Case No: 2500559/2023

EMPLOYMENT TRIBUNALS

Claimant: **B Wilson**

Respondent: **Elpha Lodge Residential Care Home Limited**

Heard at: **Newcastle upon Tyne (partly by video)**

On:9-11 October 2023, 19 December 2023, 7 and 10 May 2024, 10 May 2024 (and 30 May 2024 for deliberations in chambers).

Before: Employment Judge O'Dempsey, S Carter and J Maugham

Representation
Claimant: Self
Respondent: S Profitt

JUDGMENT

1. **The claimant's claim to have been dismissed contrary to section 103A of the Employment Rights Act 1996 succeeds;**
2. **The compensatory element of any award is to be reduced by 50%;**
3. **No reduction is made for contributory fault.**

4. **The claimant's claim for one week's notice pay succeeds as the claimant was not guilty of gross misconduct.**

REASONS

1. This hearing was conducted over several days, largely due to technical difficulties with the video connections for various people. It was originally to be heard by video. It was to be heard from 9-11/10/23. Due to technical problems on 9 October we attempted to start early on 10 October. The disclosure difficulties referred to below and further technical difficulties meant that it became apparent that we could not finish the hearing in the three days allocated. Yet further technical difficulties meant that the hearing had to be listed for 14 December and 19 December 2023. However due to the respondent's witness difficulties 14 December had to be vacated. Unfortunately a member of the panel became too ill to sit on 18 December 2023. The parties were asked whether they

would consent to continue with 2 panel members instead but the respondent, as is its right, did not consent to this course. The remaining two panel members held a case management hearing on 19 December 2023 to try to ensure that the case was listed as soon as possible. Unfortunately, due to counsel's commitments, 7 and 10 May 2024 were the only dates that could be arranged. Counsel was asked to notify the tribunal if he was available earlier so that earlier dates could be arranged. However no such dates became available. On 7 May 2024 the tribunal and parties again sought to convene the hearing on line. However, due to different technical difficulties, that hearing had to be abandoned. The panel therefore directed that the hearing on 10 May 2024 was to take place in person with the exception of the respondent's counsel, who, due to ill health, had to attend by video. The panel checked with counsel who was well enough to proceed, and the tribunal is grateful to him for ensuring the case could be concluded. The panel heard the remaining evidence and received submissions. The panel then met in chambers for the remaining day of the hearing which was convened on 30 May 2024. Due to this complicated series of events the hearing, having started on 9 October 2023, did not conclude evidence and submissions until 10 May 2024. The parties and all participants are thanked for their patience. Subsequently the decision and reasons for it have needed to be written up.

2. At the start of the hearing the respondent conceded that the claimant had made four protected disclosures for the purposes of the Employment Rights Act 1996. These were:

(a) That on 28 December 2022 the claimant told the registered manager that a resident we will refer to as P1 had been put in a headlock by his carer (referred to as P2).
(b) On 30 December 2022 the claimant told Tammi Nellis ("TN") that a member of staff had put a resident in a headlock;
(c) That a resident was not being stimulated as he was left in his room all day; and
(d) A risk assessment had not been carried out in respect of a resident.

3. There was a disagreement as to whether the claimant made a protected disclosure concerning whether a resident had been required to go back to his room and being left without food.

4. The claimant accepted that he did not have a claim for holiday pay. It was also agreed that the hearing should deal with liability only.

5. The claimant had not provided a witness statement and it was agreed that he should proceed by confirming the truth of what he had said in his claim form and in further and better particulars.

6. We heard from the claimant, Jacqui Wallace ("JW") and TN. We received written submissions from the respondent's counsel, for which we were grateful.

7. We should say something about the state of the respondent's disclosure as some significance was given to this in the following circumstances. It emerged in the hearing that the respondent had not disclosed a handbook and confidentiality policy which it said was relevant. It had also failed to disclose a training list. This emerged on 11 October 2023. In the course of explaining why these documents were being disclosed late counsel explained the method by which disclosure was effected. Requests were made to the respondent more than once during the course of preparation for the hearing for them to disclose relevant documents.

They were actioned by the client (Paul Nellis "PN" and Karrin Little, an accountant). We were told that the claimant's personnel file had been reviewed on 10 October and the documents were said to have been found. Counsel said that the person reviewing the file had not previously viewed these documents as relevant. Counsel pointed out that it was not selective disclosure because the documents disclosed assisted the respondent's case. He explained however that the seriousness of the duty to make proper disclosure had been communicated, and that a search to see whether there was anything else had been done.

8. The late disclosure of these documents and the fact that the claimant had to go from his home to get them printed up, took up a considerable amount of tribunal time . The documents were said to be relevant to the claimant's credibility but they were clearly relevant to the issues in the case and the tribunal allowed them to be admitted as evidence. The respondent's lawyers, we were told apologised for a failure on their part.

9. The purpose of recounting that episode is that several months later (10 May 2024) it emerged that the respondent had still not made disclosure of obviously relevant documents. We considered that JW's account that she had notes of what the claimant said when he initially made his disclosure, but did not think them relevant as they were just scribbles, wholly incredible in these circumstances. She had provided the statement from the member of staff (P2), and what the claimant had told her was plainly highly relevant. The existence of a written note of complaint would also mean that an investigation into the claimant's allegations could have started.

10. We concluded (as set out below) that the reason these notes were not disclosed is because the respondent wanted to ensure that its delay in doing anything about the disclosure could be explained by the idea that the claimant had been asked to put his concern in writing and that this had to be done before any investigation would take place. JW said (in evidence) that she had to start the investigation and that two days later she did from the notes she had taken from what the Claimant had told her.

The issues

11. There was a list of issues but as the question of whether or not protected disclosures were made is conceded or in one case moot, the sole issue on liability it seemed to us is what the reason for dismissal or principal reason for dismissal was in this case. We also considered it appropriate to give an indication of whether reductions on financial compensation would be made to reflect the chance of the claimant's employment ending lawfully within 18 months of the date on which he was dismissed and whether any reduction to reflect contributory fault was appropriate.

The law

12. The statutory provisions that are relevant for this case are set out in section 103A of the Employment Rights Act 1996 (as relating to the dismissal claim). The respondent conceded that the claimant made protected disclosures and it is not argued that a distinction in terms of causation is to be drawn between the protected disclosures which are conceded and those which are not. In those circumstances we considered it unnecessary to determine whether the disputed disclosure was a disclosure or not.

13. The principal issue in this case is whether the reason or principal reason for the claimant's dismissal was the fact that he had made protected disclosures, and in particular the ones conceded by the respondent.

14. A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee (Royal Mail Group Ltd v. Jhuti [2020] ICR 731 at paragraphs 44 – 45, citing Abernethy v. Mott Hey and Anderson [1974] ICR 323 at 350.). Similarly in West Midlands Cooperative Society Ltd v. Tipton [1986] ICR 536 at pages 544 – 5 the House of Lords approved Lord Reid in Post Office v. Crouch [1974] ICR 378 at page 399: statutory provisions for claims of unfair dismissal "must be construed in a broad and reasonable way so that legal technicalities shall not prevail against industrial realities and common sense". It observed that the reason for the dismissal to which the unfair dismissal provisions refer could aptly be termed the "real" reason for it.

15. The essential point, according to Underhill LJ in Croydon Health Services NHS Trust v. Beatt [2017] ICR 1240, at paragraph 30 is that the reason for dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what "motivates" them to do so. The focus is therefore on the mental processes of those who are said to be responsible for the dismissal.

16. It is not enough that the protected disclosure is a material influence in the decision to dismiss, because it must be the principal reason or the reason for dismissal.

17. We note the guidance by the Employment Appeal Tribunal in El-Megrisi v. Azad University (IR) in Oxford (UKEAT/0448/08/M AA) to the effect that section 103A does not require that the contributions of each of the protected disclosures to the reason for the dismissal be considered separately and in isolation. If the tribunal finds that they operated cumulatively the question is whether the cumulative impact is the principal reason for the dismissal.

18. It is of course necessary in many cases to identify by reference to each alleged protected disclosure its influence on the reason for a detriment or dismissal. However in this case the respondent has not sought to argue that any of the disputed disclosures by the claimant contributed to his dismissal. What the respondent argues is that the dismissal had nothing to do with the communications by the claimant.

19. However given that one of the issues in this case is whether the circumstances of a conversation with a resident who we refer to as "P3" was a reason for dismissal (namely the closing of the door and breaching confidentiality) it is necessary for us to consider whether that incident can properly be separated from the making of the disclosures.

20. In Page v. The Lord Chancellor [2021] EWCA Civ 254 [2021] ICR 912 Underhill LJ pointed out (in the analogous context of victimisation under the Equality Act 2010) that there will in principle be cases where the employer has dismissed in response to the protected act, but where the employer can as a matter of common sense and common justice say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable.

21. It can be permissible to separate out factors or consequences following the making of a protected disclosure from the making of the disclosure itself. The tribunal must ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did.

22. We remind ourselves that we must focus on the explanation put forward by the respondent and address whether that explanation is accepted. If it is not we must explain why not, and if the explanation is accepted then whether the respondents reason is properly separable from the disclosure itself. It is necessary for us to approach the question of the separation between the protected disclosure and any alleged conduct with caution.

23. In the Fitzmaurice v. Luton Irish Forum (EA – 2020 – 000295 – RN) HH J Tayler reminded tribunals of the "need to consider with great care whether the surrounding circumstances could properly be treated as separable from the making of a protected disclosure" (see paragraph 11); the need arises "because of the possible inroads into the protection offered to whistleblowers by severing protected disclosures from ancillary matters". These will include the manner in which the disclosure is made, things done at the time that it is made, and the circumstances in which it is made. That list, from paragraph 11 of Fitzmaurice, is obviously an indicative list and not exclusive.

24. Here the tribunal is concerned with an allegation about the claimant's conduct after making the disclosure. We have to consider whether that conduct is the genuine reason or principal reason and if it is whether it is properly separable from the making of the protected disclosure.

Findings of fact

25. The claimant was employed from 5 October 2022 in the kitchens. He was not a care worker for the purposes of the confidentiality policy of the respondent. When he started he did not get the contract which was placed before us by the respondent. He did not receive the necessary training apart from on the job training from his line manager, the chef. This was not comprehensive. He did sign a confidentiality clause but we concluded that on 5 October 2022 it was simply put before him and he did not read it and there was no evidence that a copy was handed to him. The tribunal reached this conclusion partly because of the evidence given by the current registered manager that the former registered manager was not very good at record-keeping and paperwork. The registered manager gave her opinion that this was why, subsequently, the respondent received the slightly negative evaluation it did from the care quality commission.

26. On 26 December 2022 the claimant witnessed an event. He reasonably believed that a resident who we will call P1 was put in a headlock by a care worker, P2. He reasonably took the view that it was in the public interest to bring what had happened to the attention of the respondent's management because he believed that the information he was communicating to them tended to show that P1's health and safety was being put in danger and that the respondent was failing to comply with its legal obligations towards P1. We note that what was going on may have been a method that it was acceptable to use. It does not matter for the purposes of the claimant's good faith or credibility whether in fact what was going on was a prescribed restraint method or not.

27. It appeared to the claimant that the resident was being subjected to rough treatment and there was a reasonable basis for that belief that he held that this was a breach of a legal standard. The claimant was careful to point out that he was not saying that P2 was doing this wilfully, but simply that the correct method should have been used and the situation should have been dealt with kindly. He was concerned that training might be necessary to eliminate such events.

28. Having witnessed this the claimant was going about his work and entered the room of a female resident (referred to as P3). She asked him if he was ok. According to her he looked about "to see if there were any members of staff nearby then closed the bedroom door". P3's statement on page 144 of the bundle goes on to state immediately
"Brian then told [P3] that [P1] had been restrained by a member of staff. P3 told Brian [the claimant] she didn't want to know, Brian said [P1] was restrained by [P2], P3 said "it's nothing to do with me"….
P3 told Brian he should talk to Elinor, she's the deputy. Brian said he wouldn't speak to Elinor he would speak to the manager."

29. We find that the claimant was shocked by what he had seen that day and the interpretation he put on it. We accept his evidence that P3 asked him what had happened; this exchange took place minutes after the incident and P3 could see that the claimant was upset. He was about to do the lunch drinks service. This was the reason he spoke to P3 in this way; it was clear that she was not made uncomfortable by the fact that there was a man in her room but by what he was saying, namely recounting the disclosure.

30. On 28 December 2022 the claimant called into the respondent's care home to speak with JW, the registered manager. He made the protected disclosure to her verbally and she took notes of what he was saying. These are the notes which were not disclosed by the respondent. The claimant said that he would email her his observations. JW did not say to the claimant that she would not start an investigation until she had the written statement from him. She did ask him for what he described as his written observations. The claimant made a verbal disclosure along the lines that he gave evidence of having given. The respondent was aware of the incident in sufficient detail to start an investigation had the respondent been interested in doing so. We have concluded that the respondent was not interested in investigating the incident, save in a nominal way.

31. On Friday 30th December the claimant attended work. He had not sent his observations because he was not sure of P2's name. He was told to see TN in the office at about 10.20 and TN asked about the incident. TN does not appear to have asked for names of witnesses she should approach about the incident. After that TN appears to have gone to the residents and asked questions about the claimant. We find that she did this as part of an effort to discredit the claimant and to seek information on the basis of which she could assert that he should be dismissed, and was influenced by the fact that the claimant had made a protected disclosure to JW which had come to TN's knowledge.

32. TN later did say to the claimant that he had told P3 about the incident with P1, and said it was against the rules. At 3pm the claimant was suspended. We accept that the claimant was not told why he was being suspended. We found TN's evidence about the sequence of events very hard to follow. In her witness statement she told us that it was after the conversation with the claimant that she

was told of the events for which the claimant was then suspended. However in cross examination she claimed that when she walked into work that day she was told by P2 that the claimant had discussed the situation (the incident) with another resident, giving the name of the resident and P2's name. On this account she knew about that allegation before the meeting with the claimant, as she told us she had said to P2 that she would ask the claimant about it because she was getting him in to talk about his attitude in the kitchen. She then says that this is when she spoke to him and he told her about the headlock. The two accounts are not consistent with each other. We found this inconsistency troubling and we accept the claimant's account of the conversation he had with TN on that date. During this she told the claimant that she did not like his attitude. She had not been told about the incidents concerning the claimant before that meeting and this is the reason it was not mentioned in her witness statement. We also noted that JW's was the first contact with the claimant, but this was not mentioned in the grounds of resistance at all.

33. Although the claimant had made disclosures to both JW and to TN, neither of them had moved to suspend P2 or to make any effective investigations into what the claimant was alleging.

34. On 2 January 2023 JW called the claimant asking for an email with the allegations in it. However the claimant, who was suspicious of the respondent by this stage having been suspended, said he would not send them because TN would not disclose the allegations against him. About 25 minutes later PN telephoned the claimant. We did not hear from him, but it was clear that the claimant was complaining about his actions in the documents sent to the tribunal and the respondent and in the summary given to the case management hearing. PN said that the claimant must send the allegation in writing and said that the police were involved and that the respondent had 12 witnesses against the claimant. The claimant did not react well to this attempt at intimidating him. He asked which Force was involved and promptly telephoned them to see whether they wanted to talk to him. They did not. He called PN back to tell him this. We find that PN's call was as described by the claimant and that it was an attempt to intimidate the claimant because he had made disclosures and clearly was seeking to get the respondent to take action on his disclosures.

35. TN once she had spoken to the claimant sought information about the claimant from residents. We deal with her motives below. During the course of that evidence gathering she received the information from P3 concerning the claimant telling P3 about the incident with P1.

36. We have made findings on the confidentiality and shut door incident below.

37. As to the "sexual remarks", the account given on 6 January 2023 page 144 is that

"P3 began talking about a time when Brian was in the kitchen making toast and residents were in the dining room, P3 told Brian the toast had popped up and he replied, 'it's not the only thing that's popped up'. P3 said Lauren heard him saying that."

38. We concluded that the claimant did make the remark. Although the claimant denied seeing that there was anything sexualised about this remark, we do not

accept his evidence. We took the view that it was a sexualised remark, albeit at the lower end of the spectrum of potential remarks of a sexual nature. The circumstances were that the claimant was in a separate room from those who might be offended at the remark and it was not directed at anybody. TN in cross examination stated that the sexual remarks (sic) had occurred about a week before 30th. No complaint was made about it until TN went seeking information about the claimant as a result of his making the disclosures.

39. As to the other matters that the respondent relies on to show that it believed that the claimant was acting in an inappropriate manner towards P3 we accept that P3 did not complain to TN about the claimant asking about the drinks order on many occasions. When pressed on this she said it was a couple of occasion and these occurred in November or December. She had spoken to the cook and the claimant had a piece of paper to remind himself. We do not consider that to signify untoward interest or inappropriate behaviour and we do not accept that the respondent viewed it in this way.

40. In relation to confidentiality and the alleged breach of the confidentiality policy. The claimant had been, briefly, aware of the confidentiality policy as he signed it. We find that he forgot since that time that he had seen it, and this accounts for his denial of having had it. It was never sent to him and he was not given a copy to keep.

41. The claimant was notified of a disciplinary hearing (called a Potential Dismissal Meeting) on 4 January 2023. He was told only at this stage that dismissal was being considered having regard to three allegations:

- Being alone with a female resident in their bedroom with the door closed without a valid reason;
- Making unsolicited sexual remarks (sic) to a vulnerable female resident;
- Breaching confidentiality policies (sic).

42. The claimant was then dismissed at a meeting on 6 January 2023, which lasted approximately 5-10 minutes. He was provided with no documentation including the policies said to have been breached. He was not given any detail of what he was supposed to have done wrong, and was not provided with any of the evidence against him in any form.

43. The letter of dismissal was signed by Mr Owen Richardson, CEO of the Respondent (page 146). However he was not at the meeting (page 141). JW and TN were (along with Karrin Little). In the letter of 4 January (page 135) the claimant was told that JW would be chairing the meeting. The letter also stated that there was a proposal to dismiss the claimant. JW gave evidence that she was the decision maker. She said that the decision was taken after the staff disciplinary meeting on 6 January 2024 and after discussion at that time with TN. We did not accept this evidence for the reasons we give later in this decision.

44. The respondent made safeguarding referrals on two different dates. The first relating to the protected disclosure incident on 4 January 2023 and the second, and more detailed referral in respect of the allegations against the claimant on 23 February.

45. The claimant was open with the respondents and before us about buying poinsettia plants for the women residents. He explained that he did this as a kind gesture to bring a bit of colour into the rooms. The claimant would have been doing things like walking down the corridor every morning and exhibiting different behaviour towards the female residents than male residents. No manager had ever sought to make an issue of this. The claimant had most likely been seen behaving differently towards the female residents frequently. We accept his account that he would go in before duty to see if provisions were needed and this is why he would walk down the annex. He had not been told, or trained, that this was inappropriate.

46. The claimant in cross examination gave the example of his complementing male residents on their shirts. However even if he did not do that we have no reason to believe that his behaviour was anything other than courteous, and there is no evidence that anyone considered it more sinister prior to the making of the disclosures.

The submissions from the respondent

47. It was submitted to us, and we accept that the reason for dismissal has nothing to do with its fairness. The only qualification to this is that if an employer behaves in an irrational or unusual way the tribunal is entitled to ask for an explanation as to why it behaved in that way. It was submitted to us that the fact that the claimant accepted in cross examination that no-one who was the subject of the protected disclosure had anything to do with the dismissal. Whilst that might be relevant in relation to a case in which it was alleged that persons who were the subject of the disclosures were said to engineer the dismissal, it does not assist the tribunal in determining whether, due for example loyalty to a long-serving care worker, the respondent disapproved of the claimant having made the protected disclosure he did.

48. We also accept the submission that the misconduct alleged was within a vulnerable setting; we do not accept that the respondent was holding its staff to a very high standard however when it conducted itself as it did. It was not a case where there was an issue of giving the claimant the benefit of the doubt in relation to conduct which otherwise would have been immediately dismissible: the claimant's conduct was, we found, exaggerated by the respondent and in the case of the remarks to the resident in her room, taken from one context (speaking about the incident) to another context (potentially improper relations with a resident or interpersonal behaviour that would have made P3 uncomfortable due to her sex and vulnerability). The claimant's conduct over the toast remark was not something for which the respondent would have dismissed the claimant if he had not made the disclosure.

49. It was submitted also that the respondent proactively made its own referral to the CQC. We accept that it did this, but did not view this as the respondent being pro-active. The terms of the referral were such as to down play the incident (and this was done after what appears to have been at best nominal inquiry or investigation by the respondent).

Discussion

50. It is for the claimant to show the reason or principal reason for dismissal. The tribunal has to consider what evidence it accepts and what it rejects. We have considered first the respondent's explanation for the dismissal. We also

reminded ourselves that the burden of proof does not shift from the claimant and requires proof on the balance of probabilities that the principal reason for the dismissal was the protected disclosures.

Discussion of "alone in a room with a female resident allegation"

51. From P3's account we find that it was obvious to the respondent receiving the account that there was nothing sinister in the claimant shutting the door of the bedroom. The respondent had sought to link the sex of the resident to her feeling of being uncomfortable. However we reject that as inherently implausible in the circumstances recounted by P3 of that encounter. When the claimant shut the door it is obvious from that account that he was trying to make sure that other members of staff could not hear what he was about to tell P3, which was in essence his protected disclosure.

52. This incident was set out by the respondent as the claimant being alone in the room of a female resident and as raising safeguarding issues. However the explanation for what the claimant was doing was (a) plainly related to his protected disclosure; (b) plainly not sinister, and the tribunal does not accept the respondent's evidence that they thought it was sinister (in particular having taken the statement at page 144 on 6 January 2023 and any interview with P3 conducted before that date).

Confidentiality breach

53. The respondent says that speaking to the resident about what he had just observed was a breach of the tenor of the policy. The policy itself did not apply to the claimant because he is not a care worker and the wording of the confidentiality clause itself, which dealt with communications with third parties. It was not a breach of the confidentiality clause to speak to a resident about an incident which was not confidential in the first place and the incident was not. Information about what the claimant had observed was also not of itself confidential. It was information about how a resident had been treated by a member of staff. We were told nothing that would indicate that this information was confidential. In so far as it is information about a resident, that does not render it confidential. The incident had taken place in one of the areas to which all residents had access. It did not occur in private. We do not accept that the respondent genuinely thought of what the claimant had done was a breach of the confidentiality clause.

54. Even if there had been a breach of some unwritten policy of confidentiality (e.g the tenor of the express policy), it would not have constituted gross misconduct in the context of this case. The alleged headlock incident had taken place in an area with others either around or potentially around. We concluded that speaking in this way to a resident about something that had just happened and had shocked the worker was not of itself even an event for which this employer would have terminated probation if the information had not been the information contained in the protected disclosure; we do not believe that the event actually operated on the mind of the respondent as the principal or even a relatively minor reason for terminating the employment. We do not consider that even if it was part of the reason for dismissal, it is separable from the protected disclosure.

55. The tribunal has no doubt that what concerned TN about the interaction with P3 was not the fact that the claimant had been alone in a room with her (for how

long is not specified and was never ascertained by the respondent) but the fact that he had talked about the protected disclosure.

56. The allegation against the claimant was that he was alone with a female resident in her bedroom with the door closed *without a valid reason.* However the respondent was aware that the claimant, on the resident's account, shut the door to ensure privacy while he told the resident of what had happened. This was a valid reason.

57. For all these reasons we reject the respondent's explanation that the reason or principal reason for dismissal was this instance of alleged conduct. Neither being alone in a female resident's bedroom with the door shut, nor the alleged breach of confidentiality formed any part of the reason for dismissal.

The "sexualised remarks"

58. We have made findings as to this at 37 above.

59. In relation to the claimant's credibility on this issue, the claimant was defensive and was not credible in his denial that it was sexualised. We concluded that this was because this was something that the claimant did not want to admit to himself.

60. It should be noted that although the respondent persisted in putting a case based on sexual remarks, there was at best only one sexual remark alleged and was we have found made. In the context it was a trivial remark. We concluded, having not heard from the immediate witnesses, that it did not cause offence at the time and the notion that it did cause offence was added at a later date. If the remarks had caused any kind of offence at the time, either P3 or the alleged witness to the remark would have made a complaint about it immediately or at least mentioned it to management. Instead, we conclude that the significance of this issue was exaggerated by the respondent to indicate a level of offence that it did not originally hold. We also took into account that the respondent's view of the claimant was not that he was over familiar with residents, but, to the contrary, he was not talking to residents as much as TN would have liked. In those circumstances it is highly unlikely that the respondent concluded that he was behaving in a sinister or significant way towards the resident. The remark itself would, without the protected disclosure, have resulted in an admonishment and nothing more. The respondent gave no evidence that it took this type of one off remark with the level of seriousness it now places on it. Furthermore it is inherently unlikely that it would have dealt with it by dismissal. In addition if the respondent had given these sorts of remarks, at this level, the degree of seriousness it now claims, staff would have been encouraged to report remarks. There was no evidence of this.

Unfair dismissal

61. The claimant was suspended over these allegations. We were concerned about the speed with which the respondent dealt with the claimant and the speed with which he was dismissed. The claimant had raised a potentially very serious incident relating to treatment of P1 and JW's reaction to that was not to seek to investigate it immediately but to suggest that the respondent needed to have the allegation in written form before taking any action on it at all. Also we did take into account that there was an inconsistency in the respondent's behaviour in suspending the claimant and not suspending the member of staff who was

involved in a potential safeguarding issue which was equally serious to those alleged against the claimant.

62. We heard the evidence of the respondent that some form of advice had been given by the safeguarding authorities not to suspend a member of staff but we consider this to be inherently unlikely. While it may have been given at some point later in the process, there was no credible evidence that it was given at the time that the claimant made the allegation. We think it is highly unlikely that where an allegation of the nature that the claimant had made was being made safeguarding authorities would not expect management to suspend the member of staff pending investigation. We conclude that the respondent had no intention of suspending a long service senior carer, despite the circumstances alleged by the claimant, which required investigation, as the type of incident that the claimant described could take place regardless of the length of service, seniority, or contact with a particular resident that P2 had.

63. As to the need to receive the allegation over the safeguarding needing to be in writing, this is not consistent with the respondent's policy (page 63, para 5.3) which states that a concern can be raised verbally or in writing. The requirement to put the concern in writing was something which the respondent introduced in relation to the claimant's concern, and none of the steps in the respondent's procedure (steps 1-3) require it to be in writing. We consider that the requirement was imposed to put the claimant off pursuing the concern further and demonstrates the respondent's decision makers' negative attitude to the claimant after he made the disclosure. We noted in this respect that JW did take notes of the verbal disclosure made to her. There was no reason why an investigation could not have been started on the basis of the information he had given.

64. We have looked at the evidence surrounding the respondent's behaviour over the disciplinary hearing (which of course it did not need to hold given the length of the claimant's service and the fact he was in or near his probationary period).

65. Although the respondent said that the claimant was not shown the resident complainant's statement due to reasons of confidentiality, when we looked at that statement it did not seem to us that it contained anything confidential in it in the context of the accusations made against the claimant. There was no evidence even that what the claimant was alleged to have said was ever put to him, or anything given to him that could remind him of the context of an exchange he was said to have had, and which, for all the evidence might have shown, was momentary.

66. Although the respondent called what had occurred a "staff disciplinary meeting" in the minutes, if it was a genuine process we considered that the respondent would have given the claimant some chance to challenge what was being laid to his charge and he was not given this in any real sense. We concluded that the disciplinary hearing which took place was purely cosmetic and we have to ask ourselves why the employer in this case chose to behave in this way. One explanation, put forward by the respondent in its closing submissions was in essence because the respondent did not owe any duties to the claimant in terms of following a procedure that a reasonable employer would have followed but that it gave the claimant a disciplinary hearing at which he had the opportunity to state what evidence he relied upon in relation to the allegations. An alternative explanation is that the employer sought to give the colour of fairness

to the dismissal because it knew it was dismissing because of the protected disclosure, and seizing on matters for which it would not otherwise have dismissed to provide a colourable reason for the dismissal unconnected with the protected disclosure.

67. We have concluded that the employer wanted to dismiss the claimant because he had made the protected disclosures, and therefore wanted to be able to show that it had gone through some form of disciplinary process in order to justify its position. The question for us is not whether we thought the respondent was doing what a reasonable employer would have done in this situation, but whether the actions of the respondent were motivated by the claimant having made the protected disclosures to the extent that the protected disclosure was the real reason or real principal reason for the dismissal. The lack of paper work relating to what the claimant said, and to the alleged investigation does not have an innocent explanation in the tribunal's view, the lack of any genuine procedure and the use of the forms of disciplinary process also suggested to us that the respondent's motivation was not the alleged conduct issues but wholly or principally the fact that the claimant had made a serious protected disclosure.

68. The current registered manager made it clear that she was seeking to improve standards, for example in relation to paperwork, from the standards that had existed under the previous registered manager. We did not think, having seen and heard her evidence, that the registered manager operated at a level of incompetence that would explain all of the rapidity and formal appearance of the process through which the claimant was put without reference to the protected disclosure.

69. The respondent went into a great deal of detail in the safeguarding referral relating to the claimant on page 157 at page 161 on 23 January 2023). By contrast in the referral regarding the protected disclosure incident (page 197, on 4 January 2023) the respondent sought to indicate that there was nothing out of the ordinary about the incident. We concluded that the respondent, again, was seeking to exaggerate the seriousness of the allegations against the claimant and to minimise the significance of the incident which was the subject of the protected disclosures.

70. In relation to the claimant's behaviour towards the women residents, the respondent appeared to rely on the fact that the claimant had bought poinsettia plants for the women residents only and linked this to the claimant being alone in a room with a female resident.

71. We can see how an employer might regard the behaviour as inappropriate but in the circumstances related by P3 we do not see how the respondent could have genuinely regarded any or all of the behaviour of the claimant as inappropriate. We consider that the respondent magnified the significance of this incident from something which it would have simply corrected by an instruction to something with exaggerated significance.

72. The respondent, in seeking to dismiss the claimant because he had made the disclosures used this and the toast incident as reasons for dismissal. However the tribunal panel, using its experience of workplaces, considered it highly unlikely that the respondent regarded these matters as dismissible matters even during the probationary period. The respondent magnified issues and looked for any problem on the basis of which they could have a reason potentially

for dismissing the claimant. We do not think they would have done this had he not made protected disclosures and we do not think they would have exaggerated the workplace significance of these incidents in the way the respondent did.

73. Even if, which we have rejected, the respondent had genuine concerns about the claimant's non-protected disclosure related behaviour, those concerns would have not been sufficient to warrant dismissal in the absence of its negative view of the claimant's protected disclosures.

74. We considered what motivated TN and JW (the latter said to be decision maker on the dismissal, albeit the letter of dismissal is signed by someone from whom we did not hear). It is clear to us that TN and JW at least discussed the dismissal of the claimant prior to the disciplinary meeting. JW gave evidence that she was the decision maker after discussion with TN. We do not accept that the decision was made after the staff disciplinary meeting. They were motivated by the fact that the claimant had made the protected disclosures. This was the principal reason for dismissal rather than any other course of action, such as a corrective word. We consider that as no opportunity was given to the claimant to deal with what was being said against him, and he was not provided with any evidence relied upon, the most likely conclusion is that JW had made up her mind well before that meeting that the claimant was to be dismissed.

75. TN spoke to residents in order to elicit the information the respondent relied upon. If the claimant had not made protected disclosures this information would have been overlooked with a view to monitoring him after the trial period (as with her concerns about his lack of interaction with the residents) or would have been the subject of a corrective word. We make this finding on the basis of the type of work that the claimant was doing, the lack of training which he had received (save for on the job training from the chef which would have dealt with kitchen related matters) and the fact that the respondent was willing to let his lack of interaction be something that could be corrected after the trial period. The significance of his behaviour has, we find, been exaggerated by the respondents as a means to justify the dismissal without reference to the disclosure.

76. We did not find JW and TN's evidence that they made the decision after the meeting credible in the light of the behaviour leading up to the meeting. Even if not obliged to take steps which in other contexts we would have expected a reasonable employer to take to avoid a finding of ordinary unfair dismissal, any employer who genuinely embarks on a procedure which ostensibly involves procedures designed to allow a person to know the case they have to answer would at least try to ensure that the person had the materials on which the employer was relying. The procedure invoked by the respondent in this case had nothing more than the show of a fair procedure, and from this we have inferred that JW and TN did not intend that the claimant should have a fair chance to defend himself. We cannot find a sensible explanation for that, save that the respondent was seeking to lend the form of fairness to the dismissal in order to deflect from the real reason.

77. Of course the burden of proof is on the claimant to establish that the making of the protected disclosures was the reason or principal reason that caused his dismissal. On the basis of the evidence that we did hear however we have concluded that the claimant discharges the burden of proof. As to JW, we have

evaluated her evidence and rejected the idea that the principal reason was something other than the fact that the claimant had made protected disclosures.

78. The tribunal remarks on the nature of the investigations or lack of them and the significance of those. First of all, although this is simply a factor in our consideration of what the respondent likely believed or had regard to, we do not regard the investigation was conducted as a reasonable one and we do not consider that the respondent regarded it as anything like a reasonable investigation (i.e. an investigation by an organisation that was seeking to ascertain what had happened and what the explanation for what happened was). We conclude that in reality the respondent did not have an interest in establishing the truth of what had happened. In reaching a conclusion on whether the respondent genuinely dismissed for the reasons it has set out we note the lack of investigation into the potentially much more serious allegation of assault via headlock on a resident. We were told that this had been done by observations of the resident. The nature of those observations of the resident were never satisfactorily explained to us. In any event we could not understand how observing someone after an incident of the nature that had been alleged could help the managers to know whether description of the incident given by the claimant was accurate or not. We also noted the notifications that the respondent did make for the safeguarding investigation and the way in which the notification to the safeguarding authorities of the headlock incident appeared to minimise that incident.

79. We noted the respondent's submission about the fact that the claimant was on his probation. Nonetheless we conclude that although an employer is entitled to dismiss somebody who is on probation the reality of the situation was that the cause of the dismissal principally was the fact that the claimant had made protected disclosures and that was the reason that operated in fact on the mind of the employer principally.

80. In relation to the fact that the respondents made reference to the CQC, we note that in essence given the nature of the complaint made respondent effectively had no choice but to make this reference. However we also note that it was delayed until 4th of January. The registered manager had been aware of the incident and had made notes on it from 28th December. The respondent we concluded was more interested in exonerating the long-serving carer than in dealing with the claimant's disclosure.

Just and equitable sum

81. We considered whether the claimant would have been dismissed in the future in any event or would have terminated his own employment without dismissal in the future. On the basis of the material we have before us be consider that that the claimant would have corrected his behaviour about which the respondent complained in the kitchen. We consider that TN exaggerated the account of what she had been told by the cook about the claimant's behaviour. We do not accept that she was told "we are going to have no crockery left" or words to that effect. We do not accept that she was told that the claimant slams doors a lot. If there had been concern about this, we believe it would have been brought to the attention of the respondent far sooner, particularly as the kitchen is connected to the residents' dining room by a hatch. We do accept however that the cook had spoken about the claimant's attitude. We find it quite likely that the claimant had an attitude towards the respondent. Repeatedly in his evidence he said that from an early stage of his employment he considered the respondent

poorly run (and hence he did not try to raise the issue about training or contracts with them); he described the respondent as shambolic at the outset. He said he could see that management was not fit for purpose.

82. We note that the claimant's behaviour included conduct which is not related to the issues for which he was dismissed and we consider that there was a chance that he would have been dismissed (or would have left) in any event before he reached 2 years of employment. Having assessed his attitude in respect of the kitchen and his attitude to the respondent's management we considered that there was a 50% prospect of him being dismissed fairly over the subsequent 18 months or leaving because he did not like the way the home was managed.

Contributory fault

83. We also considered whether anything that the claimant did contributed to his dismissal. We had to consider whether the claimant did anything morally blameworthy and if so whether we should exercise our discretion to limit the amount of compensation or reduce it by a percentage reflecting the way in which is conduct actually contributed to his dismissal. We consider that the respondent did not regard the reasons it put forward for the dismissal as the real reasons for dismissal. We conclude therefore that nothing should be deducted to reflect contributory fault. Even if the claimant had committed acts which were morally blameworthy, which in the context of the case we do not accept, we would have concluded that as an exercise of our discretion would not be appropriate to reduce the compensation by any percentage for contributory fault.

Wrongful dismissal

The law

84. By section 86 of the Employment Rights Act 1996 the notice period to be given by an employer to terminate the contract of employment of a person who has been employed continuously for a period of one month or more is one week. If an employee commits an act of gross misconduct all rights are forfeit under the contract and the employee may be summarily dismissed.

Discussion

85. The claimant was dismissed by letter dated 6 January 2023, and that is the effective date of termination. He was paid up to that date. However he was not paid in respect of the notice period to which he would ordinarily be entitled.

86. We were not directed to any contractual term which would have entitled the claimant to more than statutory minimum notice.

87. We consider the question of whether the claimant committed acts which objectively constitute gross misconduct in the following way: First did the claimant's behaviour breached the implied term of trust and confidence? In that respect it is useful to remind ourselves of the additional statements surrounding that term, but in essence the term is that the party alleged to be in breach must not without good and proper cause act in a way that is likely to undermine the relationship of trust and confidence. Looked at from this perspective we conclude that the claimant did not breach this clause. First, the claimant's behaviour in speaking about the incident involving the headlock to another residents did not in our view breach the confidentiality requirement, nor could it properly undermine the relationship of trust and confidence as there was objectively good and proper

cause to remark on what the claimant believed may have been an unlawful assault.

88. Secondly in relation to the other incidents the toaster comment was something which was not likely to undermine the relationship of trust and confidence in any fundamental way as it was clearly remedial by speaking to the claimant about the language that he used. Viewed objectively in the context in which the remark was made there is no basis for saying that it constituted gross misconduct. Neither do we think that putting it alongside being alone in a room with a female resident in the circumstances that the claimant described in which we accept constitutes gross misconduct or in the context of the other matters laid to the claimant's charge such as saying good morning to female residents, asking P3 about the drinks rota on a couple of occasions, or buying the female residents poinsettia plants for Christmas.

89. Taking a step back and viewing the claimant's alleged behaviour in the round we also do not accept that that was capable of undermining the relationship of trust and confidence in the circumstances of this case.

90. We did not hear from witnesses to the alleged incidents themselves apart from the claimant. Some of these matters on which the respondent relied were capable of being gross misconduct in certain contexts but we have concluded looking at all the circumstances as relayed to us in the evidence that they were not capable of constituting gross misconduct in this context. We take the view that the toast incident, at its highest was misconduct and not gross misconduct as it did not undermine the contract in any fundamental way; we took the view that the alleged confidentiality behaviour did not breach a term of the contract and that it was not such as to undermine the contract even if it constituted a breach of contract. However the express terms of the contractual policy relied upon did not apply to the claimant who was a kitchen worker. The implied terms of the contract were also not breached. The claimant was asked by P3 what was the matter and replied. Finally we consider that being alone in the room with P3 in the circumstances described did not undermine the fundamental terms of the contract. All of these matters were such that a word of admonishment and correction would normally have been given, and the parties to the contract would have continued with the relationship. We therefore consider that the claimant had not committed any act of gross misconduct and that the claim for wrongful dismissal succeeds. The claimant is entitled to one weeks notice pay.

Conclusion

91. We therefore find that the claimant was unfairly dismissed contrary to section 103A of the Employment Rights Act 1996 and that he was dismissed in breach of contract so that he is entitled to one week's pay in respect of notice. The parties should now send their dates to avoid so that a remedy hearing can be convened if the parties are unable to reach agreement on the amounts between themselves. The claimant will be asked whether he seeks reinstatement or re-engagement. As to compensation the compensatory element of his award will be reduced by 50%.

D O'Dempsey

Employment Judge **O'Dempsey**
17 July 2024