. Essex confirmed in an email to Ms Palladino that it proposed to take no further action. That is why we found it likely that the Respondent complied with the recommendations made by the CQC and the safeguarding team. If it had not, it is unlikely that Essex would have said that it would take no further action.

17 The Respondent did not report back to the Claimant on the process that had been followed in addressing the concerns she raised. Also, they did not tell her what had happened as a result of the CQC becoming involved. In her live evidence today, Ms Palladino stated that this was something she regretted.

18 Ms Palladino confirmed in her evidence that this was not the first time a member of staff had raised concerns about something that had happened in the business. She referred to at least three other instances when this had occurred. It is unlikely that all three other members of staff also contacted the CQC. Her evidence was they were not dismissed for it and at least one person is still employed by the Respondent. Ms Palladino's evidence was that she did not take it as the Claimant telling on her colleagues. She realised that there was an element of there being a poor workplace culture at the home. She confirmed that she took the Claimant's concerns seriously as it involved the safety of the residents. Ms Palladino confirmed that the home was registered with the CQC and was therefore a care home with standards to meet and a regulatory framework to abide.

19 The Claimant was adamant in the hearing that the Respondent had not done enough to address the matters that she had raised in her concerns. However, when asked what else they should have done she was unable to say.

20 On 27 October, the Respondent wrote to all staff to confirm that from 28 August 2017, their hours had been changed from 28 hours per week to 24 hours. The Claimant's evidence was that she refused to sign the letter agreeing to this change in her terms and conditions. However, the Claimant continued to work the new shifts from then until she was dismissed in January 2018.

21 We find that the Claimant lived alone within walking distance of the Respondent's residential care home in Ingatestone. The Claimant's unchallenged evidence was that her nearest relative is her daughter who lives in Plumstead in South London.

22 Sometime in October the Claimant raised an issue with the Home Manager, Ms Stapley, that she would like to not be rostered to work on Boxing Day. The Claimant's contract stated at page 36 that because of the nature of the business, employees may be required to work on any of the public holidays listed below. That list included Boxing Day as well as Christmas Day, New Year's Day, Good Friday, Easter Day and the first and last Mondays in May and the last Monday in August. The contract stated that it was a condition of her employment that she should work any of those days when required to do so.

23 The Claimant acknowledged that she knew that it was likely that she would be rostered to work on Boxing Day as it fell on one of her usual work days. The Claimant asked her manager Ms Stapley in October and subsequently again in mid-November whether she could be excused from having to do that shift. She was not asking for annual leave on that day. Ms Stapley did not agree to the Claimant's request.

24 It is likely, that Ms Stapley then went off sick sometime in November which meant that about 3 weeks before Christmas, the Claimant asked the Respondent's Deputy Manager, Mr Chris Diwell whether she could be excused from doing the shift. She offered to do any other shift that the Respondent wanted her to do instead. The Claimant intended to go to Plumstead to spend Christmas Day with her daughter and did not want to have to come back to work on the following day, Boxing Day, in time to take up a shift at 8pm that night. In their conversation, Mr Diwell indicated if she did not work on 26 December, the Respondent could use agency staff. It was not clear to us whether he actually told her that she did not have to work the shift on Boxing Day or that she was released/removed from the shift.

25 By the date of the hearing Mr Diwell no longer worked for the Respondent and although the Claimant contacted him to ask him to give evidence at this hearing and he initially agreed, it then became difficult for her to contact him as the hearing drew near. We did not hear from him. The Claimant had a copy email which referred to another time when Mr Diwell had confirmed that agency staff would cover a shift when she was ill.

26 The Respondent's case was that authorisation for the use of agency staff could only be given by Ms Palladino and Ms Chapman in the office as there was a cost involved which would be incurred by the Respondent. Such expenditure would require authorisation from a senior employee above Mr Diwell's level. Possibly when they spoke about this again in November, Ms Stapley told the Claimant that she should try and swap the shift with a colleague but she was unsuccessful in doing so.

27 The Claimant was on the rota to work 23 December, which she worked. That shift ended at 8am on 24 December. The Claimant was still on the roster to work on the night shift on 26 December from 8pm to 8am. We find it likely that over the holiday season Ms Stapley did two long shifts to cover staffing at the home. Even though these are Bank Holidays, the home was open and the Respondent needed staff to cover all shifts.

28 Ms Palladino's unchallenged evidence was that the Respondent had lots of requests from staff around this time for time off to spend with their families. The Respondent had to balance their need for time off with the need to ensure that the

home was fully staffed throughout the holiday period. The Respondent had obligations and duties towards its residents which did not change during the holidays.

29 We find that the Claimant texted Ms Stapley her manager on 24 December to say that she would not be able do her shift on 26 December as she would be in London. She stated that she had asked several members of staff if they could cover for her but had not found anyone. She apologised for the inconvenience.

30 The Claimant's case was that this was simply a text that she sent out of courtesy to remind Ms Stapley that she was not coming in to work. We find it unlikely that this was so as the Claimant explained in the text what she had done to cover the shift and that she could not do the shift. If the Respondent had already released her from doing the shift as was her case, then she would have needed to explain in this way. It is unlikely that Mr Diwell had given her a definitive decision that she did not have to do the shift. He stated that it was possible to cover her shift with agency workers. However, we find it unlikely that he told her that she did not have to do the shift. The Claimant's name was still on the rota to do the shift on the evening of 26 December. It is likely that she knew that she was expected on duty and that is why she sent Ms Stapley the text message. We therefore did not accept the Claimant's explanation as to her reason for sending the text.

31 Ms Stapley replied to the Claimant by text message to state that the Claimant needed to be at work and that another colleague, Josie, had also stated that she was not coming in. She stated that she had accommodated the Claimant as much as possible and that the Claimant had had plenty of time to look into it. This confirms that the Claimant had raised the issue of her shift on 26 December, earlier that year.

32 In her response, the Claimant referred to the Deputy Home Manager, Chris Diwell and stated that he had said to *her "no problem, agency will cover*" when she told him that she did not want to work the shift. In her reply text message, the Claimant stated that she could not get back and that her daughter had checked the trains and that it was not possible for her to return to Ingatestone to come to work on 26 December. She said that it was unfortunate that there was nothing that she could do about it and that she was willing to do any other shifts when she is back to work on 28 December. Ms Stapley replied to say that Mr Diwell did not have any right to say to the Claimant that the Respondent would get agency cover for her shift as there is no agency cover over the Christmas period.

33 Ms Stapley stated at 13:47 that day that if the Claimant did not turn up for her shift she would take disciplinary action against her and that if this meant her not going to her daughter's then *"so be it".* She reiterated that the Respondent had a duty of care 24/7 to the residents and that the Claimant ought to look at her employee handbook and contract of employment.

34 The Claimant, in her response, acknowledged that the Respondent may want to take disciplinary action against her which she was upset about but that if that was the case, she would have to accept it. She reiterated her offer to work whatever shifts the Respondent needed covering from 28 December onwards. The Claimant's reason for not turning up for her shift on 26 December as stated in her text message was that she believed that it was not possible for her to get public transport back to Ingatestone from

Plumstead. The text message conversation with Ms Stapley was the first time that the Claimant had been told directly that disciplinary action was a possible response by the Respondent if she failed to attend her shift on 26 December.

35 The Respondent did get agency staff to cover the Claimant's shift on 26 December. The Claimant worked the night shifts on 29 December, 30 December and 2 January.

36 During the day on 2 January, the Claimant received a telephone call from the Respondent asking for her full address. She gave that information and later received the letter dated 2 January inviting her to a disciplinary hearing set for Monday 8 January 2018. The letter of invitation alleged that the Claimant had:

> *"failed to attend your shift on the 9th and 26th December 2017 without good reason and despite agreeing to cover the shift in mid-November. This put the home and the residents at risk and resulted in the use of an agency care assistant."*

37 The letter enclosed a copy of its disciplinary procedures, a copy of the text messages between the Claimant and Ms Stapley and informed her that if she was unable to provide a satisfactory explanation for the matters of concern at the disciplinary hearing, her employment might be summarily terminated for gross misconduct. The Claimant was advised of her right to be accompanied and that if she did not attend the disciplinary hearing without giving advanced notification or good reason, the Respondent would treat her non-attendance as a separate issue of misconduct.

38 The letter also had this statement:

> *"At this point I would like to draw your attention to our disciplinary rules and procedures which state that we retain the discretion to take into account your length of service with us and to vary the procedures accordingly, in respect of formal warnings up to and including termination for first breach of conduct rules."*

39 The Respondent's witnesses were unable to tell the Tribunal what this statement meant.

40 On 5 January, the Claimant called the Respondent to say that she was unwell. The Claimant had the flu. The disciplinary hearing was rescheduled for 22 January.

41 The disciplinary hearing was conducted by Ms Palladino and we had the notes of hearing in the bundle of documents. We conclude that it is likely that the meeting lasted around 20 minutes. The Claimant confirmed in the disciplinary hearing that she had originally agreed to do the shift. In live evidence at the hearing, she stated that this was an error and that she had not been aware of what she was saying in the meeting as she had been ill. However, we find that the notes show that she confirmed on more than one occasion in the disciplinary hearing that she had agreed to do the shift on 26 December. In the first paragraph on page 66 she mentioned that she had agreed to do the shift and then on or around mid-November, she became unsure about the transport situation. Later in the notes, she was asked when she had agreed to do

the shift and she answered that it must have been in mid-November. Both statements confirm that she had originally agreed to do it. Ms Stapley also said this in one of her text messages to the Claimant on 24 December.

42 The Claimant stated in the disciplinary hearing that she told Ms Stapley in mid-November that she could not attend work because of the transport situation and Ms Stapley had said that there must be something (which we find is likely to be a reference to some mode of transport) that could get her to work. It was then that the Claimant referred to her conversation with Mr Diwell. She also confirmed that she had not worked the previous Christmas.

43 We find that when she was first appointed in March 2016, the Claimant informed the Respondent that she had a pre-booked holiday to Canada. That was booked for over the Christmas period of 2016. The Respondent honoured the Claimant's pre-booked holiday.

44 The letter of invitation to the disciplinary hearing stated that the action was being taken because the Claimant had put residents at risk by her failure to attend work that night. This was in addition to causing the Respondent to have to incur agency fees for hiring agency workers that night. Ms Palladino explained at the Tribunal hearing that the authorisation to incur agency fees by hiring agency workers could only be done by her and by Ms Chapman in the office and that if Mr Diwell was going to authorise the Claimant not coming to work on Boxing Day he would have been required to seek authority from one of them in order to book an agency worker. He had not done so. This was because the costs of agency workers were an expense for the Respondent which they would prefer to avoid if possible.

45 The allegation that the Claimant put residents at risk did not relate to the quality of her care. It related simply to that night. This was a significant shift on a significant night. There was a possibility that the Respondent would not have been able to get agency workers at such short notice as the Claimant had only let the Respondent know on the afternoon of 24 December that she was not attending work on 26 December. Residents could have been at risk that night if there had been insufficient staff on duty or staff who were not familiar with the Respondent. Also, Ms Palladino's unchallenged evidence was that the residents at Ardtully were mostly elderly and vulnerable people who do not like to be looked after by staff who are unknown to them. Ms Palladino confirmed that she worked on Christmas and Boxing Day.

46 Ms Palladino confirmed that by the time of the disciplinary hearing it was not possible for her to speak to Mr Diwell about this matter as he had already left the Respondent's employment, having failed his probation.

47 Ms Palladino pointed out to the Tribunal that according to the terms of her contract, the Claimant was expected to work during Christmas and New Year. She referred to this in the disciplinary hearing and also stated to the Claimant in the meeting that the she had abandoned her shift without permission. Having stated that she was not able to attend work on 26 December, the Claimant's colleague, Josie had attended work; she was given a lift to get there. The Claimant complained that nothing had been offered to her regarding transport.

48 During the disciplinary hearing Ms Palladino informed the Claimant that she had done some research on the internet and that she had found out that it was possible for the Claimant to have got to work on 26 December. She did not show the Claimant the research and it was not in the trial bundle. Ms Palladino stated that knowing that she was on the rota to work on 26 December, the Claimant should not have gone to London knowing that she would not be able to get back for her shift.

49 Ms Palladino's evidence was that when she considered what sanction to impose on the Claimant she felt that there was only one sanction that was appropriate in the circumstances. The circumstances that she had in mind were that the Claimant knew that she was due to work the shift that night but had not made arrangements to ensure that she would be at work that day. Ms Palladino felt that the Claimant would do this again and had not demonstrated in the disciplinary hearing that she felt sorry for what she had done and the impact her actions could have had on the business. She felt that she could not trust that the Claimant would not turn up for a shift in the future, if it did not suit her and her wish not to work could not be granted. Ms Palladino did not believe that a warning or any other sanction would have been sufficient to address the misconduct because of her belief in the likelihood of this happening again if the Claimant remained in employment.

50 On the next day, 23 January, Ms Palladino telephoned the Claimant to notify her that she had been dismissed with immediate effect. The Claimant subsequently received a letter from Ms Palladino confirming her decision to terminate the Claimant's contract of employment. The Claimant had been on the rota to work on the following day, 24 January and Ms Palladino wanted to let her know as soon as possible of the outcome of the disciplinary hearing as she did not want someone turning up to work and then finding out that their employment had been terminated.

51 The letter was dated 23 January and confirmed that she had been dismissed. It also stated that the Claimant had failed to work a shift that fell on a day that she would normally work. The letter also stated, that the Claimant had not worked over the Christmas and New Year period but we find that this was incorrect as she had worked the 28 and 30 December. The Respondent stated that having carefully considered her responses, including the fact that she had short-term service, it was Ms Palladino's decision to terminate the Claimant's employment. The Claimant was paid 4 weeks' pay in lieu of notice. The dismissal letter did not class her conduct as gross misconduct. Instead, it was described as misconduct.

52 The Tribunal asked Ms Palladino what was the meaning of the reference to *'a short amount of service'* in the dismissal letter. She was unable to explain what it meant.

53 The Claimant believed that she would be getting a written warning and was likely to have been surprised at Ms Palladino's decision to dismiss her.

54 The Claimant appealed against her dismissal by letter dated 26 January. The letter was addressed to Shelley Chapman, the accounts manager at the Respondent's Head Office, as she had been advised to do in the letter of dismissal.

55 In her appeal letter, the Claimant stated that at no point had it been made clear to her that a failure to attend the shift could result in her dismissal. She complained that the decision to terminate her contract was too severe. By 24 December when she was told that her non-attendance on the shift could cause disciplinary action to be brought against her, she was already at her daughter's home and could not come back to Ingatestone. The Claimant stated that she had tried repeatedly to sort out the shift before Boxing Day but had been unsuccessful in doing so.

56 The Claimant also emailed Mr Madlani on 6 February to challenge the decision to dismiss her. Mr Madlani was the Director of the Amba Care Homes Group. He did not reply to her until after the appeal hearing.

57 In her letter to him she set out the sequence of events and gave details on whom she spoke to and when. The Claimant referred to a conversation with Ms Stapley in which she showed her an email from Transport for London (TFL) dated 11 December, which stated that there would be no trains on the Overground on 25 and 26 December 2017. She wrote about a subsequent conversation with Ms Stapely on 17 December when she reported on her search for someone to take over or swap the shift with her. It was in this letter that she stated that by the time she was threatened with disciplinary action she was already at her daughter's and could not get back. She made no references to her disclosures in the letter.

58 The Claimant asked Mr Madlani for her job back. She asked to be given a final written warning instead.

59 The Claimant received a letter from Ms Chapman dated 6 February inviting her to an appeal hearing on 13 February to consider the issues she raised in her appeal letter. Ms Chapman considered that the Claimant wanted to discuss the following points at her appeal hearing: -

- The deputy manager in mid-December said that the shift could be covered by agency staff
- At no stage was it made clear that failure to attend could result in dismissal
- The Claimant felt that the outcome was far too severe when reflecting the fact that she had been a carer for over 18 years, and
- She had made repeated attempts to sort out the problem of the 26th December night shift from October onwards.

60 The Claimant's appeal hearing took place on 13 February 2018.

61 In the appeal hearing, Ms Chapman asked her whether she would work over the following Christmas, if she was reinstated. She also asked the Claimant whether she thought it was fair that she had not worked one shift over the Christmas and New Year for two years running. We find that this was a reference to the Claimant taking a pre-booked holiday to Canada the previous Christmas, soon after she started with the Respondent. The Claimant had worked shifts during Christmas 2017 but had not worked the Boxing Day shift. She also worked shifts after Christmas.

62 Ms Chapman showed the Claimant information that she had got from TFL's (Transport for London) website which showed that the Claimant could have gotten to work on 26 December. We had a printout at the hearing but it was not clear whether it referred to transport on Boxing Day as it did not say so.

63 When Ms Chapman asked the Claimant if there was anything else that she would like to add, the Claimant referred to her disclosures. In response, Ms Chapman asked the Claimant whether she was aware of the company's whistleblowing policy. The Claimant stated that she was. The notes show that Ms Chapman then went back to talking about the Claimant's absence on 26 December.

64 We did not have a copy of the Respondent's whistleblowing policy in the bundle of documents.

65 The Claimant wrote again to Mr Madlani on 16 February querying the outcome of the appeal.

66 The letter from Ms Chapman informing her of the outcome of the appeal hearing was dated 15 February. In the letter Ms Chapman responded individually to each of the Claimant's points of appeal. To the Claimant's point that she had not been made aware that failure to attend work could result in dismissal, Ms Chapman referred to the employee handbook and the statement in the disciplinary rules and procedures which was that the Respondent retained the discretion to take into account an employee's length of service and to vary their procedures accordingly in respect of formal warnings up to and including termination of employment for a first breach of contract rules. In reply to the Claimant's appeal point that the punishment of dismissal was too severe, Ms Chapman replied that the Claimant had been aware from communication from Ms Stapley that disciplinary action was going to be taken if she did not attend her shift.

67 Ms Chapman upheld Ms Palladino's decision to dismiss the Claimant.

68 We find that on 19 February Mr Madlani replied to inform the Claimant that the appeal decision was final and that she had no further right of review.

69 The Claimant wrote to Mr Madlani again on 28 February and referred directly to the disclosures but she did receive any further correspondence from the Respondent.

70 The Respondent's disciplinary procedure in the bundle did not list non-attendance at work as a gross misconduct offence although it did state that it was not an exhaustive list. It did list the following: - *failure to devote the whole of your time, attention and abilities to the business and its affairs during normal working hours*, as acts of misconduct. The list of unsatisfactory conduct also included: - *failure to carry out reasonable instructions or follow the company rules and procedures*.

71 We were told that the Respondent's Handbook reinforced the rule that annual leave could not be taken over Bank Holidays but we were not shown that part of the Handbook.

***Law***

72 If an employee had been employed by the Respondent for over two years and had claimed unfair dismissal, the Respondent would have the burden of proving the reason for dismissal and that it was a fair reason within section 98(4) of the Employment Rights Act 1996. The Respondent would have to prove that the decision to dismiss the employee was fair and reasonable, was based on a genuine belief of misconduct arrived at from conducting a reasonable investigation and lastly, that the decision to dismiss was within the band of reasonable responses open to an employer in response to the misconduct it found that the employee had committed.

73 In the case of an employee with less than two years' service such as the Claimant, an employer can dismiss successfully unless the employee can prove that s/he had been dismissed for an inadmissible reason such as that she had made a protected public interest disclosure and that it was the reason or if more than one, the principal reason, for the dismissal. If the employee fails to prove this then the Tribunal does not have jurisdiction to consider the unfair dismissal complaint.

74 Workers also have protection from being subjected to any detriment on the ground that they have made protected disclosures. In analysing this part of the claim, the Tribunal has to consider whether the employee suffered some detriment and if so, whether it was caused by some act or deliberate failure to act on the part of the employer. The Tribunal also has to consider whether the employer's act or omission was done on the ground that the Claimant made protected disclosures.

75 What is a detriment? *Harvey on Industrial Relations and Employment Law* states that an employee is subjected to a detriment if s/he is put at a disadvantage. If the employee's situation is worse off than would otherwise be the case or in comparison to someone – either real or hypothetical – who did not make protected disclosures and their cases are comparable in every other way; then the employee would be at a disadvantage and would have suffered a detriment.

76 If either or both claim is successful, the Claimant would be entitled to a remedy.

***Applying law to facts***

77 The Tribunal will now set out its decision on all parts of the Claimant's claim.

78 The Tribunal will consider in turn each of the issues set out in the list of issues set down at the preliminary hearing in this matter of 16 July 2018.

Disclosures

Did the Claimant make protected disclosures?

79 The issues in the case begin at paragraph 8 of the Tribunal's minutes of the preliminary hearing held on 18 July 2018. The issues listed at paragraphs 8 – 20 in the list relate to the disclosures the Claimant made to Ms Palladino on 22 June 2017.

80 The Tribunal will not go through each issue because at the hearing, the Respondent conceded that the Claimant had made protected public interest disclosures.

81 It is also this Tribunal's judgment that the Claimant made disclosures to Ms Palladino on 22 June 2017 and then to the CQC in July. The Claimant disclosed orally to Ms Palladino at the Respondent and in writing to the CQC that EA had not had manual handling training, that this was something that concerned her and that safe manual handling procedures had not been followed on the night shift on 20 June at the Respondent's care home. She provided information that tended to show that a person, namely the Respondent, was failing to comply with legal obligations to which it was subject and that the health and safety of an individual (the resident) was likely to have been endangered. These matters were in the public interest as they clearly related to the standard of care the Respondent offered to its residents and what it might likely offer to anyone else who became a resident.

82 It was not clear to the Tribunal whether the words the Claimant alleged that she used and as set out in the issues numbered 8, 10, 11, 12 and 13 were the words that were used. Nevertheless, is our judgment that Ms Palladino understood what the Claimant told her and said that the Claimant should let her sleep on it. She then took the action outlined above in paragraph 12 in the Findings of Fact above and reported to Essex Council safeguarding team and the CQC on that action. At the end of their enquiries, Essex confirmed to the Respondent that it had decided to take no further action.

83 It is our judgment that the Claimant made protected disclosures.

Did the Claimant suffer a detriment as a result of making these protected disclosures?

84 The Claimant alleged as set out at paragraph 20 of the minutes of the preliminary hearing that the Respondent took her off the night shift during the week beginning 22 January. At paragraph 21 the issue was whether the Respondent had only put her on the rota for 18 hours in the following week. It is her case that these things were detriments and that they happened because she had made protected public interest disclosures.

85 In relation to the first detriment which is the reduction from 28 hours to 24 hours, it is our judgment that this was something that the Respondent did to all staff at Ardtully. The Respondent wrote a letter to all staff on 27 October to confirm what they already knew, which was that their hours had been reduced to 24 from 28 since August 2017. The Claimant was clearly unhappy about the change as she refused to sign the letter of confirmation. However, she worked 24 hours a week up to the date of her dismissal and therefore accepted the change.

86 It is highly likely that this was a unilateral change that the Respondent made to everyone's contract as we were not told about any consultation or process to make the change. However, the Claimant was no worse off than her colleagues who had also had their hours reduced and who had not made protected disclosures. This was not an action that was taken only against the Claimant.

87 It is our judgment that although a reduction in hours would be a detriment as it would result in a reduction in wages, it was not a detriment done to the Claimant because she had done protected disclosures.

88 The other detriment the Claimant relied on was that the Respondent only put her on for 18 hours for the week beginning 22 January 2017.

89 It is our judgment that she was on the rota for 18 hours and on day shifts for the week beginning 22 January, as opposed to her contractual 24 hours. She would normally work night shifts which were paid at the rate of 10% more. If she had worked that week there would have been a significant drop in her salary. However, she was dismissed on 23 January. She did not work the week beginning 22 January. She was paid up to 23 January plus 4 weeks' pay in lieu of notice. It is likely that this was paid at the rate of a 24-hour week as we were not told that she had been paid at the rate of 18 hours.

90 It is therefore our judgment that the Claimant did not suffer this detriment.

91 It is our judgment that the Claimant did not suffer a detriment that had been done on the ground that she made protected public interest disclosures to the Respondent.

Automatic Unfair Dismissal

92 Paragraph 23 of the list of issues asks whether the Claimant had requested leave on 26 December as early as October 2017. It is this Tribunal's judgment that she had. It is likely that she spoke to Ms Stapley about being relieved of her shift on Boxing Day as it fell on one of her usual working days. Ms Stapely did not grant her request.

93 Paragraph 24 asks whether the Claimant got authorisation not to attend work on 26 December (Boxing Day) from Mr Diwell the deputy manager. It is our judgment that the Claimant did not get authorisation from Ms Stapley and she then spoke to Mr Diwell about it as he was Ms Stapley's deputy. As the deputy manager on probation, it is our judgment that Mr Diwell did not have authority to override Ms Stapely's decision. In any event, it is our judgment that it is highly unlikely that Mr Diwell told the Claimant that she did not have to work the shift of 26 December. The Claimant tried to explain to Ms Stapely when they were texting each other on 24 December, why she would not be able to attend work. Her reason for not attending work was because she considered that it was unlikely that she would be able to get there because of reduced public transport. She did not initially tell Ms Stapley at the time that her reason for not attending work was not because she had already been given authorisation not to attend by Mr Diwell. She did refer to Mr Diwell later in the conversation. Mr Diwell did not attend the hearing to give evidence after promising the Claimant that he would do. Lastly, at the disciplinary hearing, the Claimant agreed that she had agreed to work the shift. Taking all those facts into consideration, it is our judgment, the Claimant did not have authorisation to not work her shift on 26 December from Mr Diwell or Ms Stapely and it is likely that when she left work on the morning of 24 December, having worked the night shift, she was aware that her name was still on the rota to work on the night shift of 26 December. The Claimant knew that she was due at work on the evening of 26 December and that is why she texted Ms Stapley on 24 December to inform her that she could not attend.

94 The next question for the Tribunal at paragraph 25 was whether it was reasonable that it should be treated as a disciplinary matter.

95 In assessing the issues listed at paragraphs 25 – 29 of the list of issues, the Tribunal is conscious of the fact that the Claimant had not been employed with the Respondent for over two years. The Claimant's only dismissal complaint is of automatic unfair dismissal. It is the Claimant's burden to show that the reason for her dismissal was not the reason put forward by the Respondent but was that she made protected disclosures.

96 If the Tribunal were deciding this matter as an unfair dismissal claim then we would be looking at more than just the reason for dismissal. We would also be looking at the processes followed by the Respondent, the investigation and whether dismissal was an option open to the Respondent in light of the misconduct committed by the Claimant.

97 In assessing whether the Claimant was dismissed on the grounds that she made protected disclosures, the Tribunal is aware that the absence of procedures or an investigation can point to the misconduct not being the real reason for a dismissal but it is not, of itself, proof of an automatic unfair dismissal on the grounds of making protected public interest disclosures.

98 In considering whether it was reasonable for the Respondent to consider this to be a disciplinary matter, the Tribunal's judgment is that the Claimant's contract of employment stated that it is a condition of the Claimant's employment that she should work on those holiday days, if she was required to do so. This was a mandatory clause in her employment contract.

99 In our judgment, given the terms of the Claimant's contract and the contents of the text messages that the Claimant received from her manager, Ms Stapley; it was appropriate and reasonable for the Respondent to treat this as a disciplinary matter. The Respondent had been able to cover the shift with agency workers and had allowed the Claimant to continue to work in the New Year before it started the disciplinary action but it did take the matter seriously and as a breach of its procedures.

100 Issue 26 in the list of issues asked whether the Respondent had reasonable belief that the Claimant had committed gross misconduct. In our judgment, the first letter of invitation to the disciplinary hearing did refer to the charge as gross misconduct. However, after conducting the hearing, Ms Palladino's decision letter of 23 January does not refer to gross misconduct. The appeal letter referred to the Claimant's dismissal but did not refer to it as being for gross misconduct. It is our judgment that the Claimant was disciplined for misconduct which the

101 The Claimant agreed in the hearing that she had failed to attend the shift on the night of 26 December in circumstances where she was expected to be at work. She also admitted that in her text to Ms Stapley on 24 December and she was texting to apologise for not being at work. The Respondent discussed transport arrangements with the Claimant during both her disciplinary and appeal hearings. In circumstances where the Respondent had made it clear in the terms and conditions of employment that employees must be prepared to work on Boxing Day if required to do so, the

Claimant's failure to attend for her shift when she had been refused permission to not come to work by the home manager was misconduct.

102 Also, the Claimant failed to attend a shift at work in circumstances where she knew that she was on the rota to work that shift and had known for some time. From her communications with her manager Ms Stapley, on 24 December, the Claimant expected the Respondent to take disciplinary action against her. In her letter to Mr Madlani and in her appeal letter she stated that she was expecting a sanction less than dismissal.

103 The Tribunal also considered issues 28 and 29 which related to the disciplinary charge against the Claimant that she had put residents at risk. It is our judgment that the Claimant worked up to 2 January 2018, which means that she worked after she failed to attend the shift on Boxing Day. In Ms Palladino's letter of 23 January she stated that the Claimant had 'potentially' put residents at risk. In our judgment, the Respondent did not come to the collusion that the Claimant had actually put residents at risk but that her actions in not attending work for her shift had the potential to do so. The risk to the residents could have arisen if the Respondent had not been able to cover the shift from the managers or from agency. The Respondent did not have any issue with the quality of the Claimant's work and that is why she was able to work after Boxing Day and was not suspended while the matter was considered.

104 In our judgment, it was reasonable for the Respondent to consider the Claimant's non-attendance at work on Boxing Day as an act of misconduct given the terms of the Claimant's contract and Ms Stapley's instructions.

105 We considered whether the Claimant had made a case that the disclosures were related to the disciplinary action brought against her in January or to the decision to dismiss her.

106 The Claimant made her disclosures in June and July 2017. They were made orally to Ms Palladino and then to the CQC. Ms Palladino dealt with them. The actions she took had been to the satisfaction of Essex Safeguarding officers. The disclosures had not the subject of comment or discussion between the Claimant and the Respondent since that time. There had not been any reference to the disclosures by either party in the months that had passed since disclosure. The Claimant had worked consistently since June and no issues arose between her and the Respondent until the matter that became the subject of this disciplinary action. The issue of the reduction in hours was not just between the parties as it affected all staff. It is our judgment that the matter of the disclosures, the visits from the CQC and the measures the Respondent took to deal with the queries from CQC and Essex Safeguarding team were not referred to by either the Claimant or the Respondent over the months between June/July and December.

107 The Claimant did not refer to the disclosures in the disciplinary meeting as it is likely that she also did not believe that they were connected to the decision to take disciplinary action against her.

108 The only connection was that Ms Palladino was the person to whom she raised her concerns and also the person who conducted her disciplinary meeting and made

the decision to dismiss her. However, in our judgment that sole fact does not lead this Tribunal to infer that the disclosures were in her mind or the ground on which she made the decision to dismiss the Claimant.

109 It was Ms Palladino's unchallenged evidence that the Claimant was not the first employee to raise matters of concern with her and that the other employees had not been dismissed for it.

110 The Claimant failed to prove facts from which the Tribunal could conclude that there was any connection between the disclosures in June and July and the disciplinary procedure in January.

111 Issue 27 asks the Tribunal to determine what was the reason for the Claimant's dismissal. It is our judgment that the Claimant failed to prove facts from which we could infer that her disclosures were part of or the main reason why she was dismissed.

112 There were no facts which showed that the disclosures were in the minds of Ms Palladino or Ms Chapman at the time of the decision to dismiss the Claimant.

113 The disclosures were not discussed at the disciplinary hearing and when the Claimant asked Ms Chapman at the appeal hearing whether she was aware of her disclosures she simply referred the Claimant to the Respondent's procedures. This shows that it was unlikely that Ms Chapman knew anything about the Claimant's disclosures. We were not told that she did. In our judgment, the disclosures were not in her mind and were not the grounds of refusing the Claimant's appeal against dismissal.

114 It is therefore our judgment that the Claimant was dismissed because she failed to attend and work a shift on Boxing Day which she had been aware that she would have to work since November when she agreed to do so. The Claimant's failure to attend her shift was considered misconduct by the Respondent because she had been expressly required to attend work, her request to be taken off the rota had been considered and denied by the home manager and the Claimant had still not attended work. The Respondent considered this to be misconduct and after a disciplinary hearing her contract was terminated.

115 In the hearing, the Claimant's main allegation was that the decision to dismiss rather than impose some other sanction was because she had made protected disclosures. We considered whether the fact that dismissal was the sanction that was imposed demonstrates that the disclosures were the real reason for dismissal.

116 Was the fact that she had made protected disclosures the reason the Respondent had decided to dismiss the Claimant for this act of misconduct rather than issue her with a lesser sanction such as a warning?

117 The statement in the Claimant's dismissal letter dated 23 January that Ms Palladino had considered the Claimant's responses and the fact that she had a short amount of service before coming to the decision to dismiss her; was a reference to the fact that the Claimant had not been employed for two years and therefore did not

have protection from unfair dismissal. It is likely that this was one of the factors the Respondent considered in reaching the decision to terminate her contract. There was no other explanation of this reference given to us in the hearing.

118 There was also a reference to *'taking into account her length of service'* in the letter of invitation to the disciplinary meeting.

119 In the appeal decision letter Ms Chapman in responding to the Claimant's point of appeal that she did not know that dismissal was a possible sanction, referred to the employee handbook and stated that the Respondent reserved the right to take into account length of service with it and vary the procedures accordingly in respect of formal warning up to and including termination of contract for a first breach of conduct rules.

120 Although neither decision-maker was able to explain to us what was meant by *'taking account her length of service'* when we asked them in the hearing, it is this Tribunal's judgement that the Respondent considered that it was appropriate to terminate the Claimant's contract of employment both because of her misconduct and because, as she had not completed 2 years' service, she had no protection from unfair dismissal.

121 In our judgment, the Respondent was also unhappy with what they considered to be the Claimant's reluctance to work over Christmas. Ms Chapman mentioned this in the appeal hearing. She asked the Claimant if she thought it was fair that she had not worked over two Christmases while working for the Respondent. The Respondent should not have considered the Claimant's holiday the previous year in coming to a sanction as it had been agreed and approved. However, the only claim we are considering here is whether the Respondent made the decision to dismiss her because she made disclosures. The fact that the Respondent may have been unreasonable in coming to that conclusion would not make the dismissal unfair unless they did so because of the disclosures. We did not have any facts that led us to that conclusion.

122 One of the other matters the Respondent considered was what they considered the likelihood that in the future, the Claimant would not attend work on a shift which was inconvenient for her. Ms Chapman's comments in the appeal hearing, Ms Palladino's explanation that this was a real risk and something she considered when deciding on sanction and Ms Stapely's comments in her text messages on 24 December all show, in our judgment that this was another important factor in the Respondent coming to the decision that dismissal was the appropriate sanction to impose on the Claimant because she did not attend work for her shift on 26 December 2018.

123 It is our judgment that the Respondent decided to terminate the Claimant's employment because they were convinced that there was a likelihood that she would not attend work in future if she was on the rota for a shift that was inconvenient, if her request to change it was refused. The invitation letter to the disciplinary hearing and the letter informing the Claimant of the result of her appeal together with the findings at paragraph 49 and 61 above show that the Respondent had the likelihood of this happening again and the Claimant's short length of service in mind when decision was made to terminate her contract. There was no evidence that the protected disclosures

were the reason or one of the reasons or in anyone's mind at the time that the decision was made to terminate her contract.

124 It is this Tribunal's judgment that the Claimant's protected public interest disclosures were not the main or principal reason for her dismissal. In our judgment, we found no facts that lead us to conclude that the fact that the Claimant made protected disclosures was the reason why the Respondent chose to dismiss her rather than impose a less serious sanction.

125 The Claimant's complaints fail and are dismissed.

Employment Judge Jones

19 December 2018