



EMPLOYMENT TRIBUNALS

Claimant

Ms S Atkins

Respondent

v Elizabeth Finn Homes Limited

OPEN PRELIMINARY HEARING

Heard at: Watford

On: 21 October 2019

Before: Employment Judge Loy

Appearances:

For the Claimant: Mr Workman, solicitor

For the Respondents: Mr Crawford of counsel

JUDGMENT

1. The respondent's application for the claimant's claim to be struck out is denied.
2. The respondent's application for a deposit order is denied.

REASONS

Background

1. The respondent operates care homes providing short stay and long stay residential personal and nursing care for the elderly including the chronically and terminally ill. The claimant is a registered nurse employed at the respondent's Rush Court care home in Wallingford, Oxfordshire.
2. The claimant alleges that she suffered detriments on the grounds that she made a protected disclosure contrary to section 47B of the Employment Rights Act 1996 ("ERA") and that the reason or principal reason for her dismissal was that she had made a protected disclosure contrary to section 103A of the ERA.

This application

3. This is an application by the respondent under rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the Regulations") that the claim should be struck out or, alternatively, under rule 39 that a deposit order should be made.
4. In particular, the respondent says that the claim is "scandalous or vexatious or has no reasonable prospect of success" within the meaning of rule 37(1)(a) or

alternatively that allegations and arguments in the claim have “little reasonable prospects of success” within the meaning of rule 39(1).

5. In both applications the respondent says that the claimant has not made a disclosure qualifying for protection within the meaning of section 43B of the ERA.

The alleged disclosures

6. The claimant says that she made three disclosures all of which were sent on her behalf by her solicitors as “Appendix 2 – Whistleblowing” under cover of their letter of 27 March 2018 sent to the respondent’s HR Business Partner, Niall Woods.

Disclosure 1

7. The claimant says that on Sunday 7 January 2018 a buzzer that had been activated by a service user was not being attended to. She says that she attended to the buzzer while three of her colleagues were not responding to it. The Unit manager, Mr Westwood, was continuing his drug round while another co-worker (Therese Knight) was “sitting on the floor against the wall, legs on display filling in some chart” and while another (Daisy Linekar) was “languishing around suggestively on the floor, resting her head in her hand, leaning on her elbow, in between.”
8. The claimant that clinical care managers were aware of such behaviour but turned a blind eye.

Disclosure 2

9. The claimant says that there was a culture of “inappropriate sexual flirting at work” also involving the Unit Manager, Therese Knight and Daisy Linekar. The claimant describes them as “a clique of favoured staff.”

Disclosure 3

10. The claimant says that “later in the year” Mr Westwood and Daisy Linekar were “embracing each other for about 15 minutes, with other people milling awkwardly around”. The claimant goes on to say she was “most concerned about the effect it is having, or is likely to have, upon the service users who have been a witness to it”

Further and better particulars

11. The claimant has provided further information in support of her case that she made disclosures qualifying for protection.
12. In that document the claimant says that she believed that her disclosures tend to show that Mr Westwood as Unit manager, and by implication the respondent vicariously, had failed to comply with their legal obligations under regulation 9(1), 10(1), 13(1) and 15(1)(d) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (“the 2014 Regulations).
13. In summary, the following statutory obligations are placed on the respondent under those regulations:
 - 13.1. **Regulation 9(1)** that the care and treatment of service users must be appropriate

- 13.2. **Regulation 10(1)** that service users must be treated with respect and dignity
- 13.3. **Regulation 13(1)** that service users must be protected from abuse and improper treatment
- 13.4. **Regulation 15(1)(d)** that all premises must be properly used
14. The claimant says that the conduct of the staff that she has disclosed is in breach of one or more of those regulations. She points out that Rush Court is the home of many of the service users and that her disclosures tend to show that not attending to a service user's buzzer is not providing proper care and that overt sexual flirtation and prolonged embracing in the home is not treating the service users with respect and dignity.

Oral and written submissions

15. On behalf of the respondent Mr Crawford provided a skeleton submission which he expanded upon orally at the hearing.
16. Mr Crawford says that in neither Appendix 2 of the letter of 27 March nor in the further particulars is there
 - Any information, rather there are merely vague allegations of general impropriety;
 - Any discernible legal obligation;
 - A reasonable belief in a breach of a legal obligation; or
 - Anything that can be considered to be into the public interest.
17. Mr Crawford also points out that Appendix 2 only arrived once the claimant knew she was facing potential disciplinary allegations herself.
18. In truth, says Mr Crawford the claimant is merely passing personal comment and voicing concerns about the behaviours of some of her colleagues and their relationships
19. On behalf of the claimant Mr Workman says that it is clear from the contemporaneous document (Appendix 2) that the claimant was concerned not just about her personal position but mainly about the effect of the behaviour of her colleagues was having or likely to be having on service users. Mr Workman points out that the behaviour about which the claimant is concerned is taking place not just in the workplace but in the home of service users many of whom are very sick and vulnerable.

Conclusions

20. Looking at the content of Appendix 2 as a whole I am satisfied that it conveys sufficient factual information to amount to a disclosure qualifying for protection. Appendix 2 does not simply contain allegations. The claimant plainly provides factual material regarding the incident of 7 January 2018 and regarding the embrace later in the year. She also provides the names of potential witnesses to the incidents. I am therefore satisfied that the requirement for disclosures to have facts not just allegations, as envisaged in *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA* is met.

21. I am also satisfied that the claimant had a reasonable belief that the respondent was failing to meet its legal obligations under the 2014 regulations. In particular, the claimant has disclosed what she believed to be a co-worker's failure to a service user's buzzer. It is plainly arguable that this would amount to a breach of the duty under regulation 9(1) of the 2014 regulations to provide appropriate care.
22. I am also satisfied that the matters disclosed are made in the public interest. The respondent is a regulated provider of social care. The respondent is regulated by the Care Quality Commission which has powers of inspection and enforcement powers regulated by statute. The standards of social care being provided at individual care homes to sick and vulnerable service users is a matter of significant public importance.
23. I accept that there is some force in Mr Crawford's argument that the claimant is expressing personal opinions about the behaviour of work colleagues. However, it is perfectly possible to express personal disapproval at the same time as making a disclosure qualifying for protection and that it in my view is the case here.
24. I therefore do not consider that the threshold of no reasonable prospect of success for strike out or little reasonable prospect of success for a deposit order has been reached. I have considered disclosure 2 carefully since it is the disclosure with the least specificity. However, ultimately, I think Appendix 2 has to be read as a whole and on that basis I decline to make either order sought in respect of all or any of the disclosures. In my view the claimant has a plainly arguable case that she has made a disclosure qualifying for protection under section 43B(1)(b).

Employment Judge Loy

Date...27th November 2019

Sent to the parties on:
27th November 2019

For the Tribunal:
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