EMPLOYMENT TRIBUNALS

Claimant: **Ms E Muchererah**

Respondents: **Rushcliffe Independent Hospitals (Kegworth) Limited**

Record of a Full Hearing (Hybrid) heard at the Employment Tribunal

Heard at: **Leicester** **On:** **16, 17, 18 and 19 January 2023**

Reserved to: 23 January 2023 (in chambers)

Before: **Employment Judge M Butler (sitting alone)**

Representation

Claimant: **In person**
Respondent: **Miss L Hatch, Counsel**

Claimant's Witness by CVP: **Miss Jurgita Ouluk**

RESERVED JUDGMENT

1. The Judgment of the Tribunal is that the claims of automatic unfair dismissal, unpaid wages and breach of contract are not well founded and are dismissed.

2. The claim for unpaid holiday pay is dismissed on withdrawal by the Claimant.

RESERVED REASONS

The Claims

1. The Claimant presented her claim to the Tribunal on 25 March 2021. She was initially employed by the Respondent as a Senior Staff Nurse on 13 May 2019 but, because she did not like working nightshifts, she was retained by the Respondent as a Bank Nurse until 26 April 2020. With effect from 27 April 2020, she was appointed to the role of Clinical Lead at the Respondent's Mill Lodge Hospital subject to a 6 month probationary period. At a probationary review meeting on 20 November 2020, she was notified that she had not passed her probationary period and her employment as Clinical Lead was terminated on notice and ended on 7 December 2020.

2. The Claimant initially brought a claim for ordinary unfair dismissal but this was struck out because she did not have two years' continuous employment in order to be able to pursue such a claim. At a preliminary hearing before Employment Judge Victoria Butler on 8 February 2022, the Claimant confirmed she was claiming automatic unfair dismissal as a result of being dismissed for (i) making a qualifying protected disclosure; (ii) for health and safety reasons; and (iii) for asserting a statutory right. She also brings claims for notice pay, non-payment of holiday pay and hours worked in excess of her contracted hours while she was on call. She confirmed that her holiday pay had now been paid and consented to the dismissal of that claim on withdrawal at the hearing. The Claimant also confirmed that the detriment she relies on is that of dismissal.

3. The Respondent is a care home provider which also operates two independent hospitals specialising in caring for patients with mental health issues of which one, Mill Lodge Hospital, was where the Claimant was employed. The Respondent defends the automatic unfair dismissal claims on the grounds that the Claimant was dismissed because she did not pass her probationary period for a variety of reasons which made it inappropriate for her to continue as Clinical Lead, that she made no qualifying disclosures, raised no health and safety concerns, asserted no statutory right and was owed no further sums in respect of additional hours worked. The reasons for the termination of the Claimant's employment included issues with time management and her abrasive attitude towards her colleagues. The Respondent has now paid the outstanding holiday pay and all other sums due to the Claimant have been paid.

The Issues

4. The parties were seemingly unable to agree a list of issues for consideration in the hearing. However, I summarise those issues as follows:

(i) What was the principal reason for the Claimant's dismissal?

(ii) Did she at anytime make a qualifying protected disclosure and, if so, to whom

and in what way?

(iii) Did she assert a statutory right?

(iv) Did she raise health and safety concerns?

(v) Was her notice pay as set out in her contract of employment paid on termination of her employment?

(vi) Was the Claimant entitled to be paid for hours worked beyond her contracted 40 hours per week and, if so, were the correct amounts paid?

The Evidence

5. I heard evidence from the Claimant and from her witness, Miss Jurgita Ouluk (who gave evidence by video). I also heard evidence from Mr William Kapurura, a former nurse at Mill Lodge Hospital. For the Respondent, I heard evidence from Mrs R Martin, former Manager of Mill Lodge Hospital, Dr V K Singh, Medical Director, Mr R Tamirepi, Director of Commissioning for Hospitals and Specialist Services, Dr A Okoko, Consultant Psychiatrist, and Mrs C Stacey, Operations Director.

6. There was an agreed bundle of documents running to 581 pages and references to page numbers in this judgment are to page numbers in the bundle.

The Factual Background

7. There is no dispute between the parties as to the fact that the Claimant began working for the Respondent as a Registered Nurse, ceased to be employed on that basis because of her desire not to work nightshifts, worked as a Bank Nurse and then, because she was considered to be an excellent nurse by the Respondent, she was encouraged to apply for the role of Clinical Lead at Mill Lodge Hospital which she successfully did. The Claimant's role as Clinical Lead was subject to a probationary period by virtue of clause 5 in her contract of employment (page 48).

8. The Respondent, through its witnesses, gave evidence that, during her employment as Clinical Lead and within her probationary period, the Claimant was considered abrasive towards her colleagues, often shouting at them, criticising Doctors with whom she worked both to patients and other staff, refused to follow instructions and work in a collegiate way and worked with a sense that her way was the only way things should be done.

9. The thrust of the Claimant's argument before me was that she was never provided with any detail of complaints made against her by other staff members and consequently was unable to either defend herself against those complaints or adjust her behaviour accordingly. Since no details of these complaints were ever made known to her, they did not happen and she was dismissed for making protected qualifying disclosures, raising health and safety issues and asserting a statutory right.

10. The Respondent's answer to these allegations is that details of the complaints made against the Claimant, largely in respect of her conduct towards others, came from those of her colleagues who did not wish to formalise their complaints meaning that the Respondent, mainly through Mrs Martin, was unable to give details to the Claimant. The Respondent denies that the Claimant ever made protected qualifying disclosures and this aspect of the claims before me is discussed further below.

11. The Claimant also says it was agreed by Mrs Martin and the Respondent's owner, Mr Rai, that she would be paid for any hours worked over and above her contracted 40 per week at the rate of £20.00 per hour. The Respondent's response to that claim is that the Claimant was entitled to time off in lieu when she worked more than 40 hours per week or, in exceptional circumstances, the Respondent would consider payment subject to receiving a timesheet with details of additional hours worked and that timesheet being countersigned by Mrs Martin.

12. I had a number of concerns about the credibility of the Claimant's evidence. Much of what she alleged was not supported by documentary evidence and, when such evidence was relied on, it was often taken out of context. Further, she clearly had great difficulty in seeing the Respondent's point of view on any matter raised before me and on one occasion attempted to change the evidence given by a witness when recounting, wrongly, what that witness had said. More specifically, her account of making protected disclosures was particularly inconsistent. She gave different accounts as to whom the disclosures were made between the first preliminary hearing, her witness statement and her oral evidence. She also persisted in her argument that her colleagues had never complained about her treatment of them despite this having clearly been raised with her in her supervision meetings with Mrs Martin (pages 125 and 127) and despite her own evidence in paragraph 34 of her witness statement where she specifically said Mrs Martin had told her that staff were complaining about her.

13. In contrast, I found the Respondent's witnesses to be honest in their recollection of events and gave straightforward explanations about what had happened and how the Claimant's evidence was taken out of context. All of the Respondent's witnesses gave their evidence calmly and patiently and I had no reason to doubt their evidence.

14. Accordingly, where there was a dispute on the evidence, I preferred the evidence of the Respondent's witnesses. The Claimant's witnesses were both former employees of the Respondent and friends of the Claimant. Miss Ouluk's evidence was largely a matter of opinion and Mr Kemura's evidence was that of a former employee who had left after an unfortunate incident where a patient had been restrained by injection having not given the appropriate consent. His subsequent claim against the Respondent had been struck out for failure to actively pursue it.

Findings of Fact

15. In relation to the issues before me, I find the following facts:

(i) The material facts in this case relate to the Claimant's employment as Clinical Lead at Mill Lodge Hospital. This employment continued from 27 April 2020 until 7 December 2020.

(ii) During her employment, the Claimant had a difficult relationship with some of her colleagues, a number of whom complained about how they were spoken to by the Claimant and, in terms, that she maintained her way was the correct and only way to do to things. The Claimant talked down to some of her colleagues and openly criticised some of the Doctors, in particular, Dr Okoko. The nursing staff complained to Mrs Martin but did so anonymously to avoid further issues with the Claimant.

(iii) During her employment, the Claimant made critical and untrue statements about her colleagues, for example, that Mrs Martin was ill-qualified to manage the hospital, Doctors were unsafe in their treatments of patients, Mr Tamirepi favoured his friends and that Dr Okoko was practising in breach of the GMC restrictions imposed upon him.

(iv) The Claimant refused to follow reasonable instructions from management, specifically, she refused to share an office with the other Clinical Lead in the hospital ("Mary"), insisting that she, the Claimant, work elsewhere away from the wards when it was Mr Tamirepi's view that she should work close to the wards to better supervise the staff and care for the patients.

(v) On 18 November 2020 Dr Okoko emailed Mrs Martin with his assessment of the Claimant in response to a request from Mrs Martin to do this (page 181). This was not as the Claimant puts it, a malicious report, but a quite reasonable assessment of the Claimant's skills in leadership and as a nurse.

(vi) In relation to the alleged protected disclosures, the Claimant said at the previous preliminary hearing that her first disclosure was made in August 2020:

"To Dr Singh, Medical Director, that the Respondent's Consultant Psychiatrist Dr Okoko was carrying out duties in contravention of restrictions on his practising certificate. The disclosure was made to Mr Singh in the meeting room".

In her evidence before me, she gave no information about this disclosure. Dr Singh denies it was ever made and, for reasons stated above, I prefer his evidence especially since the Claimant gives no detail as to precisely what was said and the date on which it was said.

(vii) Since the Claimant's witness statement in this hearing says that this disclosure was not made to Dr Singh but to Derbyshire NHS Trust ("the Trust"), I find her evidence to be so confused and inconsistent that I conclude no disclosure was made to either Dr Singh or the Trust. Further, I bear in mind that the Claimant failed to adduce any detailed evidence of the alleged verbal disclosure she made to Ms K Allen of the Trust and Ms Allen did not attend as a witness.

(viii) In relation to her second alleged disclosure, which at the previous preliminary hearing she said was sent by email "in or around October 2020" to Richard Day of the Trust, the Claimant produced no evidence of this. There was no email in the bundle, no reply from Mr Day and I do not accept that this disclosure was made. Moreover, she said in evidence that the subject matter of the disclosure was the restraint of a former patient and his sedation without consent which, as with the alleged disclosure about Dr Okoko practising in breach of GMC restrictions, would have prompted some prompt action from the relevant authorities. The fact that there was no such action in either case confirms the conclusion that no such disclosures were made.

(ix) Under the terms of her contract of employment, the Claimant was required to work a minimum of 40 hours per week under clause 9 (page 66) and clause 11 provides that she may be required to work additional hours "at your normal rate of pay". It is not disputed that the Claimant worked additional hours including from time to time completing the admissions process for patients during the night. It was agreed with Mrs Martin that, although some additional hours fell within her salary, if excessive hours were declared to Mrs Martin and authorised by her, the Claimant could either be given time off in lieu or, again subject to approval by Mrs Martin, an overtime payment. In this regard the Claimant was to complete an overtime sheet to be countersigned by Mrs Martin and payment would be authorised. The Claimant did this on one occasion (page 124) and I do not find that, as she suggests, she filled in a number of such forms and handed them in to the receptionist. Consequently, the Respondent was never given a detailed record of the hours the Claimant allegedly worked therefore, nor did she act in accordance with the agreement with Mrs Martin as regards payment or time off in lieu. The only time that on call hours were raised by the Claimant with Mrs Martin is recorded at page 128 and I do not accept that this shows the Claimant complained about health and safety as a result of working excessive hours. The Claimant produced a time sheet for the whole period of her employment (pages 328-9) but did not submit claims for overtime other than the one at page 124. This further corroborates the Respondent's account that no other claims were made.

(x) I do not find that the Claimant ever asserted a statutory right in relation to excessive hours under the Working Time Regulations 1998. There is no evidence that she ever did this other than asking to be paid for on call hours worked in a supervision meeting with Mrs Martin on 28 August 2020 (page 128). I find that the Claimant did not pursue this request nor did she ever ask Mrs Martin to counter-sign an overtime payment request after the first one she submitted (page 124). Indeed, Mrs Martin offered to look at payment for additional hours worked (page 521) but it seems the Claimant did not follow this up at the time.

(xi) There was no agreement between the Claimant and any one at the Respondent that she would be paid an additional 223 hours in overtime

payments and the failure to pay this payment was not an unlawful deduction from wages nor did the Claimant assert a statutory right in relation to the alleged non-payment.

(xii) I find that the principal reason for the Claimant's dismissal was her poor performance illustrated by her poor leadership skills and her treatment of her colleagues as et out by the Respondent in the letter terminating her appointment (page 186).

Submissions

16. The parties made submissions. The Claimant made oral submissions and Miss Hatch written submissions which she briefly expanded on. I do not repeat those submissions here but confirm I considered them in detail in reaching my conclusions.

The law

17. Section 103A Employment Rights Act 1996 ("ERA") provides:

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.

Section 43B ERA provides:

(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.

(2)For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3)A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4)A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5)In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

Section 100(1)(c) ERA provides:

(1) 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—

(c)being an employee at a place where—

(i)there was no such (health and safety) representative or safety committee, or

(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d)in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e)in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2)For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the

circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3)Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

Section 104 ERA provides:

(1)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—

(a)brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b)alleged that the employer had infringed a right of his which is a relevant statutory right.

(2)It is immaterial for the purposes of subsection (1)—

(a)whether or not the employee has the right, or

(b)whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3)It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4)The following are relevant statutory rights for the purposes of this section—

(a)any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an ***[****employment tribunal****]****,*

(b)the right conferred by section 86 of this Act, . . .

(c)the rights conferred by sections 68, 86, ***[****145A, 145B,****]*** *146, 168,* ***[****168A,****]*** *169 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deductions from pay, union activities and time off) . . .*

(d)the rights conferred by the Working Time Regulations 1998, ***.....***

Section 101A ERA provides:

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—

(a)refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,

(b)refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,

(c)failed to sign a workforce agreement for the purposes of those Regulations, or to enter into, or agree to vary or extend, any other agreement with his employer which is provided for in those Regulations, or

(d)being—

(i)a representative of members of the workforce for the purposes of Schedule 1 to those Regulations, or

(ii)a candidate in an election in which any person elected will, on being elected, be such a representative,

performed (or proposed to perform) any functions or activities as such a representative or candidate.

Conclusions

18. The Claimant's main argument in this case is basically that she performed her duties to a very high standard, was the subject of untrue and at times malicious comments made by her colleagues about her attitude towards them, and therefore, the reason for her dismissal could not have been because of her poor performance but must have been because she blew the whistle, complained about health and safety or asserted a statutory right. These matters are particularly relevant since under section 108 of the Employment Rights Act 1996 the Claimant does not have sufficient continuous service to bring a complaint of "ordinary" unfair dismissal.

19. Dealing firstly with the protected disclosures, I have made findings of fact that they were never actually made. The Claimant's explanation of her disclosures at the previous preliminary hearing was different to those made before me. Did she make the first alleged disclosure concerning Dr Okoko, to Dr Singh or to the Trust? Dr Singh categorically denied the Claimant's assertion that she blew the whistle to him. There is no evidence that she blew the whistle to anyone at the Trust in relation to this issue. In relation to the disclosure to Mr Day which

concerned the forced sedation of a patient, she says this was made by email but that email was not produced. Whilst the Claimant will no doubt assert that her evidence should be believed, especially in relation to the first alleged disclosure, her evidence is inconsistent between the preliminary hearing and this hearing. But, more importantly, when dealing with patients with mental health issues, safeguarding is a priority (as with most other patients). Had these disclosures been made to the Trust medical alarm bells would have rung and further enquiries would have been made immediately. We do not know whether Mr Day was contacted and asked to give evidence or provide documents but there is, unfortunately for the Claimant, absolutely no reliable evidence before me that she ever made a protected disclosure. The Claimant also now says that she blew the whistle about Dr Okoko to Ms K Allen at the Trust and a witness order was made to compel her attendance at this hearing. She did not attend and there is no evidence that the Claimant contacted her to try to obtain a witness statement in advance of the hearing. Accordingly, since I do not conclude that the Claimant ever made protected disclosures, they could not have been a reason for her dismissal. Whilst I bear in mind the requirements to be met as set out in **Williams v Michelle Brown UKEAT/0044/19**, since the first is that there must be a disclosure of information and I find there was none, the claim of suffering the detriment of dismissal after making a protected disclosure falls at the first hurdle.

20. In order to succeed in a claim for automatic unfair dismissal for health and safety reason under section 100 of the Employment Rights Act 1996, the Claimant must establish that the reason or principal reason for the dismissal fell within the provisions of section 100(1)(a)-(e). It is clear that the Claimant discussed her on-call duties with Mrs Martin in her supervision meeting on 28 August 2020 (page 128). She was told that should she feel tired the morning after being called upon the night before, she should rest at home before driving to work or work at home. Whilst the Claimant does not specify the provision in s. 100 ERA upon which she relies, I assume it to be s.100(1)(c). The burden of proof rests with the Claimant to show her dismissal was for this reason. Her claim in this regard must fail. She seems to have raised the issue once only. Mrs Martin proposed ways in which any danger whilst driving could be eliminated and even changed the on-call rota (which turned out to be impracticable). The Claimant was not required to be on call every night and, even though she could rest and come in to work later or even work from home, she continued to work as before. This suggests she had no real concerns and, having continued to work as before without raising the issue again, the Respondent clearly did not have the issue in mind when the Claimant's employment was terminated.

21. Regarding the claim for automatic unfair dismissal for asserting the statutory right under the Working Time Regulations 1998, there is simply no evidence that the Claimant ever acted in any way which amounted to such an assertion. Further, the documentary evidence produced does not support her claim that she regularly worked 50 or 60 hours per week (page 229). S.104(3) ERA provides that the employee must at least make it reasonably clear that what right has been infringed **(Armstrong v Walter Scott Motors (London) Ltd EAT 766/02).** There is no evidence before me that the Claimant, even by her own account, connected the hours she said she was working with the 48 hour week under the Working Time

Regulations. It is for this reason that the Respondent relies on the contract of employment in relation to working such additional hours necessary for the business. It is clear to me that the Claimant has not asserted a statutory right and cannot, therefore, succeed in her argument that this was a reason for her dismissal.

22. In relation to the claim for unpaid wages or an unlawful deduction from wages, this claim cannot succeed. The Claimant submitted one time sheet claiming an overtime payment. This was considered and approved by Mrs Martin. This is entirely in accordance with Mrs Martin's evidence and establishes that any sums reasonably due to the Claimant would be paid. The Claimant's oral evidence in relation to overtime was unconvincing. She did not mention in her witness statement that she had handed in many overtime sheets to the receptionist but heard nothing further. To then suggest this had happened when giving her evidence and yet had not raised a single query as to why none of the additional hours had been paid is not credible. I conclude, therefore, that she made no such claim for payment, the Respondent did not agree to pay her for all additional hours worked and this claim is dismissed.

23.For the above reasons, all of the claims are dismissed.

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Employment Judge M Butler

Date: 10 March 2023

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