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# EMPLOYMENT TRIBUNALS

**Claimant:** Miss M Mulwanda  
**Respondent:** Shiloz Services Limited  
**Heard at:** East London Hearing Centre  
**On:** 21 – 22 and 28 – 29 November 2018  
and (in chambers) 21 January 2019  
**Before:** Employment Judge J Goodrich  
**Members:** Mr T Burrows  
Mrs GA Everett

## Representation

**Claimant:** Mr A Rozycki (Counsel)  
**Respondent:** Mr R Claire (Counsel)

# JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The Claimant was unfairly dismissed.
2. The Claimant has been subjected to detriment on the ground of making a protected disclosure, to the extent further set out below.
3. The Claimant's claim for wrongful dismissal (notice pay) succeeds.

Accordingly, unless the parties agree remedy themselves, a remedy hearing will take place on Monday 11 March 2019, at East London Tribunal Centre, 2<sup>nd</sup> floor Import House, 2 Clove Crescent, London E14 2BE, commencing at 10.00 a.m. and listed for one day.

# REASONS

## *The Claim and the Issues*

1 The background to this hearing is as follows.

2 The Claimant presented her Employment Tribunal claim on 24 February 2018. Before doing so she had obtained an early conciliation certificate from Acas covering the period from 5 February to 12 February 2018.

3 In box 8.1 of her claim form the Claimant ticked that she was bringing a claim for unfair dismissal.

4 Attached to the Claimant's claim form was a copy of a letter the Claimant had written to the Respondent, dated 19 January 2018, headed "re: sexual harassment complaint". In the letter she set out her account of relevant events leading to what she described as her "coerced resignation". Included in the letter were complaints of having been sexually harassed by one of the residents of the home where she worked; and criticisms of how her complaints were dealt with by Sandra Akpan of the Respondent.

5 The Respondent entered a response, denying the claims and giving their account of events in their grounds of resistance. It was clear, from reading the ET3 response, that their main points of resistance to the claim consisted of extensive factual disputes as to what has taken place.

6 The Claimant was directed by the Employment Tribunal (Employment Judge Gilbert) to give further details of the disclosures she said that she had made that qualified for protection; and the detriment or dismissal she alleged had been made.

7 The Claimant duly gave further particulars, as required.

8 On 11 May 2018 Employment Judge Brook conducted a Preliminary Hearing in the case.

9 Amongst the matters referred to by Employment Judge Brook was an issue regarding outstanding holiday pay. He recorded that the Claimant had commenced County Court proceedings to recover outstanding holiday pay in the sum of £1106.60 in the mistaken belief that this claim could not be brought in the Employment Tribunal. Judge Brook recorded that Mr and Mrs Akpan agreed that this sum was indeed due to the Claimant and that they would pay this sum plus the Claimant's £70 issue fee within 7 days and that upon receipt of this money the Claimant agreed that she would notify the County Court withdrawing that claim.

10 Employment Judge Brook also identified the issues in the case and made a number of Case Management Orders.

11 Between the Preliminary Hearing and this hearing there was extensive correspondence between the parties, or their representatives, and the Tribunal, about case management issues. Two Judges reminded the parties of their duty to assist the Tribunal to further the overriding objective and in particular to cooperate generally with each other and with the Tribunal.

12 At the start of the hearing the Judge asked the parties' representatives whether the issues for the Tribunal to determine were as set out by Employment Judge Brook. They confirmed that these remained the issues in the case.

13 Attached, therefore, to this judgment, as an appendix, are the issues identified at the Preliminary Hearing.

14 Various documents were added to the bundles of documents without objection from the other side.

15 Although the case had been listed for five days, only four were available for the Tribunal and the judgment was reserved.

### ***The Relevant Law***

#### *Whether a disclosure is a protected disclosure*

16 Section 43A Employment Rights Act 1996 ("ERA") provides:

"In this act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B which is made by a worker in accordance with any of section 43C to 43H.

17 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,
- (d) That the health and safety of any individual has been, is being or is likely to be endangered"

18 It can be seen that there are a number of elements within section 43B(1) that are

required of the worker in order that the disclosure qualifies for protection. There is the requirement for the disclosure of information. The information needs to be such which, in the reasonable belief of the worker making the disclosure is in the public interest and tending to show one or more of the facts set out in sections 43B(a) to (f).

19 There has been controversy and many appellate decisions on what amounts to disclosure of information.

20 In the case of *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38 (EAT) it was held that in order to fall within the statutory definition of protected disclosure, there must be a disclosure of information. There is a distinction between “information” and an “allegation” for the purposes of the act.

21 In the case of *Kilraine v London Borough of Wandsworth* [2016] IRLR 422 (EAT), however, the (then) President of the Employment Appeal Tribunal warned against Tribunals asking whether an alleged protected disclosure was information or an allegation when reality and experience suggested that very often, “information” and “allegation” were intertwined. He went on to state: “the question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point”.

22 *Kilraine v London Borough of Wandsworth* was subsequently considered by the Court of Appeal which agreed with the point made above by Langstaff J in the Employment Appeal Tribunal. The Court of Appeal gave guidance as follows:

“In order for a statement or a disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)”.

23 Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43(b)(1) ERA, namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters.

24 The issue of what amounts to a reasonable belief and the public interest have also been the subject of consideration.

25 In the case of *Babula v Waltham Forest College* [2007] IRLR 246 CA it was held that in order to bring a claim in respect of the protected disclosure, it is sufficient that the employee reasonably believes that the matters he relies upon amount to a criminal act, or found a legal obligation, even if it turns out that this belief is wrong.

26 In the case of *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837 (CA) it was held that the Tribunal has to ask (a) whether the worker believed, at the time he was making it, that the disclosure was in the public interest, and (b) whether, if so that belief was reasonable. Element (b) requires the Tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest. The necessary belief is simply

that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. A disclosure does not cease to qualify simply because the worker seeks to justify it after the events by reference to specific matters which the Tribunal finds were not in his/her head at the time he/she made it. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his/her predominant motive in making it.

27 Further guidance was given that the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people serving that interest. That is the ordinary meaning of “in the public interest”. Relevant factors in considering whether it is reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker could include the numbers in the group whose interests the disclosure served; that nature of the interest affected and the extent to which they are affected by the wrongdoing disclose; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer.

28 In the case of *Kraus v Penna Plc [2004] IRLR 260 EAT* it was held that the word “likely” in section 43B(1)(b) requires more than a possibility or a risk that the employer might fail to comply with the relevant legal obligation. The information disclosed should, in the reasonable belief that the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant obligation. The decision in this case might be at odds with the decision of the House of Lords in the case of *SCA Packaging v Boyle [2009] ICR 1056* when, considering the meaning of the word “likely” under the relevant disability discrimination legislation it was taken to mean “could well happen” rather than “more likely than not”.

29 A disclosure made to the worker’s employer is one which qualifies for protection by virtue of section 43C ERA.

30 Section 47B ERA gives protection to a worker against detriments. It provides:

“(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.”

31 Section 47B ERA requires, therefore, a causal link between making a protected disclosure and suffering detriment. This issue was considered by the Court of Appeal in the case of *Fecitt & Others v NHS Manchester [2012] IRLR 64CA*. There it was held that with regard to the causal link between making a protected disclosure and suffering detriment, section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer’s treatment of the whistleblower.

32 In the case of *Fecitt v NHS Manchester (2012) IRLR 64*, comments were made on the anomaly created between section 47B requiring only a material influence of the employer’s treatment of the whistleblower, whereas in unfair dismissal the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. Section 48(2) ERA provides that on a complaint under section 47B ERA it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

33 Section 98(1)(c) ERA sets out the requirements for an employee to establish a constructive dismissal. An employee is dismissed if he/she terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it without notice by reason of the employer's conduct.

34 In order to satisfy the requirements of section 95(1)(c) ERA it is necessary for the employee to show that there has been a breach of contract, whether an express or implied term of contract; whether that breach of contract is sufficiently serious, or fundamental, so as to justify the resignation; that the employee left at least in part because of the fundamental breach and not for some unrelated reason; and that the employee has not affirmed the contract or waived the breach. A breach of the implied term of mutual trust and confidence in an employment contract amounts to a fundamental breach of contract.

35 Where (as here) an employee does not have the necessary qualifying service to bring an "ordinary" unfair dismissal claim they will need to show one of the prohibited grounds as being the reason or principal reason for the dismissal. In this case, section 103A ERA was relied on, which 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."

### ***The Evidence***

36 On behalf of the Claimant the Tribunal heard evidence from the Claimant herself; and from Mr Edward Ogbemor, the Claimant's husband.

37 On behalf of the Respondent the Tribunal heard evidence from:

37.1 Mrs Sandra Akpan, owner and director of the Respondent.

37.2 Mr Samuel Akpan, husband of Mrs Akpan and initially a director of the Respondent.

37.3 Mrs Oghenevogaga Edagobo, support worker at the Respondent.

37.4 Mrs Rosalinda Mba, support worker for the Respondent at the relevant times (now senior support worker).

37.5 Mrs Caroline Oguntoye, support worker for the Respondent.

### ***Findings of Fact***

38 We set out below the findings of fact we consider relevant and necessary to determine the issues we are required to determine. We do not seek to set out each detail provided to us, nor to make findings on all the details on which the parties were not agreed. We have however considered all the evidence provided to us and we have borne it all in mind.

39 The Claimant, Ms Mubanda Mulwander, was employed by the Respondent from 22 May 2017 until 12 January 2018.

40 Our findings of fact concern not only the breakdown of the working relationship between the Claimant and the Respondent; but, also, the breakdown of close relationships between the Claimants and Respondents families. These developed initially through the Pentecostal church for which Mr and Mrs Akpan are pastors; and where the Claimant and her husband were congregational members from about 2011.

41 Since the Claimant and her husband became members of the church where Mr and Mrs Akpan are pastors the two families have had close relationships. Mrs Akpan was present at the birth of the Claimant's son and is godmother to him. Both Mr and Mrs Akpan were present at the Claimant's wedding. The Claimant was maid of honour at the wedding of Mr and Mrs Akpan's daughter. The Claimant described Mrs Akpan as being "like a mother to her". The Claimant is in her 20s and Mrs Akpan reached the age of 50 during the course of this hearing.

42 Mrs Akpan has worked in the care industry for many years and is a qualified social worker.

43 The Respondent's business is to provide a supported living service for people with learning disabilities. It is a new business. In 2017 the Respondent's had their first clients moving into the home with the Respondent's first clients moving into the home provided by the Respondent in 2017.

44 In her evidence Mrs Akpan described the Respondent, Shiloz Services Limited as being to provide a service to adults with learning disabilities who could exhibit challenging behaviour and have mental health and emotional issues. Referrals would be from social services, to date either Redbridge and Hackney local authorities. The local authority would provide a support plan for the service user being referred to the Respondent and the Respondent's support workers would provide day-to-day support for those service users.

45 Initially, during the Claimant's employment, there was one customer of the business only. Subsequently, another service user, described as "AA" was resident between 26 September and 29 November 2017.

46 Both parties accept that AA could exhibit challenging behaviour and had anger management issues.

47 The Claimant was one of a number of support workers, whose job it was to provide day-to-day support to the service users. This might include matters such as helping the residents with personal care, interacting with outside agencies, going outside the home to help with issues such as shopping and generally supporting their needs.

48 The workforce consisted of the Claimant and a number of support workers. They worked on different shifts. One shift was between 7.00am to 5.00pm. Another shift was between 11.00am to 9.00pm. Another shift was a night shift between 9.00pm and 7.00am.

49 The Claimant usually worked either of the earlier shifts from 7.00am to 5.00pm or 11.00am to 9.00pm. Usually she worked with Mrs Mba, another support worker, who also usually worked a day time shift.

50 The above findings are by way of background and not in dispute between the parties.

51 There is a dispute between the parties as to whether it was the Claimant who initiated asking to work for the Respondent; or whether it was Mrs Akpan who approached the Claimant to do so. It is unnecessary for us to make a finding of fact on this issue, which is one of many disputes between the parties as to the relevant details.

52 There are extensive disputes between the parties as to the facts in the list of issues recorded by Employment Judge Brook. Our assessment of the credibility of the witnesses, particularly the principal witnesses (the Claimant and Mr and Mrs Akpan) was as follows.

52.1 The Claimant appeared to be most straightforward of the witnesses and the most focused on answering the questions she was asked. That is not to say that she was not mistaken at times about her evidence or that all of her evidence was accurate.

52.2 The least convincing of the witnesses was Mr Samuel Akpan. Both he and Mrs Akpan showed reluctance to answer the questions they were asked in cross-examination. In the case of Mr Akpan this was particularly apparent. Despite numerous reminders from the Judge to focus on and answer the questions asked of him Mr Akpan failed to do so to the extent that his evidence appeared on various occasions to be evasive. On one important issue Mr Akpan gave evidence that was flatly contradictory not only to the relevant part of his evidence but also that of Mrs Akpan. When cross-examined both he and Mrs Akpan downplayed the potential effects of the resident AA stopping becoming a resident when there was only one other resident. They referred to the sum they were receiving for his care being small (£800 a week); and made play of the fees paid for the other resident being sufficient to employ all the staff concerned. Yet, when asked by the Judge why they did not pay the Claimant's holiday pay until after the Preliminary Hearing before Employment Judge Brook, which took place over three months after the Claimant's employment terminated with the Respondent; Mr Akpan stated, after some prevarication, that it was because of financial constraints. The two pieces of evidence were flatly contradictory and both cannot be true. The both roundly denied any adverse financial consequences if the resident AA was to leave, yet Mr Akpan ascribed financial constraints as the reason for not paying the Claimant the sums they knew she was owed.

*Relevant events before 24/25 October 2017*

53 Initially, the Claimant and Mrs Akpan's working relationship was good. As referred to above they and their families had developed strong friendships.



54 The Claimant has two young children and wanted the shifts that she worked to be from Monday to Fridays and not to work at weekends. She explained that she did not want to work weekends in order to spend time with her family and to attend church.

55 When cross-examined, Mrs Akpan accepted that the Claimant made it clear when starting her employment with the Respondent that she did not want to work Saturdays or Sundays.

56 Mrs Akpan also accepted in cross-examination that up to 25 October 2017 the Claimant did not in fact work any Saturdays or Sundays.

57 The support workers had rotas for their shifts and completed time sheets. There was agreement between the parties that Mrs Akpan approved and signed off the rotas. The parties disputed the extent of the autonomy the workforce had in compiling the rotas and the extent of involvement of Mrs Akpan (or at least her involvement after the events of 24 and 25 October 2017 to which we refer below).

58 The Respondent's home has availability for up to five residents. At the start of the Claimant's employment there was one resident. On 29 September 2017 another resident, AA, joined the home as a service user and remained there between 26 September 2018 and 29 September 2018.

59 The report provided for the Respondent on AA showed him as having anger management issues. Both the Claimant and the Respondent's witnesses referred to occasional angry outbursts and actions on the part of this resident. The jobs of the support workers were to provide support for the residents by such matters as helping them with their personal care, their interactions with agencies and the outside world generally, shopping and obtaining food and generally to provide help and support.

60 The Claimant gave AA her personal mobile telephone number and also her details on whatsapp, snapchat and facebook.

61 The Claimant was not unique in AA having at least the personal telephone numbers of other support staff. He had the personal mobile telephone number of Mrs Edagobo, another of the support workers. Her explanation for this was that she had telephoned him on a personal mobile telephone to check his whereabouts when he had not returned back to the home after a shopping trip to Tesco Express when it was less than five minutes walk from the house and he had not returned for half an hour. The Tribunal was not clear why she had not used the home's landline for this purpose. On one occasion AA telephoned Mrs Edagobo when she was off duty and she told him to delete her phone number from his telephone, which he did.

62 In dispute is whether the Claimant gave AA these personal details because she was told to by Mrs Akpan; or whether she gave them willingly without any pressure from Mrs Akpan. On the balance of probabilities, we find that the Claimant felt obliged to do what was necessary to ensure that AA was happy at the home, but that Mrs Akpan was not putting pressure on her to do so. The Tribunal considered more likely that the Claimant was interpreting a perfectly understandable desire on Mrs Akpan behalf for the home to be successful and the residents to be happy as being to accede to, wherever

possible, AA's wishes.

63 Giving AA the details of her mobile telephone proved to be burdensome to the Claimant as AA telephoned her when she was off duty and had a long conversation at a weekend. She stopped answering his telephone calls on her mobile telephone number.

64 In dispute is whether, prior to what happened on 24/25 October AA started to sexually harass the Claimant. The kinds of sexual harassment of which the Claimant complains are actions such as frequent out of work hours telephone calls, unwanted physical contact, sexual comments about her appearance, clothing and body, descriptions of his sexual preferences and experiences, a comment to the effect that if she was not married he would have sex with her and being called by him for assistance on two occasions when he was naked. The Tribunal finds that he did do so including because:

- 64.1 When cross-examined the Claimant's explanation for AA's actions was that, after she stopped answering his telephone calls, he asked her why she did not pick up his telephone call and that after this it progressed to other things. This was plausible.
- 64.2 One of the Claimant's complaints of sexual harassment was that on two occasions she was asked by AA for assistance only to find him naked and not requiring any assistance. This has some similarity with parts of the evidence of others of the support workers. Mrs Mba stated that on one occasion AA came out of the bathroom naked and that she told him to go to his room and get dressed before she could assist with what he wanted. Mrs Edagobo in her witness statement also referred to an occasion when AA used the downstairs shower and walked out of the bathroom naked; and that she had to tell him to go back to his room to cover himself. Many women might find such behaviour offensive and harassing although, apparently, Mrs Mba and Mrs Edagobo did not. It appears to us plausible that AA was sexually attracted to the Claimant, who as a young woman he found attractive, and he behaved differently towards her than other female staff.
- 64.3 During the course of the cross-examination Mrs Mba stated that in the course of a discussion she had with the Claimant about AA the Claimant said that AA fancied her, to which she (Mrs Edagobo) replied "grow a backbone". Mrs Edagobo explained that as a support worker they knew the environment they were working with and he had made the same comment to her. This seemed indicative both on the possibility of that the Claimant was being sexually harassed and also an expectation that support workers should get on with their jobs in the face of most behaviours of residents.

65 The Claimant did not record the incidents of sexual harassment she says AA made towards her. Her explanation for this was that she and Mrs Akpan had a relationship which went beyond the workplace, that she had told her that she needed someone she could trust and that she needed to be careful about what she wrote in the records. Although we have some doubts about this evidence, on the balance of probabilities we find that the Claimant felt some constraints about what she wrote in the

daily record book about what had taken place during that day. We accept that she had a different relationship with Mrs Akpan than the other support workers in view of their close friendship over a number of years, that of their spouses and their attendance at church and their relationships with each other and their children. It appeared plausible to the Tribunal that, with the Claimant regarding Mrs Akpan as a mother figure, that she would have wanted to please her and not do things that might cause difficulties to the home.

66 There are other disputes of less significance between the parties as to other matters such as what training the Claimant went on. The Tribunal does not consider that much of use could be made of this dispute, particularly because the Respondent's representative was questioning the Claimant (mistakenly) cross-examining her on the wrong date for the training course concerned.

67 On the balance of probabilities, therefore, the Claimant did not speak to Mrs Akpan about the sexual harassment at the time, both because she felt that she could deal with the issues herself, and because this was what she felt was expected of her. This is consistent with Mrs Edagobo's evidence that the support workers knew the score and should have "a strong backbone".

#### ***Events of 24/25 October***

68 There was some confusion between the parties as to whether the events in question took place on 24 and 25 October; or 25 and 26 October 2017. It was agreed between the parties that the correct dates were in fact 25 and 26 October 2017.

69 On 25 October 2017 the Claimant was working a day shift, from 7.00am to 5.00pm.

70 After returning home following her shift the Claimant had a conversation with her husband, Mr Ogbemor, about the behaviour of the resident AA towards her that evening. In particular, she complained that AA had told her that if he did not get a girl to sleep with him, he will have to rape someone. The context for this comment was that AA was expressing frustration about dates he had had that had not gone well.

71 Mr Ogbemor was concerned about his wife's safety. He telephoned Mrs Akpan. The parties agreed that:

- 71.1 He informed Mrs Akpan of AA's comment that if he did not get a girl to sleep with him he will have to rape someone and said that his wife did not feel safe.
- 71.2 He also notified her that AA had been making telephone calls to her on her personal telephone number.
- 71.3 Mrs Akpan was displeased that it was Mr Ogbemor, rather than the Claimant herself, who had contacted her. She told him that she was listening to him only out of courtesy.
- 71.4 When cross-examined Mrs Akpan also stated that Mr Ogbemor

expressed concern about the safety of all members of staff.

72 In dispute is whether Mrs Akpan also told Mr Ogbemor (or the Claimant the following day) that it was a breach of confidentiality for the Claimant's husband to be telephoning her about AA. The Tribunal finds that, contrary to Mrs Akpan's evidence, she did not say this to either of them at the time. As explored later in these findings of fact, the Claimant was only challenged about this issue of confidentiality after she had given in her resignation, over two months later.

73 Later that evening, following her conversation with Mr Ogbemor, Mrs Akpan spoke with AA. She asked him if he had the Claimant's personal phone number. He told her that he had and that he had called her on some occasions. Mrs Akpan asked her to delete the phone number in her presence, which she did.

74 In dispute between the parties is whether Mrs Akpan also questioned AA about whether he had made the comment to the Claimant about having to rape someone if he did not get a girl to sleep with him. The Tribunal finds that she did not ask him about this and was reluctant to do so for fear of alienating him as one of only two residents in the home including because:

- 74.1 Mrs Akpan produced a reasonably detailed typed note of her record of her conversations with Mr Ogbemor, AA and her conversation with the Claimant the following morning. Although she referred in the file note to her conversation with AA about having the Claimant's mobile telephone number, there is no reference in the notes to the comment about rape. The Tribunal regards this as an important omission, for two reasons. Firstly, it was the main concern of Mr Ogbemor. It is thus highly surprising that, if she did discuss the issue with AA, she made no reference to it in the note. Secondly, it is consistent with the Claimant's case that Mrs Akpan did not want to record matters that might cause problems for her business.
- 74.2 According to the evidence of Mrs Edagobo and in a record she said she made that evening AA had told her that he was getting frustrated as he needed a woman or else he would rape a girl. When Mrs Akpan was questioned as to why she did not discuss with AA Mrs Edagobos' report of what the Claimant had said to her, her response was that it had been dealt with appropriately. This appeared unconvincing – two of her female members of staff had reported a remark which was unacceptable. Even if she believed that it was an idle threat, she appeared to be underplaying the issue, in the context of her role as manager of the home.
- 74.3 The fact that Mrs Akpan did not challenge AA about the remark he had made to Mrs Edagobo also highlights another area of concern of the Tribunal. Mrs Edagobo gave evidence that she had written up AA's comment about needing a woman or else he would rape a girl in the daily record during her night shift on 24/25 October 2017. Mrs Akpan not discussing it with AA following her conversation with Mr Ogbemor later on 25 October suggests, as was put to Mrs Edagobo, that the

record was only written later, after the Claimant issued these proceedings.

74.4 More generally the Tribunal had concerns about the reliability of parts of Mrs Akpan's evidence.

74.5 Another concern of the Tribunal about the reliability of evidence of the Respondent's witnesses is that in the detailed notes of a grievance meeting conducted by Mr Akpan after the Claimant's employment with the Respondent had terminated, Mrs Edagobo made no mention of AA's comment about rape. This was surprising to the Tribunal.

75 In dispute is also whether AA complained to Mrs Edagobo and Mrs Oguntoye that AA had complained to them the following day about Sandra (Akpan) speaking with AA about Mubanga (the Claimant) saying that AA had said to her about raping a woman. The Tribunal finds that AA did not make such remark because Mrs Akpan had not raised the issue with him. We find that he did express upset about being told to delete her mobile telephone number, but not about the other issue. We found this aspect of their evidence unconvincing and were mindful that, as current employees of the Respondent and with Mr and Mrs Akpan present at the Tribunal hearing, they may have felt under pressure to "tow the party line".

76 The following morning the Claimant was at work. Mrs Akpan had a conversation with her about the telephone call made by Mr Ogbemor the previous evening. The contents of that discussion are disputed. The Claimant's evidence was that Mrs Akpan asked her what made her feel unsafe; that she repeated what her husband had reported about AA's remark about having to rape someone if he did not get to sleep with a woman; and that she told her about other previous incidents of sexual harassment (referred to above in these findings of fact). Mrs Akpan's evidence, in contrast, was that the Claimant denied that there was any problem in her working environment and was happy and satisfied with her work; that she felt safe; that her husband had no right to ring her to discuss AA; and that he had done the same thing at a previous job and she had had to leave her job. Also in dispute is whether the Claimant expressed concerns not only about her safety but the safety of all female staff and members of the public. On the balance of probabilities, the Tribunal finds that:

76.1 The Claimant did express some form of apology about her husband telephoning on her behalf. It appears to the Tribunal to be plausible that, in view of her close relationship with Mrs Akpan up to that point, she left it to her husband to report the matter; and, if challenged by Mrs Akpan about this, gave an apology for not having reported the matter herself.

76.2 We find that, other than in this respect, the discussion was as described by the Claimant.

77 The Tribunal so finds because we found the Claimant's evidence more convincing on this issue. It is more consistent with the Claimant's case that her relationship with Mrs Akpan soured after the events on 25 and 26 October, as we explore further below. For example, as referred to below, she and her husband stopped attending the church where

Mr and Mrs Akpan were pastors and, in January 2018, she left the Respondent's employment without another job to go to.

78 The Claimant and her husband were committed members of the church for which Mr and Mrs Akpan were pastors. They did not attend church every week and there were times over the years when they had a few weeks of non-attendance. We accept Mr and Mrs Akpan's evidence to that extent. Both parties agree, however, that the Claimant and her husband were regularly attending church on Sundays in the months leading up to the incidents of 25 and 26 October 2017 (other than the Sunday before 25/26 October); and they stopped attending church after that. The most plausible reason for this, as was the Claimant and her husband's evidence, was that they were upset about Mrs Akpan's handling of the telephone call of 25 October with Mr Ogbemor; and the Claimant's meeting with Mrs Akpan on 26 October.

79 Mrs Akpan underplayed, therefore, the complaints or concerns expressed on 25 October 2017 by the Claimant.

**Allegation- On 25 October 2017 the Claimant orally lodged a grievance with Mrs Akpan in respect of AA's unwanted sexual conduct and what she regarded as an unsafe working situation, which grievance was not dealt with expeditiously or at all until after the termination of the Claimant's employment. The Claimant continued to have contact with AA in the course of her employment**

***Allegation – in the period 25 October 2017 – 1 December 2017, the latter date being that on which AA voluntarily left the Respondent's care to return home, the Respondent took no steps to prevent further harassment of the Claimant by AA or to assess the working situation for safety***

80 The Tribunal has set out (at paragraph 75 above) the contents of the Claimant's verbal complaints to Mrs Akpan about AA's behaviour.

81 AA continued to be a resident at the Respondent's home till on or about 1 December 2017. He was less present at the home during November 2017 as he started to reconcile with his family and eventually to return to live with them. The Claimant had some contact with him during the following weeks, although less as his presence at the home diminished.

82 The Claimant complains that Mrs Akpan took no steps to prevent further harassment of her by AA or to assess the working situation for safety. The Tribunal finds that Mrs Akpan took no such further steps, nor assessed the working situation for safety. Mr Akpan's evidence (which we have found to be incorrect) was that the Claimant told her that she did feel safe. She also, as referred to above, did not take AA's threat seriously. Her attitude to AA's comment, or threat, about wishing to rape a woman, was that the issue had been dealt with by the reply of the worker concerned; and she took no action about the Claimant's husband's telephone call, other than to discuss it with the Claimant the next day; and did not act in response to the Claimant's verbal complaints the following day about AA until the Claimant sent a written grievance (which we consider later in these findings of fact).

***Allegation – in the period 15 October – 7 January 2018, the Respondent obliged the Claimant to work Sundays despite the Claimant previously having opted out of Sunday work for religious and family reasons***

83 Up to 25 October 2017, as referred to earlier above in our findings of fact, the Claimant did not work any weekend shift, so far as the Tribunal was made aware. Mrs Akpan was aware that she did not want to do so in order to attend church and because of her two young children. Between 25 October 2017 and her last day at work, in January 2018, the Claimant worked six weekend shifts, four on Saturdays and two on Sundays. Mrs Mba, who previously had regularly been working weekends, stopped working weekends.

84 In dispute between the parties is whether the Claimant was being obliged to work weekends by Mrs Akpan (as is her case); or whether she did so by agreement between her and her colleagues (although Mrs Akpan approved the rotas). The Tribunal finds that, although there were a number of reasons for the changes, one of these reasons was that Mrs Akpan was unwilling to continue to accede to the Claimant's desire not to work weekends, following the incidents on 25 and 26 October. The Tribunal so finds because:

- 84.1 We accept Mrs Mba's evidence to the extent that she had been working weekends and no longer wanted to do so.
- 84.2 There was no convincing evidence to the Tribunal that the Claimant was now willing to work weekends. Even if the Claimant was no longer committed to attending church on Sundays (which is contrary to her evidence that she and her husband attended another church from time to time), part of the Claimant's reasons for not wanting to work weekends were because of wanting to spend time with her young children (aged 2 and 5 at that time). Mrs Akpan was, therefore, giving preference to Mrs Mba's wish not to work weekends compared to the Claimant's evidence that the change was extremely disruptive for her family was convincing.
- 84.3 Mrs Mba's evidence that she was no longer willing to work any weekends was not particularly convincing. There was no reference to this in her reasonably detailed witness statement. We accept that she might have wanted to work less weekends, we are sceptical as to whether she wanted to stop doing so altogether.
- 84.4 The Tribunal finds that there was a combination of reasons for the Claimant being required to work at weekends after 26 October 2017. There was Mrs Mba's desire to work, at least, less weekends; Mrs Akpan's need to cover the shifts, and a souring of what had been Mrs Akpan's good relationship with the Claimant up to the point of her and her husband making complaints about AA's behaviour towards her.

***Allegation- during November and December 2017 Mr Akpan, in his capacity as Pastor to the church attended by the Claimant, apologised to the Claimant for any shortcomings that might have occurred and attempted to mollify the Claimant by inviting her to re-commence attendance at Church. The Claimant regarded this as***

***an improper attempt by Mr Akpan to unduly influence her in and about her stated concerns regarding AA***

85 Mr Akpan's evidence on this issue was more convincing than other aspects of his evidence.

86 Mr Akpan, in addition to position as a pastor, is a solicitor with his own solicitor's practice.

87 Mr Ogbebor was owed money by a company he had carried out work for. Mr Akpan helped him to recover the money.

88 Mr Akpan carried out the work without charge and Mr Ogbebor was grateful for this. He bought a bottle of champagne which his wife gave to Mrs Akpan on his behalf. The present was declined, which upset the Claimant and her husband. This was sometime later, around 12 January 2018, by which time relations between the two families had undoubtedly soured.

89 Mr Akpan explained that, as a pastor, he had a responsibility to communicate with regular members of church who stop attending church. The Tribunal accepts that this was a regular practice on his part, rather than the Claimant and her husband being singled out when they stopped attending church.

90 Mr Akpan sent text messages to Mr Ogbebor an example provided to us was a message in which he referred to not having seen Mr Ogbebor or his family in church that day; and stated, "are you still offended?". He referred to having sent several messages to him and his wife but not having received any response.

91 The Claimant and her husband clearly were upset as appears to have been recognised by Mr Akpan. The most likely explanation for their upset was, as was the Claimant and her husband's evidence, that they were upset at the response from Mrs Akpan to the Claimant and her husband's concerns expressed about AA.

92 The Claimant and her husband continuing not to attend church, Mr Akpan visited them at their home on or about 28 December 2017. In dispute between the parties is whether the apology made by Mr Akpan included a specific reference to Mr Ogbebor's telephone call to Mrs Akpan on 25 October 2017; or whether it was a more general request for forgiveness if anything he may have done had caused offence, coupled with a desire for them to return to attending church.

93 The Claimant felt some comfort from Mr Akpan's visit, although neither she nor her husband resumed attending the church where Mr and Mrs Akpan were pastors. As referred to below in this judgment she explained that Mr Akpan's visit and apology were a reason why she wrote a friendly resignation letter.

***Allegation – on 7 January 2018 the Claimant gave the Respondent four weeks notice in writing, her last day of employment to be Thursday 8 February 2018. The Claimant asserts that she gave notice because of the Respondent's conduct set out above.***



94 By email dated 7 January 2018 the Claimant gave notice, four weeks, as required, of her resignation from the Respondent's employment. Her email was a friendly one including the sentence:

"I have had an exciting time here and thank you for the opportunity given, while wishing the company all the best for the future."

95 Why did the Claimant write her resignation in such a friendly tone when she was subsequently to write a detailed grievance letter outlining many complaints, to which we were refer below?

96 The Claimant's explanation was that Mr Akpan had come to their home to apologise if he or Sandra (Akpan) had offended her and she felt no need to write a horrible resignation letter; that she wanted to be done with Shiloz and not to have anything more to do with them. This was convincing to the Claimant. She had already started detaching herself from Mr and Mrs Akpan by no longer attending church. The two families had been friends, there was reference in the text messages and Mr Akpan's email on 28 December 2017 to forgiveness and expressing sorrow if he had offended the Claimant and her husband. It is also convincing that what changed the Claimant's motivation was the letter written by Mrs Akpan in response to her resignation letter (referred to below).

***Allegation – by letter of 12 January 2018, the Respondent accepted the Claimant's resignation and went on to accuse the Claimant of breaching patient confidentiality. The Respondent stated that, but for her resignation, the Claimant's conduct warranted dismissal***

97 Mrs Akpan replied to the Claimant's email, by email dated 12 January 2018. Included in her response was the following statement:

"The directors have reviewed your contract of employment and based on your conduct in relation to an adult within the service, are satisfied that you had breached client confidential information which entitles the company to terminate your employment without notice. However, since you have resigned, the company has accepted your resignation."

98 The Claimant was highly shocked and upset at the contents of the email. She went in to work later that evening and asked her about the email. In the course of the discussion Mrs Akpan stated that she would ensure that she (the Claimant) would not secure another job in the care industry.

99 The Tribunal finds that the response by Mrs Akpan to the Claimant's resignation was vindictive. Between 26 October 2017 and 12 January 2018, she had made no mention of possible disciplinary action, or made any complaint about breach of confidentiality. If she had truly been concerned about the issue, she would have acted sooner. Mrs Akpan, was unhappy about the Claimant and her husband's complaints about AA, her relationship with the Claimant soured following that; and the Claimant's resignation letter escalated her unhappiness with the Claimant.

100 The Claimant did not return to work after 12 January 2018, and did not work her

period of notice.

101 Why did the Claimant resign from her employment, even although she did not have another job to go to? The Tribunal finds, as was her evidence, that her resignation was caused by Mrs Akpan's treatment of her after the events of 25 and 26 October. She was unhappy about issues such as feeling that her complaints about AA's behaviour towards her were not taken seriously; having to work week-ends when previously she had not done so; and feeling that Mrs Akpan behaviour towards her had changed from being good friends to being hostile towards her. The Tribunal doubts whether she resigned because of Mr Akpan's visit to invite her and her husband to re-commence attending church. When the Claimant was cross examined on her resignation letter, she said that Mr Akpan had come to her house and apologised if he or Sandra had offended her, so she felt no need to write a horrible resignation letter and just wanted to "be done with Shiloh's".

102 Having initially stated that she would work her notice period, the Claimant then did not work her notice because of the letter dated 12 January, referred to earlier above, that Mrs Akpan wrote to her, together with the conversation she has with Mrs Akpan later that day. She was distressed by the accusation of breach of confidentiality and that she could have been dismissed for that, together with Mrs Akpan telling her that she would ensure that she would not work in the care industry again.

***Allegation – by a report dated 12 January 2018 the Respondent responded to the Claimant's grievance. The Claimant alleges that there was no proper or any involvement by the Claimant in the investigation of the Claimant's grievances and that the report was self serving and biased against the Claimant. The Claimant regards this report as a further (post termination) detriment***

103 The Claimant wrote a grievance letter to Mrs Akpan dated 19 January 2018. It was a detailed letter setting out matters which form the subject matter of these proceedings. She also raised additional matters, particularly complaining that she had noticed a change of character and attitude from her after her complaint about AA. She complained of not having her presence acknowledged, and not communicating with her and finding fault in the way she worked, becoming more and more confrontational with her.

104 By letter dated 30 January 2018 Mr Akpan notified the Claimant that he would be investigating her allegations. Mr Akpan described himself as "HR and Compliance Consultant". When cross-examined he accepted that he has no Human Resources qualifications and regarded his qualification as a solicitor as being sufficient for his self description.

105 The Claimant was unhappy about Mr Akpan's letter. She expressed surprise at his "feigned" lack of knowledge about a sexual harassment complaint, stating that he had known about the event since October 2017; and disputed that he would investigate the complaint objectively. She also stated that she had reported the matter to the police (who have not, so far as the Tribunal is aware taken any action on the matter).

106 In order to investigate the Claimant's complaints Mr Akpan convened a meeting on 30 January 2018 attended by the Respondent's employees and Mrs Akpan herself.

107 Minutes of the meeting show the Respondent's employees making various criticisms on the Claimant, disputing her allegations. The minutes do not show the complaints as having been presented in a particularly neutral light. Also of note, as referred to earlier above, is that Mrs Edagobo made no reference to AA having made a threat to rape a woman in a conversation with her.

108 Mr Akpan wrote a detailed letter to the Claimant, dated 12 February 2018, rejecting the Claimant's grievance. Although the ostensible reason for the letter was to investigate the Claimant's complaint, a significant part of the letter was spent in dealing with the complaint Mrs Akpan had made that the Claimant had breached client's confidential information by discussing AA with her husband. Part, therefore, of Mr Akpan's grievance investigation report read more like a disciplinary investigation report than an investigation of the Claimant's grievance. It was consistent with the Respondent's treatment towards the Claimant having changed, from friendly and supportive to detrimental, after the Claimant's husband's and the Claimant's complaints about AA behaviour towards her.

***Allegation- after leaving her employment the Respondent failed to pay the Claimant outstanding holiday pay in the sum of £1106.60***

109 It is accepted by the Respondent that they failed to pay the Claimant her holiday money until after she had issued proceedings, some months later, in County Court.

110 As referred to above, no satisfactory explanation was given by Mr or Mrs Akpan for their failure to pay the Claimant her holiday pay until pressed to do by Employment Judge Brook at the Preliminary Hearing he conducted on 11 May 2018. It was, the Tribunal finds, another vindictive act on the Respondent's part forming part of the souring of their relationships after the events of 25 and 26 October 2017.

***Other Matters***

111 The ill feeling between the parties was not entirely one sided. Mr Ogbebor posted derogatory comments about Mr and Mrs Akpan on his Facebook page on 13 October 2018. In May Mr Ogbebor attended the Respondent's church and created a scene.

112 The Tribunal does not accept, however, the Respondent's case that the Claimant was seeking to extract exorbitant sums of money from them.

113 An elder of the church approached Mr Ogbebor in an attempt, on behalf of the Akpans, to resolve the proceedings. The text message provided by Mr Ogbebor was to settle the proceedings for £3,400 and to retract the allegations of breach of confidentiality. The £3,400 was, Mr Ogbebor explained, the fees they had spent on solicitors up to that point for representing them. The text messages concerned being at the end of May 2018, appeared a convincing estimate of what they owed their solicitors for representing them. If the estimate is correct the Claimant would have recouped her legal fees only rather than any losses she may have incurred. It was also consistent with the Claimant's case that she would have walked away from the Respondent without taking proceedings if it had not been for the letter of 12 January from Mrs Akpan accusing her of breach of patient confidentiality and gross misconduct.

114 The Tribunal has also considered whether the Claimant did commit gross misconduct as alleged by the Respondent. We find that she did not. We have in mind that the character of the institutional employer, the role played by the employee in that institution and the degree of trust required of the employee vis a vis the employer must all be considered in determining the extent of the duty of trust and the seriousness of any breach thereof.

115 The Claimant was a junior employee of the Respondent. The comment made by AA as to wanting to rape a woman if he did not get to sleep with someone, at face value would have involved a serious criminal offence. It was important that Mrs Akpan, as the owner of the home, knew about it.

116 Importantly in the Tribunal's considerations, as referred to above, we do not believe that Mrs Akpan thought at the time that the Claimant had committed gross misconduct, or she would have acted by taking disciplinary proceedings. Additionally, the Tribunal finds that on 25 October 2017 the Claimant, feeling understandably distressed at AA's comment and his behaviour towards her previously, told her husband what had occurred. In the context of such a serious remark on AA's part this, the Tribunal finds, falls short of amounting to gross misconduct.

### ***Closing Submissions***

117 On behalf of the Claimant Mr Rozycki gave typed submissions, supplemented by oral submissions.

118 On behalf of the Respondent, Mr Claire gave oral submissions.

119 The Tribunal does not set out the submissions in detail, although we have considered them carefully and borne them in mind.

120 Amongst the submissions made on behalf of the Claimant were the following points:

120.1 Submissions as to the relevant law, and naming various caselaw, some of which cases we have referred to in our summary of the law above.

120.2 Submissions as to the facts the Tribunal was invited to find and reasons for preferring the Claimant's evidence to that of the Respondent.

121 On behalf of the Respondent Mr Claire submissions included:

121.1 Submissions as to the findings of fact the Tribunal was invited to make.

121.2 The Claimant did not believe that AA was likely to commit a criminal offence, so her disclosure was not protected.

121.3 In relation to the issue of confidentiality the Claimant had admitted a breach of confidentiality.

- 121.4 In response to being asked to make alternative submissions on “Polkey” and contributory fault, if the Tribunal were to find the dismissal to be unfair, there was a clear breach of confidentiality by the Claimant and this should be taken into account.

## **Conclusions**

### ***Protected disclosure detriment claims***

*Whether what the Claimant’s husband told Mrs Akpan during their telephone conversation on 25 October 2017 was a protected disclosure.*

122 Section 47B ERA provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

123 Section 103A, refers to the “employee” making a protected disclosure.

124 On the face of it, therefore, it appears to be the worker or employee himself or herself who needs to make the protected disclosure, not someone else.

125 Mr Rozycki, in his closing submissions, referred to paragraphs 23 and 24 of *Thompson v London Central Bus Co Ltd EAT/0108*. This was a case on victimisation, contrary to section 27 of the Equality Act 2010. Section 27 refers to “B does a protected act”. Similarly, therefore, to section 47B and section 103A ERA, it appears to require the individual concerned to have done the protected act, not someone else on their behalf.

126 The Employment Appeal Tribunal accepted that an individual could bring a complaint of detrimental treatment by reason of the protected acts done by others.

127 The Tribunal accepts, therefore, in view of the guidance given in the *Thompson* case, that the Claimant can rely on the disclosure made on her behalf by her husband as being a protected disclosure; and concludes that Mr Obgebor’s complaint was capable of being a protected disclosure despite it being a disclosure that was not made by the Claimant herself. Even, however, if the disclosure of Mr Ogbebor was not capable of being a protected disclosure would make no difference to the result of this case as the Tribunal has concluded (below) that the Claimant made a protected disclosure in her meeting with Mrs Akpan.

*Whether the Claimant’s oral complaints to Mrs Akpan on 26 October 2017 about AA’s sexually inappropriate behaviour towards her amounted to a protected disclosure.*

128 The Respondent’s objection to this and the Claimant’s husband’s disclosure being protected were that the Claimant did not believe that AA was likely to commit a criminal offence.

129 The Tribunal does not agree with this submission. The Claimant discussed AA’s remark about wanting to rape someone with her husband because she was worried and

upset about it. She reiterated those worries to Mrs Akpan when she saw her the following day. Nor was it put to her that she did not believe that AA would be likely to commit a criminal offence (or that a person was likely to fail to comply with the legal obligation, or that health and safety was likely to be endangered, the other categories of section 43B ERA on which the Claimant relies). Likewise, her husband was concerned enough to telephone Mrs Akpan himself. It appears a reasonable response of the Claimant and her husband to take AA's remark seriously as being a threat to rape a woman that he would potentially carry out, even if Mrs Akpan and Mrs Edegobo did not believe that he was likely to do so.

130 The Tribunal is satisfied that the disclosure was in the public interest. Although the Claimant was probably more concerned about her own safety than that of her work colleagues (she did not bring the threat to her colleagues attention directly, only through Mrs Akpan), or members of the public, it was made clear in the *Chesterton* case that whilst the worker must have a (genuine and reasonable) belief that the disclosure is in the public interest, that does not have to be his/her predominant motive in making it. The Tribunal is satisfied that it formed part of the Claimant's motivation.

131 The Tribunal also reminds itself, again as advised in the *Chesterton* case, that the Claimant needs a reasonable belief of the disclosure tending to show one or more of the matters set out in section 43B(1)(a)(f) ERA. Different individuals can have different views as to what is reasonable as has been made clear over many years in the analysis of section 98(4) ERA. The Tribunal is satisfied that the Claimant did have a reasonable belief that a criminal offence was likely to be committed; and that the health and safety of others was likely to be endangered by the Claimant's remark. Mrs Edagobo, apparently, did not so believe- we have some doubts about whether she did not believe that AA might carry out his threat, however the question for the Tribunal is as to what the Claimant's reasonable beliefs were.

*Allegations of detriments (see paragraph 8 of appendix and findings of fact above).*

132 In order to succeed in a public interest disclosure detriment claim, it is necessary for the Claimant to show that he or she was a worker for the Respondent; brought the complaint in time; that the disclosure was protected; that the worker was treated detrimentally by the employer; and causation, namely that the detrimental treatment was on the ground of the protected disclosure.

133 The main basis on which the Respondent resisted the Claimant's claim was through disputing the Claimant's version of the relevant facts in the case. As shown in the findings of fact, to a large extent the Tribunal preferred the evidence of the Claimant and her husband to that of the Respondent's witnesses. It was not suggested, for example, that if the Claimant's factual version of events were to be held to be correct, that the Claimant would nonetheless not have been subjected to the detriments she was complaining of.

134 With one exception the Tribunal finds that, from 25/26 October 2017 the Respondent treated the Claimant detrimentally because of the complaints she and her husband had made about AA's behaviour. In our findings of fact the Tribunal has described what was a good working relationship and close friendship between the Claimant and Mrs Akpan prior to the events of 25/26 October 2017; the events that took

place on those dates; and the subsequent souring, or deterioration of the Claimant's relationship with Mrs Akpan. The Tribunal has considered, in our findings of fact, why it was that the relationship changed after those dates. An important factor, the Tribunal has found, was because of Mrs Akpan's response to the Claimant's husband's, and the Claimant's protected disclosures; and then, after the Claimant's resignation, Mr Akpan's investigation of the Claimant's written grievance dated 19 January 2019.

135 The Claimant accepts, however, that Mr Akpan's apologies to the Claimant and her husband were not on the ground of the protected acts. We accept that he was carrying standard procedures to encourage members of the church which he and his wife were pastors to return to church attendance.

136 In the other respects the Tribunal accepts that a factor, although not necessarily the only factor in the detrimental treatment of the Claimant was the protected disclosures.

137 The Claimant's claims of protected disclosure detriment, therefore, succeed, other than complaint 8 d.

### ***Automatic Unfair Constructive Dismissal Claim***

138 Why did the Claimant leave the Respondent's employment? She left initially, as described in our findings of fact above, because of Mrs Akpan's response to her and her husband's complaints including failure to act on them or reassure the Claimant; her changing of the rotas so that the Claimant was now working weekends; and the souring, generally, of her relationship with Mrs Akpan, as referred to in our findings of fact above.

139 The Tribunal is satisfied that the Respondent committed a fundamental breach of contract towards the Claimant, namely the implied term of mutual trust and confidence. Usually if an employer commits various acts of public interest disclosure detriment towards an employee it will amount to a breach of trust and confidence. It is almost bound to cause an employee to lose trust and confidence in an employee, as it did here.

140 The Claimant needs to show that she resigned, at least in part because of a fundamental breach of contract by the Respondent. No other reasons were put forward by the Respondent as to why the Claimant resigned and the Tribunal is satisfied, as set out in our findings of fact, that the Claimant resigned at least in part because of the Respondent's fundamental breach of contract towards her.

141 There has been no suggestion by the Respondent that the Claimant affirmed the contract or waived the breach.

142 The constructive unfair dismissal claim therefore succeeds.

### ***Breach of contract claim (notice pay)***

143 Nothing much was said by either party as to the Claimant's wrongful dismissal claim. It is likely, in any event, that any notice pay claim would overlap with a loss of earnings claim as part of compensation for loss of earnings in the Claimant's unfair dismissal claim.

144 The Claimant did, however, resign from her employment with the Respondent, without working her notice and she was constructively unfairly dismissed by the Respondent. If still pursued, therefore, this claim succeeds.

**Next steps**

145 We encourage the parties to seek to agree remedy. Before the parties left the Tribunal at the end of the hearing, a provisional remedy date (conditional on whether the Claimant was to succeed in her claims, or some of them) was agreed with the parties for 11 March 2019. If remedy has not been settled with the parties, the remedy hearing will take place on that date.

Employment Judge J Goodrich

22 February 2019

**APPENDIX**

**The Claims**

1. The Claimant brings the following claims:
  - a. Constructive unfair dismissal contrary to Sections 94, 98 and 103 of the Employment Rights Act 1996;
  - b. Detriment on the grounds that protected disclosures were made pursuant to the provisions of Section 47B(1) of the Employment Rights Act 1996;
  - c. Wrongful dismissal in relation to the balance of the notice period.

**Protected Disclosures**

6. The Claimant relies upon the following as qualifying protected disclosures:
  - a. On 24 October 2017 the Claimant's husband telephoned Mrs. Akpan allegedly telling her of AA's sexually inappropriate behaviour towards the Claimant, including remarks by AA to the Claimant that if he wasn't sexually satisfied then he might rape someone. This, it is alleged, was described to Mrs Akpan as an unsafe working environment for the Claimant;



- b. On 25 October 2017 the Claimant herself orally complained to Mrs Akpan about AA's sexually inappropriate behaviour towards her in similar terms to those of her husband and that she herself felt the situation to be unsafe. At the same time, the Claimant orally lodged a grievance in respect of the same.

### **Issues for the Tribunal**

7. The issues for the Tribunal regarding the alleged disclosures are:
  - a. Did the Claimant disclose information within the meaning of Section 43 of the Employment Rights Act 1996?;
  - b. Did the Claimant have a reasonable belief that any such information disclosed a breach of an obligation on the part of the Respondent, in particular in respect of Sections 43B(1) (a) (b) & (d) of the Employment Rights Act 1996?
  - c. Did the Claimant reasonably believe that the disclosure of this information was in the public interest?
  - d. Did the Claimant disclose information to her employer for the purpose of Section 43 of the Employment Rights Act 1996?

### **Detriment/Victimisation**

8. The Claimant relies upon the following acts/omissions as detriments and/or victimisation:
  - a. On 25 October 2017 the Claimant orally lodged a grievance with Mrs Akpan in respect of AA's unwanted sexual conduct and what she regarded as an unsafe working situation, which grievance was not dealt with expeditiously or at all until after the termination of the Claimant's employment;
  - b. In the period 25 October 2017 to 1 December 2017, the latter date being that on which AA voluntarily left the Respondent's care to return home, the Respondent took no steps to prevent further harassment of the Claimant by AA or to assess the working situation for safety. The Claimant continued to have contact with AA in the course of her employment;
  - c. In the period 25 October 2017 to 7 January 2018, the Respondent obliged the Claimant to work Sunday's despite the Claimant previously having opted out of Sunday work for religious and family reasons;
  - d. During November and December 2017 Mr Akpan, in his capacity as Pastor to the Church attended by the Claimant, apologised to the Claimant for any shortcomings that might have occurred and attempted to mollify the Claimant by inviting her to re-commence attendance at Church. The Claimant regarded this as an improper attempt by Mr Akpan to unduly influence her in and about her stated concerns regarding AA;

- e. On 7 January 2018 the Claimant gave the Respondent 4 weeks' notice in writing, her last day of employment to be Thursday 8 February 2018. The Claimant asserts that she gave notice because of the Respondent's conduct set out above at a to d;
- f. By letter of 12 January 2018, the Respondent accepted the Claimant's resignation and went on to accuse the Claimant of breaching patient confidentiality in virtue of telling her husband of AA's unwanted sexual conduct towards her. The Respondent stated that, but for her resignation, the Claimant's conduct warranted dismissal. The Claimant regarded this both as a further detriment and as the last straw in her constructive dismissal on the basis of which the Claimant brought forward her termination date and left the Respondent's employment on 12 January 2018;
- g. By a Report dated 12 February 2018 the Respondent responded to the Claimant's grievance. The Claimant alleges that there was no proper or any involvement by the Claimant in the investigation of the Claimant's grievances and that the Report was self serving and biased against the Claimant. The Claimant regards this Report as a further (post termination) detriment;
- h. After leaving her employment the Respondent failed to pay the Claimant outstanding holiday pay in the sum of £1106.60. The Claimant regards this as a further (post termination) detriment.

### **Issues for the Tribunal**

- 9. The issues for the Tribunal regarding the alleged detriments are:
  - a. Did the aforesaid acts/omissions occur as alleged by the Claimant?
  - b. If so, did they, or any of them, amount to and/or victimization?
  - c. If so, where they, or any of them, as a result of the Claimant having made the protected disclosures referred to at paragraph 6 above?
  - d. Have the Claimant's claims been pursued within the time limits set out in Sections 48 and 207B of the Employment Rights Act 1996, having regard to the Claimant's contention that the detriments relied upon constituted a course of action.

### **Automatically Unfair Constructive Dismissal**

- 10. The Claimant contends that as a result of the matters relied upon as detriments (paragraph 8 a to d above), on 7 January 2018 the Claimant gave one month's notice terminating her employment. The Claimant relies on this as a constructive unfair dismissal. The Claimant contends that the said acts of detriment/victimization also amounted to repudiatory breaches of her contract of employment which she accepted as terminating her contract on the basis of a constructive dismissal. In particular the Claimant relies upon the Respondent taking no steps to safeguard the Claimant from the unwanted sexual harassment of AA

and/or assess her working environment for safety, requiring her to work Sundays, failing to action her grievance, and the Respondent's accusation when accepting the Claimant's resignation on notice that she breached patient confidentiality. Further, taken together, the Claimant regards the Respondent's conduct as breaching the implied term of trust and confidence. The Claimant regards the termination of her employment as a constructive automatically unfair dismissal. As a result of the aforesaid Report, and as set out at paragraph 8(f) above, the Claimant brought forward her effective date of termination to 12 January 2018.

### **Issues for the Tribunal**

11. The issues for the Tribunal are as follows:

- a. Was the Claimant constructively dismissed?
- b. If so, then was the reason or principle reason for the dismissal that the Claimant made either or both of the protected disclosures referred to at paragraphs above such that the dismissal was automatically unfair contrary to Section 103A of the Employment Rights Act 1996?

### **Wrongful Dismissal**

12. If the Claimant was constructively dismissed by reasons of the matters complained of as detriments/victimisation (whether or not the same amounted to detriments/victimisation at law), is the Claimant entitled to be paid the balance of any notice period?

### **Remedies**

13. The Claimant seeks compensation only. If the Claimant is successful in her claims, or any of them, then the issues for the Tribunal are as follows:

- a. What loss has the Claimant sustained by reason of any unlawful treatment on the part of the Respondent?
- b. Has the Claimant taken reasonable steps to mitigate her losses?
- c. Is the Claimant entitled to recover general damages and/or injury to feelings under Section 49 of the Employment Rights Act 1996?
- d. If any compensation be awarded to the Claimant then should this be increased or reduced by reason of a failure to comply with the ACAS Code of Practice?