



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr S Chumber

v

Hestia Healthcare Ltd

Heard at: Bury St Edmunds

**On: 5 to 8 February 2018
& 13 March 2018 (in chambers)**

Before: Employment Judge Laidler

**Members: Mr T Wilshin
Mr P Bowerman**

Appearances

For the Claimant: In person assisted by Mr S Hussein
(Mr Hussein not attending on the last day)

For the Respondent: Ms C Harrington

RESERVED JUDGMENT

- 1. The reason for the claimant's dismissal was conduct and the claimant has not established that his dismissal was less favourable treatment because of his disability or that he had made protected disclosures.**
- 2. Whilst the respondent knew or ought reasonably to have known that the claimant was disabled by virtue of information given to it at interview it did not know and could not reasonably be expected to know that the use of the stairs placed the claimant at a substantial disadvantage in comparison with those who are not disabled. The duty to make reasonable adjustments did not therefore arise.**
- 3. All claims brought fail and are dismissed.**

REASONS

1. The claim form in this matter was received on 27 February 2017. In that the claimant claimed he had been unfairly dismissed and discriminated against on the grounds of disability. The claimant acknowledged in the claim form he did not have two years' service, but brought the claim that his dismissal was connected to his disability and the fact he had made whistle blowing disclosures to the Care Quality Commission. The claimant stated that his disability was Psoriatic Arthritis.
2. In its response the respondent defended the claims stating that the claimant had been dismissed for acts of gross misconduct. It did not accept the claimant satisfied the definition of disability within the meaning of the Equality Act and denied that he had been dismissed for any claims for having made protected disclosures.
3. The first preliminary hearing took place before Employment Judge Moore on 26 May 2017. It was listed then for a preliminary hearing to determine whether or not the claimant satisfied the statutory definition of disabled and orders were made in that respect.
4. That preliminary hearing took place before Employment Judge Warren on 8 September 2017. Shortly before that the respondent conceded that the claimant was a disabled person, but the hearing proceeded to clarify the issues in the case. Ms Harrington produced a list of issues as amended at that hearing and these were seen in the tribunal bundle at pages 72 to 74. For ease of reference they are as follows.

Public interest disclosure unfair dismissal claim

5. What did the claimant say or write? The claimant relies upon:
 - 5.1 A written statement made in June 2016 and given to the respondent's Home Manager, Ms K Randhwara;
 - 5.2 A telephone call he made to the Care Quality Commission on 5 June 2016;
 - 5.3 A written statement made on 15 July 2016 and given to the respondent's Home Manager, Ms K Randhwara.

The claimant says that in each of these communications he made three complaints: firstly that a member of staff, Lucy, created false fluid charts, secondly, that the respondent routinely neglected and failed to respect the dignity of a person in their care ('RP') and thirdly, that on 15 June 2016 Lucy edited a document of the Caredoc software system originally written by the claimant.

6. In either of these complaints, was information disclosed which in the claimant's reasonable belief tended to show on the following?
 - 6.1 A criminal offence had been committed. The claimant relies upon his belief that it was against the law to edit documents.
 - 6.2 A person had failed to comply with a legal obligation to which he was subject;
 - 6.3 The health and safety of an individual had been put at risk. The claimant refers to the health or safety of RP and the other residents at the home;
 - 6.4 Or that any of those things were happening or were likely to happen, or that information relating to them had been or was likely to be concealed? The claimant says he believed the respondent had concealed the relevant matters;
 - 6.5 If so, did the claimant reasonably believe that the disclosure/s was made in the public interest?
 - 6.6 Was the making of any proven protected disclosure the principal reason for the dismissal?
 - 6.7 As the claimant has less than 2 years continuous employment, the burden is on the claimant to show jurisdiction and therefore to prove that the reason or if more than one the principal reason for the dismissal was the protected disclosure(s).

Disability

7. The respondent concedes that the claimant is disabled by reason of his Psoriatic Arthritis.

Section 13

8. Has the respondent subjected the claimant to treatment falling within section 39 of the Equality Act namely dismissing him?
9. Has the respondent treated the claimant as alleged less favourably than it would have treated a hypothetical comparator?
10. Has the tribunal found primary facts from which it could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
11. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 20 and 21

12. Did the respondent apply the following provision, criteria and/or practice generally, namely requiring employees to climb stairs at the Willows Care Home?
13. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that the claimant had significant physical difficulty in climbing stairs.
14. Did the respondent take such steps as were reasonable to avoid the disadvantage? For example, allowing the claimant to work on the ground floor, allowing the claimant to carry out the role of activities co-ordinator and/or allowing the claimant to carry out the laundry.
15. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

Breach of contract

16. Was the respondent entitled to terminate the claimant's employment summarily?
17. If not, to what compensation, if any, is the claimant entitled?
18. At the commencement of this hearing these issues were discussed. The respondent took issue with various paragraphs in the claimant's statement in which he referred to a patient whose arm was broken. Counsel's position was that this was not part of the alleged protected disclosures and was not relevant to the issues that the tribunal would have to determine. The tribunal considered the position and indicated to the parties that on the claimant's own evidence that incident was after his dismissal so could not be relevant to the issues and was not relevant to whether or not the claimant had made a protected disclosure prior to his dismissal.
19. There was a joint bundle of documents running to approximately 239 pages. At the hearing the claimant and his representative produced a list of additional documents. The respondents had commented on these and their principal position was either that the documents had no relevance or were already included in the bundle. In addition, some were marked without prejudice and should therefore not be included. The claimant and his representative accepted some of these points, but in relation to what appeared to be a contemporaneous diary of notes the claimant had kept it was indicated that this went to the harassment he was suffering at the time and related to the

arm breaking incident. It was then argued on the claimant's behalf that this contributed to his dismissal.

20. The respondent argued that this was a significant change in the way that the claimant's case was put. As identified in the issues there were three alleged disclosures. It was now being said that the arm breaking incident was not a disclosure and not raised as an issue, but that it was material to the way in which the respondent approached the disciplinary and decision to dismiss. The respondent had not prepared to deal with this matter. It was an entirely new allegation.
21. The claimant and his representative indicated that they wished to seek leave to amend to rely upon the arm breaking incident. They were given time to discuss the matter as they would need to indicate exactly the wording of the amendment sought.
22. After a break it was indicated by the claimant and his representative that they wished to rely on the arm breaking incident as a protected disclosure. The claimant had been the one to go with the resident to hospital and when he came back from the hospital he disclosed to Fay Gooch and Vivian Vuchemtigah. Having made that disclosure it was part of the reason that the claimant was dismissed. The claimant was asked why this had never been raised before. The claimant thought he could rely upon it as it was part of the reason why he was dismissed. He had not really understood what was going on at the previous preliminary hearing when the issues were clarified. He made his disclosure verbally to the Deputy Home Manager, Fay Gooch and verbally to Vivian. He told them he had been interrogated at the hospital as to how the resident's arm had been broken and he had said he was only chaperoning the resident.
23. Having heard from the claimant and opposition to the application, the tribunal determined that leave to amend would not be given. It was raised far too late in the proceedings and had never been raised before. The claimant had submitted his claim form, there had been a preliminary hearing and this issue had never been raised or at the disciplinary hearing or appeal. The claimant has shown he was well able to raise issues if he wished to do so. It is already the claimant's case that the investigation was not done properly. The respondent cannot be expected to produce all relevant documents about the arm breaking incident at this late stage. There would be cost consequences to the claimant if there now had to be a postponement and that is a very valid point for the respondent to have raised. It was determined the case would proceed on the list of issues as had been agreed and as set out above.
24. The tribunal heard from the claimant and from the following on behalf of the respondent: -

James Sales, Regional Operation Director

Vivian Vuchemtigah, Peripatetic Nursing Manager

Chris May, Director of Specialist Services

Sarah Ferguson, HR Director

25. The tribunal read the witness statements and then took the statements as read. The witnesses were cross-examined upon them. There was insufficient time left for the tribunal to conduct its deliberations and the decision was therefore reserved.
26. On 7 February, the third day of this hearing the claimant arrived with a handwritten statement headed "Incident 13 October 2016". Mr Hussein on his behalf stated that those involved in the incident had been required to write up a statement. The claimant had written this and it should have been part of his disciplinary hearing. It was produced now as they had not realised it was not in the bundle. The claimant refers to it in his witness statement as not being in the bundle and having been sent to the respondent although the respondent says it was never received. He referred to paragraph 73 of the claimant's witness statement which does state "my statement of 14.10.17 was not provided and it was not included in the pack to the hearing manager... I will request the respondent to add this to the bundle and by the time of the ET hearing it should be in the bundle". Mr Hussein stated that they had only realised the day before it was not in the bundle and asked Ms Harrington where it was and she said she did not have it. They therefore obtained it the previous evening. Mr Hussein said they genuinely did not realise until yesterday morning it was not in the bundle. Mr Sales had by this time already given his evidence. This issue had never been raised before even though on the first day of the hearing the claimant's additional documents had been discussed.
27. The respondent argued that this document should not be allowed in and considered by the tribunal. It is a disputed document. The claimant raised it in his witness statement which was exchanged on 15 January. He must have realised then it was not in the bundle. There was nothing to suggest it was in the bundle as the respondent has never had it. Its existence was not raised at the disciplinary hearing or the appeal. There has never been reference to it. The respondent has always queried its very existence. Counsel acknowledged that there was a conversation between her and the claimant and his representatives the day before when she asked if they had the statement. They had said no and there was no suggestion they had it. The tribunal had not been put on notice that there might be further questions for the witnesses. There would be a need to recall the claimant and to see whether they could get Mr Sales back.
28. The tribunal adjourned and took time to consider the position and then gave its conclusions on this matter to the parties. The statement had been produced on the third day of the hearing. It was not raised at the outset when the issues were discussed nor when there was discussion of 43 additional pages that the claimant said should be in the bundle. The claimant and Mr Sales, the Dismissing Officer had given their evidence and Mr Sales had left the tribunal. At no time in his oral evidence did the claimant say that he had this statement that he wrote at the time and that was not in the bundle.

29. The tribunal had checked his interview notes appearing at page 121. These were audio recorded and extensive. The claimant was given every opportunity to state his version of events and did so. There is reference to a statement, but it is not known to which one. Fay Gooch would need to be called to establish that.
30. Vivian Vuchemtigah did the investigation. Her report refers to the claimant's statement at page 105 and 108. She will be giving evidence. The claimant already states at paragraph 73 that she "manipulated the investigation" and questions of that nature can be put to her in cross-examination. Those can be put without this statement being allowed in evidence.
31. The tribunal determined that the claimant had had every opportunity to produce a copy of this statement before now, but had not done so. The obligation to disclose all relevant documents rests on both parties and is a continuing obligation. It is unclear why if the claimant had this document and wished to rely upon it he did not disclose it to the respondent and insist as he had done with other documents that it go in the bundle.
32. It was not in accordance with the overriding objective for this document to be allowed in with the consequence that witnesses would have to be recalled and the length of the hearing inevitably extended. There would be greater prejudice to the respondent by allowing this statement in than there is to the claimant if it is not allowed. The claimant will still have the opportunity to put his questions to Vivian Vuchemtigah about the statement and her investigation.
33. It was the claimant not Mr Hussain who put questions in cross examination to Vivian Vuchemtigah. This it has to be acknowledged was a difficult process for both of them. The claimant was making serious allegations against her but she gave her evidence in a very fair and honest manner and where her evidence conflicts with that of the claimant her evidence has to be believed.

The Facts

34. From the evidence heard the tribunal finds the following facts.
35. The claimant applied for the position in a handwritten application form dated 24 October 2015. He stated there were no special arrangements he required in order to attend an interview. He did mention "chronic ill health" in the section dealing with relevant skills, knowledge and experience. He wished to explain the gap in his employment history from January 2010 and stated: -

"This was due to chronic ill health which I will be happy to discuss in detail at an interview. However, I do believe having suffered the experience of ill-health it will be an asset for the position I have applied for as I now have detailed knowledge of what is required and expected of a carer. I understand mobility issues as well as understanding long term medication...."

36. There was nothing specific on the application form about the disability now relied upon.
37. The tribunal also saw in the bundle the interview checklist dated 29 October 2015. This noted that the claimant suffered from severe arthritis and he was once in a wheelchair for a long time and had a carer. He was keen to get back into work. He was happy to do either work as a support worker or a domestic. He was recommended for either position.
38. The claimant was duly offered a position and a contract of employment was entered into dated 6 November 2015. This contained a clause 10 setting out the circumstances in which the claimant could be dismissed without prior notice or pay in lieu and included if he committed “any act of gross misconduct or gross incompetence or other repudiatory breach of contract”.
39. The tribunal was taken to a performance and development review of the claimant in April 2016. In this he stated his training had been first class and that he had quite an amazingly NVQ assessor. Some of the carers he worked with were excellent and there was “true teamwork”. He wanted to go as far as possible with care work and a possible diploma. The nursing staff and management “are supporting me wonderfully well”. There was nothing in this document to suggest the claimant was having problems with colleagues or that he was being made to work upstairs which was causing him a difficulty. Whilst the tribunal would not necessarily expect such allegations to be contained in such a document, the claimant was expressing such enthusiasm for the role and his colleagues that the tribunal has had to conclude that he could not have been subjected to bullying of the type he describes at that point. e
40. In the claimant’s witness statement at paragraph 9 he set out an allegation that he heard Lucia Chungwe say to Sharie King “lets kill him, send him up to Mrs EO and B”. The claimant states this was said as Lucia knew he had a disability and he was made to work upstairs. He tried to use the lift, but Lucia had told him he could not use the lift because other staff such as the laundry department needed to use it. It was put to the claimant that this had not been raised with any manager and the claimant accepted that he had not raised it. There was not any letter or email in which he had asked for adjustments to be made either.
41. In paragraph 18 of his witness statement the claimant states he was breaking down during his shifts because of the pain he was in and would often have to support himself on the wall because of the pain. A carer once came to help him, but Lucia stopped the carer saying, “leave him if he can’t do it he should find a different care home to work in”. The claimant accepted he had not raised this matter in writing at the time. He does not allege in his witness statement that he raised it with anybody.
42. The claimant stated in various documents that he had to work upstairs for at least 6 months. He then stated that after April 2016 he had been allocated downstairs but only to allow him to administer eye drops. His evidence was

that then he was required to be upstairs again and the respondent has produced no evidence to refute that. The tribunal has not seen any shift records to show where the claimant was allocated to work and has not heard from any manager in day to day control of his shift pattern. The tribunal has read the claimant's impact statement and the letter of 8 May 2017 from Phoenix Primary Care and accepts that with the claimant's condition having to go up and down stairs would have caused him substantial disadvantage in comparison to those without his severe Psoriatic Arthritis.

43. The claimant alleges that at paragraph 20 of his witness statement that he had to take a Mr C out on a Friday afternoon as this was part of his care plan. He asserts that Mr C asked why the claimant had to do this when it was clear he was disabled. The claimant asserts it was because he was being blackmailed by Lucia, Tamanna Ahmed and Vivian. He was told he had to take Mr C out or he would not be working there. He was told that if he is not working there he would have to pay back the £1,100 for the NVQ course.
44. It was put to the claimant that he had never been compelled to take Mr C out and that he had come in on his day off to take him out. The claimant accepted he had done that and that he helped him when he moved to another home. No one else would have taken him out if he had not done so. When questioned about the alleged threat concerning the fees for the NVQ course and that there was in fact no agreement that such fees would be clawed back, the claimant's answer was that he did not really read the paperwork, but he had not knowingly signed such a clause. The tribunal accepts the respondent's evidence that there is no such clause and this casts doubt on the claimant's credibility in this respect. The tribunal does not accept such a threat was ever made.

The incident regarding RP - 15 June 2016

45. The claimant alleges that on entering on lounge resident RP had soiled himself and was walking around dropping faeces everywhere. The claimant and Fay Gooch were present. Fay Gooch asked the claimant to stop RP walking around and the claimant took him for a shower. The claimant states that the faeces had now dried and it took 25 minutes to get him clean. After showering and making him comfortable the claimant added notes to the care home's computer system using Caredoc. The claimant asserts that he did this at 16.19 and that at 19.34 Lucia updated and falsified the record by deleting the following words:-

“May be if more senior members of (sic) staff delivered the same dignity and compassion towards Mr P maybe (sic) he would not end up in such distress”.

46. This Caredoc entry was relied upon by the claimant as his first disclosure. It was recorded in the list of issues as “a written statement made in June 2016 and given to the respondent's Home Manager Ms K Randawara.” In cross-examination however, the claimant acknowledged that the actual written

document that he gave was that which appeared on page 41 of the bundle being a handwritten statement by him dated 15 July 2016. It was therefore agreed that disclosure 1 could be removed from the list as not existing.

47. The claimant in the list of issues had stated that each of the documents relied upon as protected disclosures showed that Lucy had created false fluid charts. He accepted in cross-examination that there was nothing in the Caredoc log or in his document of 15 July about false fluid charts.

Second disclosure - telephone call to the Care Quality Commission on 5 June 2016.

48. The tribunal saw an email from the Care Quality Commission to the claimant dated 9 November 2017 and this acknowledged: -

“On 5 July 2016 you contacted us with your concerns relating to one of the team leaders working at the Willows Residential and Nursing Home, which you had also reported to the Area Manager for service. Our records show that we provided you with contact details for the whistle blower helpline and for ACAS to support you with this issue.

You also told us about a particular incident relating to a service user in which you told us they had been left in distress after being left for over 30 minutes after soiling themselves. Please be assured that based on your information, we immediately made a safeguarding referral to the Safeguarding Team at Bedford Borough Council. CQC is not able to look into individual concerns and complaints (we do not have the legal powers to do that) ...”

49. The claimant accepted that this was a report to the CQC about Mr P and that it was not about false fluid charts. He also acknowledged that he did not report Lucia for allegedly changing the Caredoc log in that telephone call.
50. It also confirms the evidence given by the respondent that the CQC pass the matter to safeguarding and do not deal with it themselves.

Third Disclosure

51. In the list of issues this was recorded as a written statement made on 15 July 2016 and given to the respondent's Home Manager Ms K Randawara. This is the document already referred to and the claimant accepted there is no reference to the fluid charts or the Caredoc system. The tribunal accepts that there was no allegation of a failure to respect dignity, but just recounting the incident with Mr P and others offering to help. The claimant maintained that he was bringing up a serious dignity issue. The resident had been left in the lounge soiled. He acknowledged however that in none of those documents did he refer to falsification of fluid charts.

52. At paragraph 31 of the claimant's witness statement he stated that Vivian was aware of the whistle blowing issues he had raised. In cross-examination he

acknowledged he did not make those disclosures in writing to Vivian. He also acknowledged that he had not personally shared with her the Caredoc log, the contents of the call to the CQC or 15 July statement. He had thought that statement would be forwarded to her, but he had not forwarded anything to her. He had however given up his anonymity in the telephone call to the CQC and “would have thought CQC would have written to the management.”

53. The tribunal heard from Vivian Vuchemtigah and accept that the CQC pass the matter direct to the safeguarding team who investigate. That is who the home would have heard from. Even if the claimant had waived anonymity the name of the whistleblower would not be revealed to the respondent.
54. With regard to Mr Sales the claimant accepted he had not shared disclosures with him. He only met him at the disciplinary hearing and tried to tell him about the disclosures but “he did not let me.”
55. In his witness statement at paragraph 72 the claimant asserts that Mr Sales “was aware that I was a whistle blower and disabled and that is why he dismissed me. He is the Regional Manager, so any CQC concerns would potentially be reported to him.” Mr Sales was clear in his evidence and the tribunal accepts that he was not and would not be informed of the identity of the whistle blower even if the claimant had waived anonymity. Individual managers would not have been informed. He did not know of complaints the claimant had raised with the CQC.
56. The then manager Kishmero Randawara resigned from her position as Home Manager without notice on the 16 July 2016.

Meeting with Claimant 21 July 2016.

57. Vivian and Fay Gooch met with the claimant on 21 July 2016 to discuss his request to reduce his hours to 18. Minutes were seen in the bundle at p101 taken by Fay Gooch and typed up. The tribunal accepts the evidence of Vivian that the claimant kept asking for the minutes and they were typed and sent to him. If issues are raised about minutes they are attached to the minutes and she had not seen any issues with these minutes raised by the claimant.
58. The claimant relies on the paragraph towards the end of the first page where he is recorded as stating:

‘When I first worked her Lucy said to Shari ‘that’s kill him put him on level two’ she didn’t realise that I was round the corner and that I heard everything.’

as evidence that he informed Vivian that going up the stairs was difficult for him because of his disability. The tribunal accepts Vivian’s evidence that it was not put to her in that way. The claimant attended the meeting very angry as to the whereabouts of the previous manager Kishmero and was making allegations about Lucy (Lucia) and Shari. Vivian wished to try and resolve these issues by having all the relevant staff meet together but the claimant was

not in agreement with that suggestion. It was not made clear to her at this meeting that the claimant was having difficulty at work in using the stairs due to his disability.

59. The tribunal saw a note of a further discussion with the claimant on 5 August 2016. The claimant denies that meeting took place. Vivian was very clear in her evidence that this was a pro forma document completed by her after the meeting and that it certainly did take place. The tribunal does not believe that she fabricated this document and accepts that this meeting did take place. It was noted that under Fay Gooch as manger the claimant 'felt things had improved'.

13 October 2016 incident

60. On 13 October 2016 there was an incident involving the claimant and other staff in front of a resident in the care home. This was investigated by Fay Gooch with further investigation carried out by Vivian. Vivian's report was dated 14 October 2016 and in the bundle at page 104. All relevant staff were interviewed and those interviews audio recorded. The claimant wished to have typewritten versions but unfortunately due to sickness absence of the administrator these were not prepared immediately following the meetings. There was a request from the claimant of the 24 November 2016 (page 133) for these. They were subsequently produced and the claimant invited to a disciplinary hearing by letter of 5 December 2016.
61. One of the allegations the claimant put in cross examination was that it was Vivian who had been 'blocking' these minutes. She gave completely convincing evidence to this tribunal that, as stated above, it was due to the administrator being off sick. If she had wanted to she could have typed up the minutes but she did not do that.
62. The claimant also stated that he had contacted the CQC on 29 November and then these minutes were produced and the claimant sacked a few days later. Vivian was a very clear in her evidence which the tribunal accepts that she did not know that the claimant had contacted CQC on 29 November.
63. A statement was obtained from the Cyril, the care home manager at the time. He confirmed that he was called to the lounge and when he approached it, the claimant was "talking with a raised voice to all the carers who were there". He summoned them all to the Nurses Office to try and understand the problem. The claimant was still "in a state of anger", was asked to calm down but Cyril stated he could not do so. He was calling Lucy "nasty, filthy and disgusting sort." He asked all of the staff to make statements and hand them in within 24 hours.
64. A statement was prepared by Lucy dated 13 October 2016. She stated the claimant had come into the lounge and approach Tamanna in a very disrespectful manner and started shouting at Tamanna in front of the service users and "he was very aggressive, pointing his finger at me in close proximity'. He then asked why Tamanna had asked for Lucy to come to assist

taking Mrs B to her bedroom. The claimant then got angry and started shouting at her in the lounge in front of the service users. She alleged. "He was very aggressive, pointing his finger at me at close proximity. I felt threatened by his behaviour, and quite vulnerable". She also stated that in a brief meeting with Cyril the claimant again started shouting and pointing his finger at her. He carried on shouting in the presence of Cyril and said she was a 'nasty, filthy thinking person'

65. There were also audio recordings of interviews with: –

Lucy

Tamanna

The claimant in which he accepted he pointed his finger and raised his voice at Lucy.

Natasha

Josie

66. The investigation report concluded by Vivian found it evident that the claimant pointed a finger at his colleague and addressed her with unfriendly words. There was lack of teamwork. The incident could have been avoided if the claimant assisted his colleague or went to the nurses or manager stating why he did not wish to do so. He did not respect the residents lounge when he confronted his colleagues in the lounge. She also found, however, that Lucy and Tamanna could have ignored the claimant's behaviour and gone to the office but they had reacted. They should be given further training and the claimant invited to a disciplinary hearing.

Disciplinary hearing 8 December 2016

67. By letter of the 5 December the claimant was invited to the disciplinary hearing. He was informed that the allegations were:

Aggressive behaviours towards your colleagues which is against the company's policy number 05.02

Insubordination towards senior member of staff.

Copies of the statements were enclosed with the letter. The claimant was advised he could submit a written statement in advance of the hearing. The disciplinary hearing would be chaired by James Sales. The claimant was advised of his right to be accompanied. He was told that he would be able to put forward mitigating factors and that due consideration would be given to these when considering what, if any, disciplinary sanctions were to be imposed.

68. The hearing was minuted and the minutes seen at page 145 of the bundle. As stated above the claimant accepted he raised his voice but did not accept he had behaved in an aggressive manner. He did accept the proposition put to him by Mr Sales that 'this is a care home and what I cannot accept is staff clashing in front of residents'. Mr Sales asked the claimant if he could assure him it would not happen again and could not obtain such an assurance. He had prior to the disciplinary hearing considered that a written warning might have been an appropriate outcome but having heard the claimant's response at the hearing and his increased aggression at it he was persuaded by the witnesses' version of events and did not feel he could put the claimant back in the home. It was too risky. He therefore took the decision to dismiss and communicated that to the claimant at the end of the meeting.
69. The minutes show that only when that decision was given did the claimant take his shoes and socks off and accuse Mr Sales of discriminating against those with disabilities. The tribunal accepts Mr Sales evidence that until that point he had no knowledge that the claimant considered himself to be disabled and that at no point in the disciplinary investigation had the claimant indicated that any alleged treatment afforded to him was because of his disability.
70. In the skeleton argument submitted by Mr Hussain, on behalf of the claimant, at the outset of this hearing he suggested that Vivian manipulated the investigation so that the claimant was dismissed. Mr Sales was adamant in his evidence, which the tribunal accepts that his decision was his alone and he did not consider it to have been manipulated by Vivian in any way.
71. Further Mr Sales did not know of the claimant's complaints to the CQC, Vivian did not raise these with him and he would not have expected her to do so.
72. By letter 8 December 2016 the decision to dismiss was confirmed to the claimant. This letter made it clear that the respondent felt it had been left with no alternative but to summarily dismiss the claimant on the ground of gross misconduct. In view of the gravity of that misconduct, the trust and confidence placed in the claimant had been completely undermined. The claimant was advised of his right to appeal by 16 December. The claimant prepared an appeal statement seen in the bundle at page 157.
73. The appeal hearing was convened on 24 January 2017. It was conducted by Chris May, Director of Specialise Services. The claimant attended unaccompanied.
74. The minutes of the appeal hearing were seen at page 164 of the bundle. At the bottom of the first page the claimant acknowledges that it was after Mr Sales said "I need to dismiss you" that the claimant took off his socks because he felt his disability was questioned "at all times". Mr May can be seen exploring the issue of the disability with the claimant. When asked however how he had been discriminated against, the claimant said "I feel that I am the fitness in the home. I walked upstairs even when the lift wasn't working". His complaint to this tribunal is that walking up the stairs was what caused him significant pain.

75. By letter of 26 January the claimant was advised that the decision to dismiss had been upheld on appeal. In cross-examination the claimant was only able to go so far as to say that it was “just a feeling” that Mr May knew of his disability and protected disclosures. The tribunal accepts Mr May’s evidence that he would not be told about protected disclosures even if the whistle blower had waived anonymity. He felt very clear having heard the appeal that the reasons for dismissal were not connected to protected disclosures and/or disability.

Relevant law

76. The claimant brings various claims under the Equality Act and the following sections are relevant: -

Section 13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

...

Section 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid...

Section 21 Failure to comply with duty

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Part 3 Limitations on the duty - Lack of knowledge of disability, etc.

- 20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know-
- (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
 - (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

77. The Code of Practice on Employment (2011) gives guidance on the application of these provisions in Chapter 6. There is a particular section dealing with the question "What if the employer does not know the worker is disabled" and this provides at 6.19 and 6.20 as follows:-

- 6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.
- 6.20 The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to

make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment.

78. The claimant also alleges that he was dismissed for having made protected disclosures. This therefore is a claim under section 103A of the Employment Rights Act 1996 (ERA) which provides: -

103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

79. Consideration must be given to section 43A as to whether or not there had indeed been a protected disclosure. Section 43B provides as follows:

43B Disclosures qualifying for protection

- (1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:-
- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
 - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
 - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
 - (d) that the health or safety of any individual has been, is being or is likely to be endangered,
 - (e) that the environment has been, is being or is likely to be damaged, or
 - (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed...

Conclusions

Dismissal

S103A claim

80. The claimant was dismissed by reason of gross misconduct for his behaviour in the home in front of the residents and not because of any protected disclosures and/or disability.
81. Most of the matters raised by the claimant with regard to the investigation would be matters that may have been relevant had the claimant had sufficient service to bring an ordinary unfair dismissal claim under the provisions of the Employment Rights Act. The claimant did not have such length of service. He therefore has to establish that within the meaning of section 103A the reason, or if more than one principal reason for the dismissal was that he had made a protected disclosure.
82. There were three disclosures relied upon. The first fell away as has been explained in the tribunal's findings of fact. In neither of the other two was there any allegation that Lucy created false fluid charts or that she edited a document on the Caredoc system. That left only an allegation to the Care Quality Commission and in the written statement of 15 July that the dignity of a resident RP had been neglected. The tribunal accepts that that had the potential of being a protected disclosure within the provisions of section 43B. Namely that a person had failed to comply with a legal obligation and/or that the health or safety of an individual had been or was likely to be endangered.
83. Neither the dismissing officer nor the appeals officer knew that the claimant had made these protected disclosures. There is no substance whatsoever in the claimant's suggestion that Vivian Vuchemtigah had manipulated the investigation or had any influence on the decision. She was not a decision maker. Mr Sales came new to the matter and it was his decision alone.
84. Even the claimant acknowledges that he did not raise the issue of disability until after Mr Sales had announced his decision to dismiss. The decision was not made because of disability or protected disclosures, but because the claimant would not re-assure Mr Sales that his behaviour before the residents would not occur again.
85. It follows from those conclusions that the claimant was not unfairly dismissed for having raised protected disclosures.

As an act of direct disability discrimination

86. The reason for the claimant's dismissal was his behaviour in front of residents and his unwillingness to reassure Mr Sales that it would not occur again. That had nothing to do with disability. Any other employee who had behaved in the same manner as the claimant would have been subjected to the same

sanction. The dismissal was not less favourable treatment 'because' of the claimant's disability.

87. Further the dismissing officer Mr Sales did not know the claimant was disabled at the time he made his decision. It was only once the decision was given that the claimant raised the issue of disability.
88. The tribunal repeats its conclusions with regard to the influence of Vivian in the decision as with regard to the protected disclosure allegation. It does not accept and there is no evidence that she had any role in the decision to dismiss due to the claimant's disability or manipulated her investigation in anyway because of his disability to ensure his dismissal.

A failure to make reasonable adjustments.

89. The tribunal is satisfied that the respondent knew or reasonably to have known that the claimant had a disability from the outset of his employment by virtue of the information given at his interview. This records that the claimant believed he would be suitable for the role in a care home because "he suffered from severe arthritis and he was once in a wheelchair for a long time – he had a Carer that's when he developed a passion for caring". However, the respondent had no evidence and neither ought it reasonably to have known of any substantial disadvantage that the claimant would then suffer on taking up employment.
90. The claimant presented up to the dismissal as being well satisfied with his role. When he had an appraisal in April 2016 he talked about an amazing NVQ Assessor, a wonderful team and everyone being supportive of him. They are not the words of someone who was in such considerable pain as the claimant has told this tribunal. He took Mr C out voluntarily. There is no evidence he raised concerns about the effect of his condition on his ability to perform the role.
91. The "provision, criterion or practice" relied upon in these proceedings is the requirement that he use the stairs. The tribunal however has no evidence as to how the stairs put the claimant at a substantial disadvantage, compared with those who are not disabled. The tribunal does not know what the disadvantage was. Although the claimant submitted his impact statement and copies of some letters from his podiatrists, even they do not give the tribunal any evidence as to the substantial disadvantage.
92. It follows that the respondent did not know and could not reasonably have been expected to know that the claimant's disability subjected him to a disadvantage, such as to lead to the duty to make reasonable adjustments arising. It did not arise and the respondent therefore cannot be said to have failed in its duty.

93. It follows from those conclusions that all the claims brought fail and are dismissed.

Employment Judge Laidler

Date: 27 March 2018

Sent to the parties on:

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For the Tribunal Office