

EMPLOYMENT TRIBUNALS

Claimant: Ms H Rochester

Respondent: Ingham House Ltd

Heard at: London South

On: 11-12 December 2017

Before: Employment Judge Siddall

Members: Ms S Murray
Ms N Christofi

Representation

Claimant: In person

Respondent: Ms J Gould, Counsel

JUDGMENT

1. The claim that the Claimant was subjected to a detriment on the grounds that she made a protected disclosure contrary to Section 47B of the Employment Rights Act 1996 does not succeed.
2. The claim for unlawful deduction from wages is dismissed upon withdrawal.

REASONS

1. We heard this case over two days. The Claimant gave evidence in person and we also heard from Ms Tess Sterling, Registered Manager and from Mr Paul Taylor who is an owner of the Respondent.
2. Ms Rochester brought a number of claims at the outset of this matter including a claim for automatic unfair dismissal contrary to section 103A of the Employment Rights Act. By the time the case arrived at this hearing, there remained just one outstanding claim which was that the Respondent's referral of the Claimant to the Disclosure and Barring Service in May 2017 amounted to a detriment on grounds of her making a protected disclosure contrary to Section 47B of the Employment

Rights Act 1996. (We were advised at the start of the hearing that the outstanding claim for arrears of wages had been settled).

3. Section 47B reads as follows: *'A worker has the right not to be subjected to any detriment by any act or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure'*.
4. The facts we have found and the conclusions we have drawn from them are as follows.
5. The Respondent operates a residential care home with approximately thirty seven residents who are all vulnerable adults with a variety of care needs. The Claimant is a former registered nurse whose registration has lapsed but who has continued to work in the health and care sectors. She applied for a role with the Respondent and was offered the role of Team Leader (nights) in an offer letter dated 31 March 2017.
6. The Claimant underwent some company training on 11 April 2017. The Respondent contends that the Claimant had not been fully trained at the point at which her employment ended. In addition she had not been trained in the Respondent's medical competencies and assessments. The Claimant disputes that she was ever told she required further training, but we note that she had agreed in her letter of resignation that she was not authorised to dispense medication.
7. The Claimant worked for two nights as an additional member of staff on a "shadow" basis on 12 and 13 April 2017. She was rostered to work on the nights of 14 and 15 April. We find that on these nights she was part of the proper staffing team and she did not work on a "shadow" basis as there were only two members of staff on duty.
8. It is not in dispute that during those two nights the Claimant made clinical decisions relating to three different patients that the Respondent was not happy with. In two cases the decision was about reducing the number of times the patients would be turned that night. The third issue related to the administration of medication to a patient referred to as Z. The other member of staff alleged that after a decision to give the patient a tranquilising drug had been made, the Claimant had taken over the administration and had then asked her colleague to complete the medical records. It is clear from the evidence provided that there was very strong disagreement between Ms Sterling and the Claimant as to whether, in hindsight, these decisions were appropriate. Ms Sterling felt that the Claimant should not have unilaterally varied the care plans of two patients and that the administration of medication had not been appropriate. The Claimant takes the view that she made appropriate clinical decisions in each situation based on her previous experience. It is not necessary for the Tribunal to determine who is correct in relation to clinical decision making. We will note in passing that the Adult Safeguarding team of the local authority decided to take no action on the basis that no resident had been harmed and that Z had been given the right medication, and that ultimately the DBS did not take any action either.
9. After completing her fourth night shift, the Claimant spoke to the Deputy Manager, Chelsea Kemp on Saturday, 16 April 2017. She raised a number of

concerns about the way the home was being operated, including concerns about the incompetence of other members of staff and about understaffing. We accept that during that conversation she indicated that she would not be returning to work that evening and that she was resigning. Ms Kemp, in turn, expressed her concern about the three patient situations that had been identified.

10. The Respondent's case is that they did not understand from this conversation that the Claimant had resigned, and that Ms Kemp did not pass this information to Ms Sterling. This seems very surprising but we accept that there was a degree of confusion on the part of the Respondent about what the Claimant was going to do.
11. The Respondent has conceded that the verbal concerns raised by the Claimant about matters at the home on 16 April amounted to protected disclosures.
12. Ms Sterling did not make a note of her conversation with Ms Kemp. At some point she spoke to the other member of staff on duty, 'Drita', who had been present when Z had been given medication. She did not make a note of that conversation either, and no written statement was taken from Drita until 8 May, after the DBS referral had been made.
13. In light of the concerns about the Claimant's conduct reported to Ms Sterling by Ms Kemp, the Respondent prepared a letter of dismissal dated Saturday 16 April 2017 and posted this to the Claimant. It was the Easter Bank Holiday week-end and the Claimant did not receive this letter until she received her post on the morning of Tuesday 19 April.
14. By that point the Claimant had already emailed Ms Sterling on 17 April confirming her resignation and setting out in writing all the concerns she had previously raised with Ms Kemp. Ms Sterling was absent over the Bank Holiday week-end and read the letter of resignation early in the morning on 19 April.
15. An earlier decision had found that as the dismissal letter was not received prior to the letter of resignation being sent and read by the Respondent, the resignation took effect before the dismissal.
16. The Claimant wrote to Ms Sterling on 19 April asking her to withdraw the dismissal and enquiring about a reference. She stated that if this did not happen she would pursue her legal rights.
17. On 19 April Paul Taylor wrote to the Claimant inviting her to mutually agree that her employment had ended upon resignation and stating that he would supply a reference if any request was addressed directly to him. The Claimant viewed this as a conditional offer of withdrawal of the dismissal. She took the view (correctly in our view) that she had already resigned and so she did not accept Mr Taylor's offer.
18. On 20 April the Claimant wrote to the Care Quality Commission raising her concerns about the operation of the home. On the same day, anticipating the Claimant's complaint, Ms Sterling wrote to the CQC setting out her account of what had happened.
19. CQC notified Adult Safeguarding Services at the local authority of the matters

raised. Ultimately Adult Safeguarding took the view that resident Z had been medicated appropriately and that no residents had been harmed and they did not conduct an investigation.

20. On 24 April Beverley Deadman, an Inspector at the Care Quality Commission wrote to Ms Sterling acknowledging the information received and the action which the home had said it was going to undertake. She included this paragraph: "I suggested that you may wish to contact DBS (ISA) to report your concerns regarding this person if you felt the concerns were of a serious nature, and to ensure that all contact and emails, disciplinary action were logged and copies sent to identify a clear audit trail".
21. We find that if Ms Sterling had not received this advice from Ms Deadman she would not have considered a referral to the DBS. Having received that letter and having previously spoken to Ms Deadman, she now considered whether to make a DBS referral. We find that she was not under any obligation to do so, but had a discretion to refer if she considered that the Claimant was at risk of causing harm to vulnerable adults.
22. Eventually Ms Sterling drafted a DBS referral form on 26 April and she sent this to the DBS on 2 May 2017.
23. On 1 June, the DBS wrote to the Claimant to state that having carefully considered all the information they would not be including her on the adults barred list. The letter advised that the information would be held on file for ten years.

Decision

24. It is not necessary for us to decide whether the Claimant made protected disclosures because the Respondent accepted that she did so in her verbal complaint to Ms Kemp on 16 April, in her letter of resignation dated 17 April and in the information she supplied to the CQC.
25. Ms Gould has referred us to the case of *London Borough of Harrow v Knight (2003) IRLR 140* which sets out the stages which the Tribunal must consider in deciding whether there has been a breach of Section 47B.
26. We have considered the question of whether the referral to the DBS amounted to a detriment. The Respondent argues that it did not, because Ms Rochester was not placed on the barred list. However the evidence of Ms Sterling made it clear that the referral is more significant than that. The information is held on the file for ten years. Ms Sterling stated that the DBS look at all the information available to them including any past referrals, and that they may consider whether a pattern of conduct has emerged which might lead to a person being barred. We conclude that even if the DBS took no action on this occasion, the fact of the Respondent's referral could be significant if the Claimant was referred to them at any point in the future. We are therefore satisfied that it amounted to a detriment.
27. We have carefully considered whether the referral to the DBS was made 'on the ground' that the Claimant had made protected disclosures. In considering this matter we have referred to the tests set out in the case of *Knight* referred to

above and also in the case of *Fecitt v NHS Manchester (2012) IRLR 64*. The *Knight* case warns us that we should not apply a “but for” test but that we should consider the mental processes of the decision maker in looking at the reason why a particular action was taken. The *Fecitt* case makes it clear that there is a causal link if the protected disclosure materially influences, in the sense of being more than a trivial influence, the employer’s treatment of the whistleblower.

28. There is a strong chronological link between the protected disclosures made by the Claimant and the referral to the DBS. Ms Rochester first raised her concerns on 16 April and Ms Sterling started to prepare a referral form on 26 April. We find that Ms Sterling would not have considered making a DBS referral if the Claimant had not referred the home to the CQC. If we were applying a “but for” test we would have found a causal link. However that is not the test.
29. We find that in practice the decision was more complex than that. We have noted the Claimant’s argument that if Ms Sterling had real concerns about the conduct of the Claimant she would have made a DBS referral on the week-end of 16 April after she had dismissed the Claimant. We have considered this point carefully. We accept Ms Sterling’s evidence that there was a lot going on between 16 April and 26 April in terms of communication with the Claimant and with the CQC. The Claimant was no longer working at the home and did not pose an immediate risk to patients. It seems clear to us that Ms Sterling only focused on the question of a referral after Beverley Deadman suggested that she should consider it.
30. We go on to consider whether the protected disclosures were a material influence upon Ms Sterling’s decision. Was it a form of retaliation for the Claimant referring the home to the CQC?
31. Ms Sterling gave clear evidence on this point. She said that she realised that referral to the DBS was a serious matter that would have an impact upon Ms Rochester. She said that she took the view that residents at the home had been put at risk of harm, even if there had been no actual harm caused. She was concerned about the Claimant’s decisions to unilaterally vary care plans that were in place for each patient and had been agreed after consultation with family members and other medical professionals. She thought about any situation that might occur in the future if the Claimant made similar decisions which ended up with a patient being harmed. Ultimately she decided that the right thing for her to do was to refer the Claimant to the DBS. Even if the DBS took no action, they would have information on file should any future incident occur.
32. The Tribunal considered this evidence carefully. The referral was a serious matter. We find that the investigation that Ms Sterling had carried out into what had actually happened during the two nights in question was not as rigorous as it could have been. She failed to document a number of conversations that she had with employees. We have observed that the account she eventually provided to the DBS differs from the one contained in the written witness statement received from the employee, Drita, which is dated 8 May, after the referral had been made. Having said that, the account of what happened more closely resembles the Claimant’s account than that provided by the other member of staff and so the Claimant was not disadvantaged in this respect. Although the investigation carried out before the referral was made was not adequate, we do not find that this factor supports an assertion that the DBS

referral was only made because the Claimant had made protected disclosures.

33. We take into account the fact that Ms Sterling had previously reached the view that the Claimant's conduct and decisions were not appropriate, because she decided to dismiss her on 16 April. We are mindful of the fact that the Claimant initially argued that this purported dismissal amounted to an automatically unfair dismissal following a protected disclosure. After it was decided that she had resigned, she argued that the attempted dismissal amounted to a detriment contrary to section 47B. This claim was struck out at a preliminary hearing. We find that Ms Sterling decided to dismiss the Claimant, in advance of being notified of her resignation, because of concerns about her professional conduct on the nights of 14 and 15 April. It was these concerns, in turn, that influenced her decision to make a DBS referral later that month.
34. We have noted the guidance in *Fecitt* which suggests that just because an employee has made a protected disclosure, it does not mean that they are protected from *any* form of adverse treatment. The intentions of the decision maker must be carefully considered. Although we have reached this conclusion with some difficulty, our view ultimately is that Ms Sterling, in making the referral, acted out of concern for her own residents and any future residents in making the DBS referral. She did not make the referral "on the ground of" the protected disclosure.
35. The claim for detriment pursuant to Section 47B of the Employment Right Act 1996 does not succeed.

M. Siddall

Employment Judge Siddall
Date 20 December 2017.

JUDGMENT & REASONS SENT TO THE PARTIES ON
22 January 2018



Mrs C Gangadeen
For the Tribunal Office