

RESERVED JUDGMENT



EMPLOYMENT TRIBUNALS

Claimant: Mr W Birch
Respondent: Anchor Hanover Group

Heard at: Leeds Employment Tribunal
Before: Employment Judge Deeley, Mrs JL Hiser, Mr K Smith

On: 22, 23 and 24 February 2021 and 11 March 2021

Representation
Claimant: In person
Respondent: Ms R Swords-Kieley (Counsel)

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1. The claimant's complaints of detriment relating to:
 - 1.1 protected disclosures (s47B of the Employment Rights Act 1996 (the "**ERA**");
 - 1.2 health and safety concerns (under s44(1)(c) of the ERA); and
 - 1.3 serious and imminent danger to health and safety (under s44(1)(d) of the ERA);fail and are dismissed.
2. The claimant's complaints of automatically unfair dismissal relating to:
 - 2.1 protected disclosures (s103A of the ERA);
 - 2.2 health and safety concerns (s100(1)(c) of the ERA); and
 - 2.3 serious and imminent danger to health and safety (s100(1)(d) of the ERA);fail and are dismissed.

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REASONS

INTRODUCTION

Tribunal proceedings

3. Neither party objected to holding this hearing as a remote hearing. The form of remote hearing was “V: video - fully (all remote)”. A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing.
4. This claim was case managed during a preliminary hearing with Employment Judge Evans on 26 October 2020.
5. We considered the following evidence during the hearing:
 - 5.1 a joint file of documents and the additional documents referred to below;
 - 5.2 witness statements and oral evidence from:
 - 5.2.1 the claimant;
 - 5.2.2 the respondent’s witnesses:

Name	Role
1) Mrs Laura Clark	Home Manager
2) Miss Miriam Nkoma	Deputy Manager
3) Miss Michelle Ingle	District Manager
4) Mrs Simona Marcu	Head Housekeeper

6. The respondent provided additional disclosure documents during the hearing. The claimant did not object to the inclusion of these documents in the hearing file.
7. We also considered the helpful oral submissions made by both representatives, together with the respondent’s representative’s written submissions.

Adjustments

8. We asked both parties if they wished us to consider any adjustments to these proceedings and they confirmed that no such adjustments were required. We reminded both parties that they could request additional breaks at any time if needed.

CLAIMS AND ISSUES

9. The list of issues was discussed with the parties in detail at the start of the hearing. The revised list of issues that the Tribunal considered in reaching its conclusions on this claim is set out below.
10. The claimant brought the following complaints under the Employment Rights Act 1996 (“**ERA**”) and the Equality Act 2010 (“**EQA**”):

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- 10.1 automatic unfair dismissal; and
- 10.2 detriment;

both of which the claimant alleges arose out of the protected disclosures and/or the health and safety complaints that he states he raised with the respondent.

LIST OF ISSUES

11. The agreed list of issues is set out below.

Alleged disclosures/complaints

12. Did the claimant raise the matters set out in Table A with the respondent?

TABLE A - DISCLOSURES OR COMPLAINTS ALLEGED		
Date	Name(s) of the people involved	Disclosures or complaints alleged
Issue 1 – 23 April 2020	Laura Clark	The claimant reported to Laura Clark that Simona Marcu had signed his initials on a cleaning work sheet to say that he had deep cleaned rooms that had not been deep cleaned on 17th April 2020.
Issue 2 – 27 April 2020	Human Resources and Michelle Ingle	The claimant raised a grievance raising concerns that he had been told to sign for tasks on 17th April 2020 (originally reported to Laura Clark on 23 April 2020) and again on 24 April 2020 that he had not completed and that when he had refused, Simona Marcu had signed his initials.

Protected Disclosures

- 13. Did the claimant make one or more qualifying disclosures as defined in section 43B ERA?
- 14. The Tribunal will decide:
 - 14.1 What did the claimant say or write? When? To whom? *The claimant says he made disclosures on the occasions set out in Table A.*
 - 14.2 Did he disclose information?
 - 14.3 Did he believe the disclosure of information was made in the public interest?
 - 14.4 Was that belief reasonable?
 - 14.5 Did he believe it tended to show that:
 - 14.5.1 the health or safety of any individual had been, was being or was likely to be endangered under s43B(1)(d); and/or

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14.5.2 that information tending to show that the health or safety of any individual had been, was being or was likely to be endangered had been, was being or was likely to be deliberately concealed?

14.6 Was that belief reasonable?

15. If the claimant made a qualifying disclosure, the respondent accepts that it was a protected disclosure because it was made to the claimant's employer.

Health and safety complaints (s44(1)(c)(i) ERA)

16. Was the claimant an employee at a place where there was no representative or safety committee for the purposes of s44(1)(c)(i) ERA?

17. If so, did the claimant bring to the respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety? *The claimant says he made the complaints set out Table A.*

Health and safety – serious and imminent danger (s44(1)(d) ERA)

18. Was the claimant in circumstances of danger which the claimant:

18.1 reasonably believed to be serious and imminent; and

18.2 could not reasonably have been expected to avert?

19. If so:

19.1 did the claimant leave (or propose to leave) his place of work; or

19.2 refuse (while the danger persisted) to return to his place of work?

Detriments

20. Did the respondent do the things set out in Table B?

TABLE B - DETRIMENTS ALLEGED		
Date	People involved	Detriments alleged
Allegation 1 07 May 2020 (para 27)	Mishel Ingle, Miriam Nkoma, Hannah Gorman, Laura Clark	Discussing the claimant in negative terms, by stating that: <i>a) Para 27 – email on 7 May 2020 16:09 page 180A</i> <i>b) Page 178 – email 16:46 referring to pandering to Claimant, Claimant ignoring Respondent, holding Respondent to ransom and calling the shots</i> <i>c) Page 178 – email 17:19 referring to Claimant going to struggle to explain why not returning</i>
Allegation 2 7 May 2020	Michelle Ingle, Hannah Gorman, Laura Clark	Deeming the claimant to be a troublemaker, by: <i>a) Saying that the Claimant would cause issues when back in the home (page 181)</i>
Allegation 3	Michelle Ingle, Miriam Nkoma,	Calculating how to end the claimant's employment, to appear as though he were AWOL as a result of making

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TABLE B - DETRIMENTS ALLEGED		
Date	People involved	Detriments alleged
7 May – 14 May 2020 (para 28-31)	Hannah Gorman, Laura Clark	such a disclosure and refusing to attend work until matters were resolved. The claimant alleges that the respondent: <i>a) Page 180 – 16:21 – email discussing failing probation and mitigating risk of claims</i> <i>b) Page 179 – 16:27 – email discussing struggling to end probation based on AWOL if allowed back to work</i> <i>c) Page 179 – 16:39 – email discussing adding performance issues as well as AWOL</i> <i>d) Page 205 – 14:59 – email discussing being in a position to proceed with AWOL dismissal</i> <i>e) Page 224 – 20:42 – email discussing using refusal to complete records as reason for dismissal</i> <i>f) Page 235 - 07:56 – email discussing attempts to prevent the Claimant escalating matters further</i>

21. By doing so, did the respondent subject the claimant to any detriments?
22. If so, were any such detriments done on the ground that:
- 22.1 he made a health and safety complaint in the manner set out in s44(1)(c)(i) ERA;
- 22.2 the claimant was in circumstances of serious and imminent danger for the purposes of s44(1)(d) ERA; and/or
- 22.3 he made a protected disclosure for the purposes of s47B ERA?

Automatically Unfair Dismissal (s100 and s103A ERA)

23. If the claimant was dismissed, was the reason or principal reason for dismissal an automatically unfair reason in that:
- 23.1 the claimant made the H&S Complaints in the manner set out in s100(c)(i) ERA;
- 23.2 the claimant was in circumstances of serious and imminent danger for the purposes of s100(d) ERA; and/or
- 23.3 the claimant made the Protected Disclosures under s103A ERA?
- If so, the claimant will be regarded as unfairly dismissed. *The claimant does not have sufficient length of service to claim ordinary unfair dismissal.*

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RELEVANT LAW

24. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' pleadings and the respondent's written submissions.

EMPLOYMENT RIGHTS ACT 1996 ("ERA") CLAIMS

25. Complaints relating to health and safety detriments, whistleblowing detriments and automatic unfair dismissal and ordinary unfair dismissal are dealt with in the ERA.

Health and safety – concerns and serious and imminent danger

26. Employees raising either:

26.1 health and safety concerns; or

26.2 who leave and/or refuse to return to their place of work in circumstances which (in their reasonable belief) amount to serious and imminent danger;

are protected under the ERA if their concerns fall within one of the categories set out in s44 of the ERA.

27. The claimant has brought claims under s44(1)(c) and s44(1)(d) of the ERA.

44 Health and safety cases

(1) An employee 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—

a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

...

(c) being an employee at a place where—

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

...

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,

...

28. The EAT considered the question of what amounts to reasonable grounds for believing that there were circumstances harmful to health and safety in *Kerr v Nathan's Wastesavers Ltd* EAT 91/95. The EAT noted that the purpose of the legislation is to protect employees who raise matters of health and safety and held

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that not too onerous a duty of enquiry should be placed on the employee. For example, in *Joao v Jurys Hotel Management Ltd* EAT 0210/11, the EAT held that the fact that working arrangements proposed by an employer are not unlawful does not mean that an employee cannot reasonably believe that they were.

29. In relation to 'serious and imminent danger', the EAT in *Harvest Press Ltd v McCaffrey* 1999 IRLR 778, set that the word 'danger' was not limited to dangers generated by the workplace itself. The EAT gave examples of cases that could fall under this head, including:
- 29.1 premises becoming unsafe as a result of an unskilled and untrained employee working on dangerous processes in the workplace, where the potential danger of a mistake affects others;
 - 29.2 the absence of a person with specific safety responsibilities where dangerous processes were being carried out; and
 - 29.3 a foolhardy employee adopting dangerous practices in the workplace (eg 'horseplay').
30. The Court of Appeal in *Akintola v Capita Symonds Ltd* 2010 EWCA Civ 405 held that an employment tribunal was entitled to find that the claimant did not have a reasonable belief that he was in circumstances of serious and imminent danger. In that case, the employer had prepared a method statement of engineering work and a specialist team had undertaken monitoring of the situation.

Qualifying disclosures

31. A protected disclosure is defined by s43A ERA as a 'qualifying disclosure' under s43B ERA:

43B Disclosures qualifying for protection

- (1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—
- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
 - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
 - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
 - (d) that the health or safety of any individual has been, is being or is likely to be endangered,
 - (e) that the environment has been, is being or is likely to be damaged, or
 - (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
32. S47B of the ERA sets out a worker's right not to be subjected to a detriment on the ground that they have made a protected disclosure.

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47B Protected disclosures

(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.

...

(2) ...this section does not apply where –

...

(b) the detriment in question amounts to dismissal...

....

33. The Court of Appeal in *Kilraine v London Borough of Wandsworth* [2018] IRLR 846, held that a disclosure must contain sufficient information if it is to form a ‘qualifying disclosure’ for the purposes of s43B of the ERA.
34. The individual must also reasonably believe that the disclosure tends to show one or more of the categories set out under s43B(1). The Tribunal must consider:
- 34.1 whether the claimant genuinely believed that the disclosure tended to show one of the categories listed in s43B (*Darnton v University of Surrey* [2003] IRLR 133); and
- 34.2 whether such belief was objectively reasonable in the circumstances (see, for example, *Phoenix House Ltd v Stockman* [2017] ICR 84 EAT).
35. The term ‘likely’ (eg in ‘likely to be endangered’ under s43B(1)(d)) was considered in *Kraus v Penna Plc* [2004] IRLR 260 to mean ‘probable or more probable than not’. The Court of Appeal held that this was a higher standard than simply ‘a possibility or a risk’.

What amounts to a detriment?

36. The test of whether an act or omission could amount to a ‘detriment’ is the same as for a discrimination complaint. The House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 held that whether an act amounts to a detriment requires the Tribunal to consider:
- 36.1 would a reasonable worker take the view that he was disadvantaged in terms of the circumstances in which he had to work by reason of the act or acts complained of?
- 36.2 if so, was the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?
37. We note that the Court of Appeal in *Deer v University of Oxford* [2015] IRLR 481, held the conduct of internal procedures can amount to a ‘detriment’ even if proper conduct would not have altered the outcome.
38. However, the House of Lords in *Shamoon* also approved the decision in *Barclays Bank plc v Kapur & others (No.2)* [1995] IRLR 87 that an unjustified sense of grievance cannot amount to a ‘detriment’.
39. We also note that in the context of whistleblowing, a detriment for the purposes of the legislation can occur even *after* the relevant relationship with the employer has

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been ended or terminated (see *Woodward v Abbey National plc* [2006] EWCA Civ 822, [2006] IRLR 677, [2006] ICR 1436).

Reason for the detriment

40. The key question is whether the making of a protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the individual (*Fecitt v NHS Manchester* [2012] IRLR 64). This requires the Tribunal to consider the mental processes (conscious and unconscious) of the person who either acted or deliberately failed to act in respect of the detriment.
41. In certain cases, the courts have drawn a distinction between the making of a disclosure and the manner in which the complaint was made or pursued. For example, in *Panayiotou v Chief Constable of Hampshire Police* [2014] IRLR 500, the EAT upheld a decision by a tribunal that a police officer's dismissal was because of his long-term sickness absence and his obsessive pursuit of complaints. The EAT said that his dismissal 'in no sense whatsoever' connected with the public interest disclosures that he had certainly made earlier. The judgment of Lewis J stresses that such a finding is entirely logical and is not confined to 'exceptional cases':

"There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosing of information by using racist or otherwise abusive language. Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed."

Burden of proof and drawing of inferences – detriment claims

42. In *International Petroleum Ltd and others v Ospioy and others* EAT 0058/17, the EAT set out the correct approach to whistleblowing detriment complaints as follows:
 - 42.1 the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he is subject is either his health and safety complaint and/or his protected disclosure;
 - 42.2 s48(2) ERA then requires the employer to show why the detrimental treatment was done. If the employer fails to do so, inferences may be drawn against the employer. However, these inferences must be justified by the Tribunal's findings of fact.

Dismissal claims

Respondent's reason for dismissal

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43. The right not to be automatically unfairly dismissed for raising health and safety concerns is set out at s100 of the ERA. The equivalent provisions for protected disclosures are set out at s103 of the ERA.

100 Health and safety cases

(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 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,

...

103A Protected disclosure

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

44. The key question is whether the reason or principal reason for the claimant's dismissal falls under s100(c) or (d) and/or under s103A of the ERA. This test is more stringent than the test for detriment claims, which requires the alleged ground to be a 'material influence' on the detrimental treatment.
45. The employee bears the burden of proof in automatically unfair dismissal claims where the employee does not have the two years' service required to bring a claim for ordinary unfair dismissal (see, for example, *Parks v Lansdowne Club* EAT 310/95).
46. In *Royal Mail Group v Jhuti* [2020] IRLR 129 the Supreme Court held that the reason for dismissal may not be limited to the reason given by the decision-maker if others have been involved in the process:

"In the present case, however, the reason for the dismissal given in good faith by [the decision-maker] turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here ... Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should

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be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker."

47. Caselaw relating to protected disclosure dismissals has held that an employee may be dismissed for the manner in which they pursue their complaints, even if the original subject of their complaint was a protected disclosure (see, for example, *Panayioutou v CC of Hampshire Police & anor* [2014] ICR EAT, referred to in the detriments section of this judgment).

S100(c) ERA

48. The EAT in *Balfour Kilpatrick Ltd v Acheson & ors* (2003) IRLR 683 held that there were three requirements that must be met for a claim under s100(1)(c) to be made out:
- 48.1 it was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee;
 - 48.2 the employee must have brought to the employer's attention by reasonable means the circumstances that he reasonably believes are harmful or potentially harmful to health or safety; and
 - 48.3 the reason, or principal reason, for the dismissal must be the fact that the employee was exercising his rights.
49. S100(1)(c) extends to harm to fellow employees and to third parties, such as hospital patients (*Von Goetz v St George's Healthcare NHS Trust* EAT 1395/97).

S100(d) ERA

50. It is for the employee to establish that he reasonably believed that he was exposed to circumstances of 'serious or imminent danger'.
51. The same caselaw on 'reasonable belief' of 'serious and imminent danger' applies as set out under the earlier part of this judgment which refers to detriments.

FINDINGS OF FACT

Context

52. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS - v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's

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memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

53. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:

“Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

54. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

55. The respondent is a not for profit provider of housing, care and support to people over the age of 55 in the UK, employing around 10,000. The respondent's administrative resources include in-house HR Support team from its Employee Relations team (known as 'Manager Direct') and an in-house legal (including an in-house employment lawyer).
56. The claimant was initially employed by the respondent as a catering assistant from 17 February 2020. He agreed to change roles to become a cleaner in late March 2020. The claimant remained in that role until he was dismissed (with one week's pay in lieu of notice) with effect from 18 May 2020.
57. The claimant was based at the respondent's Halycon Court care home throughout his employment (the "**Home**"). His basic working hours were 16 hours per week, which usually consisted of two shifts per week. The times and days of the claimant's shifts varied from week to week. The claimant's contract was subject to a 6 month probationary period, during which his employment could be terminated by either party giving one week's written notice.
58. The claimant performed cleaning duties during the period from late March to 25 April 2020 inclusive. However, he was on sick leave from 6-14 April 2020. During that time he was working on average two days per week when he was attending work.
59. The respondent organised its rotas a couple of weeks in advance. Copies of staff rotas were kept in the rota folder for staff to consult whilst they were at work. Staff could also phone the Home to check when they were supposed to attend work.

Respondent's policies and procedures

60. The respondent's policies and procedures were available on its intranet. The claimant confirmed that he could access the policies and procedures from the Home.
61. The respondent operated an Attendance policy and procedures, which set out the respondent's requirements for various scenarios. For short term absences,

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colleagues were required to update their manager by telephone on every working day of their absence for the first seven days' absence, unless otherwise agreed.

62. Unauthorised absences or "AWOL" were defined as follows:

"If a colleague fails to report their absence as outlined in this policy this will be classed as unauthorised absence and their pay will be suspended from day 1.

Their line manager will attempt to make contact with them by telephone and will write asking them to make contact...

...If the colleague makes contact or returns to work at any point through the process their reasons for failing to report their absence correctly should be explored. Depending on their explanation, disciplinary action may still need to be taken.

If a colleague goes AWOL during their probationary period a formal disciplinary hearing will not be held. If they have not made contact by Day 4, following a Probation AWOL Day 1 Letter being sent on Day 1, their employment will be terminated without notice (refer to the Probationary Policy for further details)."

63. The respondent's Probationary Policy referred to its Probation Procedure and stated:

"A colleague's employment can be terminated at any point during the probationary period if it becomes clear that they are not suitable for the role or for the business. In this case a dismissal meeting will be held as detailed in the Probation Procedure..."

AWOL

If a colleague goes AWOL during their probation period attempts will be made to contact them by telephone to ensure their welfare and to encourage them to report their absence as outlined in the Attendance policy.

If no contact is established, the Probation AWOL Day 1 Letter will be sent, informing them that if they don't make contact by day 4 of their absence, their employment will be terminated. The line manager will inform payroll to suspend their pay from day 1 of their unauthorised absence.

If no contact has been made by day 4, the Probation AWOL Day 4 Termination Letter will be sent advising the colleague that as continued absence without authorisation is a gross misconduct offence, their employment has been terminated without notice or payment in lieu of notice."

64. The respondent also operated disciplinary, grievance and whistleblowing policies.

Home's management structure

65. The management structure relevant to the Home was as follows:

65.1 **District Manager** – Miss Michelle Ingle (who was known to her colleagues as "Mishel");

65.2 **Home Manager** – Mrs Laura Clark;

65.3 **Deputy Home Manager** – Miss Miriam Nkoma;

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- 65.4 **Head of Housekeeping (and the claimant's line manager)** – Mrs Simona Marcu.
66. The management team also received support during the claimant's employment from Ms Hannah Gorman, Employee Relations Advisor.
67. Miss Nkoma was not physically present in the Home for much of the claimant's employment because she was shielding due to the Covid-19 pandemic. She worked from home, supporting Mrs Clark and the rest of the Home's management team.
68. The claimant had a good working relationship with Mrs Marcu and with Mrs Clark. Mrs Clark described the claimant as a 'breath of fresh air' and said that his attitude to work up until 23rd April 2020 was 'fantastic'. Mrs Marcu said that both she and the claimant had joined the Home as new starters at around the same time and that they used to 'laugh and sing' whilst working together. Mrs Marcu said that the other cleaning staff had worked in the Home for many years and were familiar with the Home's procedures.

Cleaning practices and schedules

69. The events relating to this claim took place against the backdrop of the Covid-19 pandemic. The first UK national lockdown started on 23 March 2020 and continued beyond the end of the claimant's employment with the respondent. The Home's residents were regarded as vulnerable to Covid-19 infection, due to their age and medical conditions.
70. The layout of the Home consisted of six floors, including:
- 70.1 the ground and first floors which were linked by a ramp;
 - 70.2 the third and fourth floors which each had twelve bedrooms;
 - 70.3 the fifth floor which had no bedrooms – it was just a medication room; and
 - 70.4 the sixth floor which consisted of a lounge and office, but no bedrooms.
71. There were around 35 residents in the Home in April 2020. The number of residents was much lower than normal and many of the bedrooms were unoccupied, mainly due to the Covid-19 pandemic.
72. The respondent normally scheduled three members of the housekeeping team to work on any given day. Two of the team would carry out cleaning duties and the third member of staff would work in the laundry.
73. The respondent obtained external advice on the time taken to perform cleaning tasks. The adviser stated that it should take around 10-15 minutes for one cleaner to carry out a 'normal' daily clean of a resident's bedroom. The tasks required for a daily clean were set out in the respondent's cleaning schedules, including:
- 73.1 wiping down hard surfaces and equipment;
 - 73.2 tidying up;
 - 73.3 cleaning hard floors;
 - 73.4 cleaning en suite bathrooms;

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- 73.5 emptying waste bins;
 - 73.6 vacuuming (if required)
 - 73.7 changing beds and removing laundry;
 - 73.8 checking sufficient PPE was available;
74. The housekeeping staff also cleaned communal areas, such as meeting rooms and toilets.
75. We accept Mrs Marcu's evidence that the cleaning schedules were initialled at the end of each day, rather than immediately after each room had been cleaned. She showed the claimant the cleaning logbook when he joined, including the procedures for cleaning detailed at the front of the logbook. She told him that they had to complete the cleaning schedules and that 'then we will be friends', meaning that they would work together as a team.
76. We also accept Mrs Marcu's evidence that the cleaning schedules were placed in the cupboard and at the end of each week (depending on when she was working), she would put all of the sheets of paper in a big folder ready for audit purposes. The respondent no longer had copies of the cleaning schedules with the claimant's initials for 17th, 23rd or 24th April as at the date of this hearing because they could no longer be located.
77. We accept Mrs Clark and Mrs Marcu's evidence that the Home had sufficient cleaning staff during April 2020, because they had also brought in additional agency staff to assist with the extra cleaning tasks required because of the Covid-19 pandemic. For example, on 17 April 2020 Mrs Marcu, the claimant and Mr Sean Batt were all present and working in the Home (as evidenced by Mr Batt's completion of the laundry infection cleaning schedule on that day).
78. In addition, the housekeeping team carried out ad hoc cleaning of the Home, such as cleaning up after any accidental spillages or other accidents.
79. By contrast, a 'deep' clean of one bedroom would take around 40 minutes. A deep clean would be performed monthly or on specific occasions, for example if the Home was receiving a new resident or if a resident was discharged from hospital. A deep clean required thorough cleaning of all areas of the bedroom, including:
- 79.1 pulling the bed out and cleaning under the bed;
 - 79.2 dusting high ceilings and skirting boards;
 - 79.3 checking the walls for spores or stains and washing them (or asking a handyman to re-paint them).

Events on Friday 17 April 2020

80. The claimant performed his normal cleaning duties for the residents' bedrooms and communal areas on 17 April 2020.
81. Mrs Marcu asked the claimant to sign for tasks on the cleaning schedules at the end of his shift on 17 April 2020. Mrs Marcu said that the claimant had completed those tasks, but that the claimant had failed to sign any cleaning schedules at all since transferring from the Home's kitchen to the housekeeping team. The

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claimant said that he was not asked to sign any schedules until 17th April. The respondent was unable to locate the cleaning schedules which Mrs Marcu had initialled using the claimant's initials on 17 April 2020. However, Mrs Marcu accepted that she had initialled all of the tasks on the cleaning schedules using the claimant's initials on 3 April and on other dates during April 2020.

82. We find that Mrs Marcu had previously asked the claimant to sign cleaning schedules (for example, on 3 April 2020), but that when the claimant had said that he was too busy, she had initialled them on his behalf. For example, on one occasion, the claimant was playing the guitar to the Home's residents.
83. The claimant refused to sign the cleaning schedules on 17 April 2020. The claimant said that he had not vacuumed the communal hall. He later said during the grievance process that he had not cleaned under the beds and wiped down all of the bathroom tiles in the resident's bedrooms. However, he was unable to recall precisely what had or had not been cleaned on 17 April 2020 during the grievance process.
84. The claimant did not suggest that there was any altercation between him and Mrs Marcu on 17 April. He left work shortly afterwards and went home.
85. The claimant stated during his oral evidence that he contacted the CQC and the Police shortly after 17 April 2020. However, we find that he did not contact the CQC during April 2020. The claimant's later emails regarding contact with the CQC and the Police suggest that he did not speak to either agency until May 2020. For example, the claimant's email of 3 June 2020 to the CQC stated:

"I had called 2 weeks ago regarding my initials being falsified in front of me on a cleaning schedule I refused to sign as we do not complete the tasks."

Claimant's discussion with Mrs Clark - Thursday 23 April 2020

86. The claimant's next shift at the Home was on Thursday 23 April 2020. The claimant states that he reported what had happened on 17 April to Mrs Clark during a conversation that took place in a lift and continued in the corridor after they both exited the lift. Mrs Clark disputes the claimant's account and states that they had a brief discussion when passing each other in a corridor. Mrs Clark states that the claimant only told her that he wanted to see her about a problem between him and Mrs Marcu.
87. We find that the claimant did mention to Mrs Clark that Mrs Marcu had initialled the sheet using his initials. However, we note that Mrs Clark was very busy at that time, given the challenges posed by Covid-19, and find that she did not fully understand the claimant's concerns from their brief conversation on 23 April 2020. The key reasons for our finding are:
 - 87.1 Mrs Clark would not have suggested a meeting the next day with both the claimant and Mrs Marcu, if she had understood the claimant's concerns; and
 - 87.2 after she had a more detailed discussion with the claimant on 27 April 2020, Mrs Clark quickly arranged a management supervision meeting with

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Mrs Marcu for the next day regarding the claimant's concerns regarding Mrs Marcu's initialling of cleaning schedules using the claimant's initials.

88. Mrs Clark told the claimant that both they and Mrs Marcu should sit down together the next day to see if they could resolve the problem. She did not give the claimant a specific time to meet. The claimant said that he would prefer just to meet with Mrs Clark, but agreed to meet with Mrs Marcu as well.

Events on Friday 24 April 2020

89. The claimant and Mrs Marcu were both working on 24 April 2020. At around 10am, the claimant went up to Mrs Clark's office. However, Mrs Clark was in the middle of dealing with an urgent safeguarding issue. She told him that they would meet later that day, after the 2pm staff meeting. Mrs Clark went for a cigarette break after her 2pm meeting ended and told the claimant and Mrs Marcu to meet her upstairs in 5 minutes.
90. The claimant continued to work until shortly before his shift was due to end at 3pm without any problems. Mrs Marcu then approached the claimant in the staff room, whilst he was retrieving items from his locker. Mrs Marcu asked him to sign the cleaning schedules for the communal toilets and a resident's bedroom for that day. The claimant refused to do so, saying it was 'illegal'. The claimant said that he had not cleaned the resident's bedroom. Mrs Marcu tried to take the claimant through each row of the schedule which set out the tasks. The claimant said that he could not clean all of the bathroom tiles. Mrs Marcu said that they did not need to clean all of the tiles – just those above the sink and behind the toilet – because a full clean of the tiles was carried out by the night staff. However, the claimant refused to discuss the rest of the cleaning schedules and walked out of the staffroom towards the toilets so that he could get changed.
91. Another member of staff, Jean Fairhead was also in the staffroom at that time. Mr Sean Batt came into the staffroom part way through the argument. We accept Ms Fairhead's account of that discussion, which she provided to Mrs Clark as part of the grievance investigation. Ms Fairhead stated:
- "[They] were arguing. Will came to get changed. Simona was asking him to sign some papers and he said no, he isn't going to sign what work he hasn't done...He kept saying she'd signed his name the week before and he wasn't happy about it...she's falsifying documents by signing work that he hasn't done."*
92. Ms Fairhead noted that *"both were loud"* but added: *"Simona wouldn't let it go, she kept following him, to lockers or wherever he moved was getting in his face."*
93. The claimant left the staffroom to get changed in the toilets. Mrs Marcu followed the claimant into the corridor. The claimant went to the toilets and changed his shirt. Mrs Marcu was waiting near the lift and said to him that he should not leave work because Mrs Clark was waiting for them in her office. The claimant said that he did not want to go and see Mrs Clark. Ms Kelly Hood and Mr Guy Denkinson observed both of them 'raising their voices' in the reception area and the claimant continuing to refer to falsified documents. Ms Hood said of the claimant:

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“Will is a new starter. He is good at his job, brilliant with residents, but Will wants to do his job properly.”

94. Ms Hood also recalled:

“I remember a comment, I think 4th floor shower room...She said to do all tiles but he said I don’t want to put my name down.”

95. Mrs Marcu went up to Mrs Clark’s office and said that the claimant was not coming to their meeting. She told Mrs Clark that the claimant was arguing with her and saying that she was doing ‘illegal things’. Mrs Clark told Mrs Marcu to go and fetch the claimant.

96. The claimant left the building and went to the car park. Mrs Marcu went to find the claimant in the car park to tell him that Mrs Clark was waiting for them both. The claimant refused to get out of the car and left the premises. Mrs Marcu then returned to Mrs Clark’s office and told Mrs Clark that the claimant had left work at around 2.45pm.

97. We were shown a copy of the communal toilet cleaning record for Floor 3 for the week commencing 20 April 2020 and note that no one initialled the records for any of 23, 24, 25 or 26 April 2020.

Saturday 25 April 2020

98. The claimant attended work on Saturday 25 April 2020 and performed his scheduled shift that day. The claimant said that he could attend work because Mrs Marcu was not working on that day.

Claimant’s grievance – Monday 27 April 2020

99. The claimant drove to work on Monday 27 April 2020. He said that when he arrived at work, he was unable to get out of the car because he was too upset to enter the building. The claimant telephoned Ms Nkoma and Mrs Clark. At the end of the call, the claimant was under the impression that Mrs Clark told him that she had checked the cleaning schedule for 17 April 2020 and that Mrs Marcu had not signed his initials. However, we find that the claimant was mistaken and Mrs Clark did not say that she had seen the cleaning schedule for 17 April 2020 at that point in time.

100. Mrs Clark recognised that the claimant was unhappy that Ms Marcu had initialled the schedules on his behalf and that he could not work with Mrs Marcu. The claimant also mentioned the altercation between himself and Mrs Marcu on 24 April 2020. Mrs Clark said that the claimant could work when Mrs Marcu was not at working. The next occasion was the weekend of 2 and 3 May 2020. The claimant denies that this was discussed. However, we have found that the claimant was aware that he was scheduled to work on 2 and 3 May 2020, because he emailed Ms Nkoma on 5 May 2020 stating that a colleague had told him that he *“would have been turned away at the weekend due to overbooking of agency staff”*.

101. The claimant said in his oral evidence that the ‘serious and imminent’ danger that he believed to exist at the time consisted of the potential spread of disease (including, but not limited to, Covid-19) through the communal toilets. He said that

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the communal toilets were marked as cleaned on the schedules but had not in fact been cleaned. The claimant did not raise any concerns regarding personal protective equipment available to staff.

102. The claimant also said in his oral evidence that the residents were the most at risk from the spread of disease. He said that he could not return to work because Mrs Clark had 'denied any forgeries' by Mrs Marcu on 27th April 2020. When asked why the risk to residents was any different on Saturday 25th April compared to on Monday 27th April 2020, he said that it was not. The claimant said that he thought wanted to raise his concerns with someone who was 'higher up', which is why he referred to the matter as 'whistleblowing'.
103. The claimant then sent an email setting out his grievance to Mrs Clark at 5.17pm on 27 April 2020. The claimant's grievance listed the events that the claimant said had taken place on 17, 23, 24, 25 and 27 April 2020 (the claimant accepted that some of the dates referred to in his email were incorrect). The claimant attached a photograph of the cleaning tasks for Room S2 dated 3 April 2020 to his grievance. He attempted to attach photographs of other cleaning schedules, however these photographs were too blurred to be legible.
104. Mrs Clark forwarded the claimant's email to the respondent Human Resources department (Manager Direct) on 28 April 2020 and asked to log it as a grievance. Mrs Clark also forwarded the claimant's email to Miss Ingle on the evening of 27 April 2020 and set out her own account of the events on 24 April 2020.
105. Miss Ingle responded to Mrs Clark, stating that Mrs Clark should speak to the claimant and Mrs Marcu regarding the claimant's concerns. Miss Ingle advised Mrs Clark:
"I don't see that it would need to be anyone else dealing with this as he mentions you but it's nothing bad, it's just that you were busy and he didn't wait around."
106. Miss Ingle also suggested that Mrs Clark could ask the claimant to work at another care home (Simon Marks Court) whilst it was being sorted out, if he was not willing to work in the Home. There was a vacancy that week for a cleaner at Simon Marks Court due to staffing shortages.

Mrs Clark's discussions with Mrs Marcu – Tuesday 28 April 2020

107. Mrs Clark then spoke with Mrs Marcu about some of the matters raised in the claimant's grievance and recorded their discussions in a management supervision form.
108. Mrs Clark showed Mrs Marcu the cleaning schedule for 3 April 2020, which the claimant said Mrs Marcu had initialled using his initials. They did not consider the cleaning schedule for 17 April 2020 or any other cleaning schedules. Mrs Marcu confirmed that she had initialled cleaning schedules on behalf of others in the housekeeping team, when cleaning tasks had been completed. Mrs Marcu said that she had initialled the schedules because they were required for audit and inspection purposes. She that this was common practice at her previous employer.
109. We accept Mrs Clark's evidence that the reason they did not consider any other cleaning schedules was because Mrs Marcu accepted that she had initialled

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schedules during April 2020 using someone else's initials. Mrs Clark told Mrs Marcu that she should not initial cleaning schedules on behalf of colleagues. She told Mrs Marcu to write a note at the bottom of the page stating who was on duty that day and that the schedule had not been signed.

Miss Ingle's message for the claimant - 27 April 2020

110. Miss Ingle phoned the claimant on the evening of 27 April 2020. The claimant did not answer his phone and Miss Ingle left the claimant a message, offering that he could work at another care home whilst his grievance was being investigated.

111. We find that the claimant did not return Miss Ingle's call because this is reflected in Miss Ingle's email to Ms Gorman on 30 April 2020. It is also reflected in the claimant's email to Mrs Clark at 3.44pm on 29 April 2020, when he referred to Miss Ingle's offer of work in another care home but did not suggest that he had called Miss Ingle back to take up that offer.

Further emails – 28-30 April 2020

112. The claimant and Mrs Clark exchanged further emails on 28 and 29 April 2020. There was some confusion between the two of them as to what documents Mrs Clark had seen and when.

113. The outcome of these email exchanges was that:

113.1 the claimant refused to speak to Mrs Clark and said that he would only communicate with her by email; and

113.2 the claimant sent an email to Mrs Clark on 28 April 2020 headed "Escalating to whistleblowing". The claimant also emailed Mrs Clark on 29 April 2020, stating:

"Also could you please tell me how I whistle blow internal [sic] as I can't get on the website with my details or do I do it to an outside body."

114. Mrs Clark asked Miss Ingle and Ms Gorman whether it was appropriate for her to continue to be involved in dealing with the claimant's complaints. She also confirmed to the claimant that the respondent was following the grievance procedure.

115. Miss Ingle emailed the claimant on the morning of 29 April 2020, noting that he had raised concerns regarding Mrs Clark and stating that she would contact him to discuss matters. She stated that she would deal with the claimant's concerns regarding Mrs Clark. She also said that if she still felt it appropriate, then Mrs Clark would investigate the claimant's concerns regarding Mrs Marcu.

116. The claimant responded to Miss Ingle's email on the morning of 30 April 2020, stating:

"I will put my concerns in writing by email to you and HR before close of play today. Laura avoided my issue and denied seeing it on Monday. In fact she denied knowing what the issue was. I was refused a 121 meeting with her and was told the meeting will involve Simona as I may have problems getting on with Simona."

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I believe I was lied to by Laura and Monday's conversation and she suggested I was in the wrong and had other issues.

At no point did Laura ever say if what you are saying is true that is unlawful instead I was told it might have been a little mistake. Even when Laura admitted seeing my initials forged for the first time yesterday there was no apology or agreement with my concerns that this was wrong. Just told that I had agreed to work this weekend, which I hadn't.

I cannot work in such an environment. I will send my complaint to HR and copy you in this afternoon.

I am sorry it has come to this as I really wanted to work in the care environment but if I don't highlight the incident it could happen again and again."

117. The claimant did not send any further emails to HR or to Miss Ingle on 30 April 2020 setting out his concerns.
118. We do not accept Miss Ingle's evidence that it was appropriate for Mrs Clark to carry out a grievance interview with Mrs Marcu. The claimant's email of 30 April 2020 clearly set out his perception of Mrs Clark's behaviour towards him. Miss Ingle could have spoken with Mrs Marcu by phone, if Covid-19 restrictions prevented them from meeting face to face.
119. Ms Gorman emailed to the claimant Mrs Clark's letter acknowledging his grievance on 30 April 2020 and attaching a copy of the respondent's grievance procedure. The claimant responded on 1 May 2020, stating that:

"I raised this to whistle blowing on the 28th as Laura Clarke had denied my signature was forged over telephone on 27th thought the evidence was always available to her..."
120. Ms Gorman responded later on 1 May 2020, stating that the respondent was dealing with his concerns in accordance with the whistleblowing and grievance policies, both of which required investigation by an appropriate manager. She also sent the claimant an invitation to a grievance investigation meeting with Miss Ingle on 4 May 2020. The claimant replied to these two emails, suggesting that the respondent was *"refusing to acknowledge my request of whistle blowing"* and that Miss Ingle was being 'very protective' of Mrs Clark.
121. The claimant also emailed Ms Gorman at 5pm on 1 May 2020 stating:

"There could have been corona disease on things signed that I hadn't cleaned."
122. The claimant stated in his oral evidence that he thought there was a risk to health and safety if Mrs Marcu initialled the cleaning schedule because he knew certain things had not been cleaned. He said that if his initials were on the cleaning schedule, then he could be *"responsible for someone being taken ill or dying"*
123. The claimant said that if someone came in who had the coronavirus, then residents, staff and any visitors could catch it if they entered a room which had not been cleaned (despite being marked on the cleaning schedule as having been cleaned).

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124. The claimant also said that he was particularly concerned about the residents' health and safety, noting that many of them had dementia and were very old and vulnerable. The claimant thought that if someone introduced the coronavirus into the Home, then it would *'go round like wildfire'*.

Claimant's absence – 27 April 2020 onwards

125. The claimant did not attend work at any time after his shift ended on 25 April 2020 up to and including his dismissal on 18 May 2020.

126. The claimant's next shifts (after 27 April 2020) were scheduled for 2 and 3 May 2020, both of which were dates when Mrs Marcu was not scheduled to work. The claimant did not attend work on those dates.

127. Ms Nkoma emailed a letter to the claimant dated 4 May 2020. The letter stated that:

127.1 the claimant had not attended work on 2 and 3 May 2020 and had not contacted the Home to explain the reasons for his absence;

127.2 his absence was currently being classed as unauthorised and that his absence would be unpaid with effect from 2 May 2020; and

127.3 he may be subject to disciplinary action, which could include dismissal, if his unauthorised absence continued.

128. The claimant responded to Ms Nkoma by email on 5 May 2020. The claimant said that he had refused to work for Mrs Marcu or Mrs Clark due to the concerns he had raised. The claimant also said that he was led to believe that: *"I would have been turned away at the weekend due to overbooking of agency staff"*. The claimant confirmed during his evidence that this was something a colleague had mentioned to him and it was not an instruction that any of his managers had given to him.

129. Ms Nkoma raised the claimant's email with Miss Ingle and Mrs Clark. Miss Ingle said that she had spoken with Ms Gorman. Miss Ingle said that they agreed that they needed to continue to follow the AWOL policy, even though the claimant had told the respondent that he did not feel comfortable working in the Home due to his complaints.

130. The claimant also contacted Miss Ingle about Ms Nkoma's correspondence. Miss Ingle said that this matter was separate to the claimant's grievance. She stated that the claimant was being treated as AWOL because he was not fulfilling his contracted hours and that he should contact Ms Nkoma regarding the matter.

131. The claimant was also scheduled to work on 6 and 7 May 2020. He did not attend work.

132. The claimant emailed Ms Nkoma on 7 May 2020, stating that he did not agree to work the weekend and stating again that he was 'led to believe' that he would be sent home if he had attended work on the previous weekend. The claimant said:

"I feel I should not work shifts for Anchor until management has resolved my whistleblowing issues".

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133. Mrs Clark and Miss Ingle discussed by email with Ms Gorman what they should do. They debated the risks of proceeding with an AWOL dismissal without first concluding his grievance. Miss Ingle stated that she thought that the claimant *'just seems to be calling the shots at the moment'* and that was making *'no attempt to work with us'*, having been offered different to shifts to those of Mrs Marcu and the opportunity to work in another home.
134. The claimant stated during his oral evidence that it was 'not safe' for him to work, even if Mrs Marcu was not at the Home, 'because management were falsifying records'. He said that he did not wish to work for a company which condoned such practice and that it was 'very unfair' to expect him to attend work whilst his complaints were being investigated.
135. Ms Gorman advised Ms Nkoma to send an email, recognising that the claimant had raised concerns which were under investigation and that it may be difficult for him to work with Mrs Marcu in the meantime. The email stated that it was important that the claimant worked his contracted hours and stated that they would ensure that:
- 135.1 the claimant did not have to work when Mrs Marcu was working; and
 - 135.2 that he could report to Ms Nkoma (instead of Mrs Marcu or Mrs Clark) if he required any support during his shifts).
136. Ms Nkoma's email also stated that the claimant had been assigned shifts on 11th May and 17th May 2020.
137. The claimant did not attend work again on 11 May 2020. Ms Nkoma attempted to contact him, but he did not respond. The claimant emailed Ms Nkoma and referred to his previous emails, in which he said that he would not work shifts for Anchor until his concerns had been addressed.
138. Following that email, Ms Gorman advised Ms Nkoma, Mrs Clark and Miss Ingle by email on the same day that:
- "I think we are now in a position to proceed to an AWOL dismissal. IF Laura is happy to end William's probation, I can draft a letter to issue tomorrow. We can then conclude his grievance post-employment."*
139. Miss Ingle responded, stating:
- "This is ok by me. I feel that we are all trying to do everything we can to resolve this and are getting nowhere."*

Grievance investigation meeting – 4 May 2020

140. Miss Ingle met the claimant on 4 May 2020 to conduct a grievance fact finding investigation meeting. We were shown copies of Miss Ingle's notes of that meeting and the claimant's comments on these notes.
141. During the meeting, the claimant and Miss Ingle discussed matters including:
- 141.1 the cleaning tasks that the claimant said were not completed – Miss Ingle asked the claimant which cleaning tasks he believed he had not completed, other than bathrooms not being cleaned or tiles wiped down.

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The claimant said that it was difficult to do this without the sheet to hand. He also questioned why the detail of the cleaning tasks were relevant to his concerns regarding Mrs Clark and the ‘forged signatures’;

- 141.2 why the claimant waited until his next shift to raise any concerns with Mrs Clark – the claimant said Mrs Marcu asked him to sign the sheet at 3pm (the end of his shift) on Friday and that he wasn’t due back into work until the following Thursday;
 - 141.3 the events that took place on 23rd and 24th April 2020; and
 - 141.4 the claimant’s concerns regarding Mrs Clark.
142. The claimant also said during the meeting that he had been told by other members of the cleaning staff that they had been asked to sign things on other people’s behalf. However, he refused to provide their names to Miss Ingle.
143. The claimant later summarised his key complaint in his email commenting on Miss Ingle’s notes of the meeting as follows:

“As you stated in your opening question/statement my complaints seem “quite vague” I will summarise them in one sentence.

I watched my manager put my initials on documents for important work that she knew wasn’t done and when I reported it to the care home manager she denied this was happening and wouldn’t see me.”

Grievance interview – Mrs Clark and Mrs Marcu

144. Miss Ingle asked Mrs Clark to interview Mrs Marcu as part of the grievance investigation. She instructed Mrs Clark as to the points that Mrs Clark should raise with Mrs Marcu. She also sent Mrs Clark a copy of the notes of her meeting with the claimant on 4 May 2020.
145. Mrs Clark met with Mrs Marcu on 12 May 2020 and provided a note of their discussions to Miss Ingle. Mrs Clark also told Miss Ingle that Mrs Marcu was very upset and was crying during their meeting. Miss Ingle did not speak to Mrs Marcu directly.

Grievance meeting with Miss Ingle – 14 May 2020

146. Miss Ingle invited the claimant to attend a grievance meeting on 14 May 2020 in order to provide the claimant with the outcome of his grievance. However, the claimant provided additional information to Miss Ingle during the meeting. Miss Ingle therefore adjourned the meeting, so that additional investigations could be undertaken.
147. There was some confusion at the start of the meeting as to which of the claimant’s complaints were considered by Miss Ingle as part of the grievance process. During the meeting, the claimant said that there were witnesses to the incident with Mrs Marcu on 24 April 2020. Miss Ingle said that she would need to carry out further investigations into this witness evidence before concluding the grievance.

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148. Miss Ingle emailed Ms Gorman later that day, stating that she had not seen the claimant's grievance of 27 April 2020 previously and checking whether the claimant had provided any other information regarding his concerns.
149. Miss Ingle said during her evidence that she did not read the claimant's email of 27 April 2020, although she accepted that Mrs Clark had sent the claimant's email to her. We accept Miss Ingle's evidence that up until that date, she had not read the claimant's grievance email of 27 April 2020, although she had read Mrs Clark's email later that day. We accept Miss Ingle's evidence that April 2020 was a particularly difficult time for care home providers, given the staffing and hygiene challenges posed by the Covid-19 pandemic, and that she may have missed seeing certain emails during this time. There was no reason for Miss Ingle to email Ms Gorman to say she had not seen the claimant's email of 27 April 2020 if she in fact recalled seeing that email.

Grievance interviews – Mrs Clark and further witnesses

150. Mrs Clark met with three witnesses named by the claimant regarding the incident on 24 April 2020 on 14 May 2020. Mrs Clark met with one further witness on 18 May 2020.
151. We have noted their key comments on the incidents in our findings of events on 24 April 2020 earlier in this judgment.

Claimant's dismissal

152. The claimant did not attend work on 11 May 2020. Ms Nkoma emailed a letter to the claimant on 14 May 2020, stating that:

"I do appreciate that you have recently submitted a grievance which is still being investigated by our District Manager, Mishel Ingle. Considering the circumstances, we have made a number of adjustments to support your return, namely:

- The change of your working pattern to prevent any shifts taking place alongside or while our Head Housekeeper is present in the home;

— The change of reporting lines so that you no longer report to the Home Manager during your shifts and can instead raise any concerns with myself;

— We have also offered you the opportunity to fulfil your contractual working hours at another one of our local homes.

As previously stated in my correspondence, your current period of absence is unauthorised and therefore unpaid. As you are in breach of our Attendance Policy and Procedure, I am writing to inform you that if you do not attend your next shift, as detailed below, we will be taking the decision to end your probation on this basis.

— Sunday 17th May 2020, 8am — 4pm"

153. The claimant replied on 15 May 2020 and said that he would attend work on 17 May 2020:

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"I will go to work on Sunday if you insist even though I have been damaged by Anchor. [I] will contact appropriate authorities today regarding the crime that was committed and the home's cover up."

154. The claimant also emailed Miss Ingle that day stating:

"As I have been told by Miriam that I will be sacked if I don't go in in Sunday I will go in on Sunday. I may see doctors today regarding anxiety due to the environment I'm being made to go to.

I do not feel I should have to go in because of what happened and while this is still unresolved. It has left me with uncontrollable anxiety.

This seems like a move for Anchor to wash their hands of my complaint as I would no longer [be] employed by Anchor. Shameful to sack someone while their whistle blowing case is unresolved and what I've been through. It just seems like punishment for whistle blowing.

Should I contact the police today regarding the signature. CQC regarding the experience and ACAS for employment law advice as I could be mentally unready to return to work and may just sit in the car park Sunday morning finding myself physically unable to enter reception. This would make me sacked then you could just drop the case.

I will try to be there Sunday because I have been threatened with the sack despite Anchor leaving this unresolved..."

155. Miss Ingle responded, stating:

"I am sorry that you are feeling unwell, if you are concerned that you are not fit for work I would suggest that you speak to your GP."

156. The claimant did not attend work on 16 May 2020. The claimant emailed Ms Nkoma on 16 May 2020 stating that:

"I do [not] feel well enough to attend work tomorrow. I do not feel strong enough to leave myself open to any potential bullying or conversations with anyone regarding this case. I do not feel safe in the environment and cannot work there until my complaint has been fully acknowledged, investigated and concluded..."

...an internal investigation is still going on and a legal investigation next week. Working with potential witnesses tomorrow may compromise my...case. Until the matter is resolved, leaving myself open to further bullying at the home makes it impossible for me to attend.

The law has been broken I [whistle blew] and no action was taken. Until you can prove to me that Anchor do not tolerate such practices I should not work for you. It would be a criminal [offence] for me to do so.

As mentioned before I was told I would be turned away the other weekend which you haven't [yet] confirmed or denied which also leaves me open to a wasted journey."

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157. Ms Nkoma took the view that the claimant was not actually unwell. Her view was that he was refusing to return to work until his grievance was resolved, because of the contents of his email of 16 May 2020.

158. Ms Nkoma wrote to the claimant on 18 May 2020, stating that he had failed his probation period due to his unauthorised absence. The letter was headed "Failed Probation" and stated:

"I am writing to confirm our decision to end your probation with effect from 18th May 2020 on the basis that you have had an extended period of unauthorised absence.

As per my previous letter, we have made several adjustments to support your return to the home. However, you have not given an indication of when you will be willing to return or how we can support you to do so. Your current period of absence has been unauthorised since 27th April 2020.

This absence is in breach of our Attendance Policy and Procedure and has had a detrimental impact on the operation of our home for both colleagues and customers.

Regarding your current grievance, Mishel Ingle, District Manager is continuing to conduct a thorough investigation into the allegations raised and will be confirming the outcome of this process in due course."

Grievance outcome

159. Miss Ingle wrote to the claimant by letter on 27 May 2020, setting out his grievance outcome. Miss Ingle stated that she had partially upheld the claimant's grievance. She concluded that:

159.1 Mrs Marcu should not have completed the cleaning schedule with the claimant's initials on 17 April 2020;

159.2 Mrs Marcu had behaved inappropriately towards the claimant on 24 April 2020, by following him in the Home and raising her voice to ask him to sign the cleaning schedule for that day's tasks. However, the claimant's reaction contributed to an escalation of events and witnesses recalled a 'heated' conversation during which both the claimant and Mrs Marcu had raised their voices;

159.3 Mrs Clark had responded to the claimant's concerns in a timely manner, but was unable to meet with the claimant on the morning of 24 April 2020 because she had unplanned urgent matters to attend to;

159.4 the claimant had alleged that other colleagues had been asked to falsify housekeeping records but the claimant had refused to name those colleagues and that Miss Ingle could therefore not investigate the matter.

160. Miss Ingle also noted that the respondent would be taking actions to manage Mrs Marcu's performance, including development of her communication skills and management capabilities.

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Claimant's appeal

161. The claimant appealed against the grievance outcome. However, he has not raised a complaint regarding that appeal and we have therefore not made detailed findings of fact relating to the appeal.
162. The claimant's email of 3 June 2020 setting out his appeal stated that: *"I find your conclusion unjust and wrong"*. He reiterated the points that he had raised in his emails and at his meetings with Miss Ingle, including:
- "I only refused to sign because there were things I hadn't done...I did highlight tasks that weren't being done....I was not touching all surfaces and tiles I was told to sign for and not given equipment or allocated time to do so. Which is why I refused to sign...I was bullied to sign and when refused my initials falsified in front of me. This is legal misrepresentation not me doing something wrong...*
- ...I had asked the care home manager only to communicate by email as she had denied the existence of any forged signatures and lied several times over the telephone. This was not refusing to communicate but trying to avoid further contradictions..."*
163. The claimant also stated that he disagreed with the grievance outcome during his oral evidence to the Tribunal because the respondent 'denied the existence of any forgeries'.
164. Ms Jill Wiseman (District Manager) heard the claimant's appeal on 24 June 2020 and upheld the original grievance outcome, noting that the claimant's grounds of appeal did not include any new evidence.

Respondent's internal emails – claimant's detriment allegations

165. The claimant submitted a subject access request to the respondent on 18 May 2020. In response, he received several internal emails exchanged between the respondent's managers and Ms Gorman after his employment had terminated.
166. The claimant complains that some of these emails amount to detriments (set out in Table B of the List of Issues set out above). He states that those emails provide evidence in support of his three detriment allegations that:
- 166.1 Miss Ingle, Miss Nkoma, Ms Gorman and Mrs Clark discussed him in negative terms;
- 166.2 Miss Ingle, Ms Gorman and Mrs Clark deemed him to be a troublemaker; and
- 166.3 Miss Ingle, Miss Nkoma, Ms Gorman and Mrs Clark were calculating how to end his employment, by seeking to show that he was AWOL because he raised concerns and refused to attend work until matters were resolved.
167. We have considered all of the emails that the claimant referred to in Table B, together with the witness evidence from the claimant, Mrs Clark, Miss Ingle and Miss Nkoma regarding the interpretation of those emails. Our findings on each allegation are set out below.

RESERVED JUDGMENT***Allegation 1 Discussions regarding the claimant in negative terms***

168. The claimant referred to the emails summarised below in support of Allegation 1.

Date	Email sender	Email recipients	Contents
7/5/20 4.09pm (p180A)	Miss Ingle	Mrs Clark and Ms Nkoma	<i>"He cannot choose to be off whilst this is looked into" – Miss Ingle states that the managers should follow the 'formal route' in managing the claimant's absence. She also states: "if he has issue in the future, will he choose not to work each time he is not happy?"</i>
7/5/20 4.46pm (p178)	Miss Ingle	Ms Gorman, Mrs Clark and Ms Nkoma	<i>"...I am happy to go with whatever, as long as we aren't pandering to him as he has had lots of opportunity to come in, I even offered him to work in another home, he listened to my message and made no attempt to work with us, he ignored any suggestion of him doing any hours anywhere and continued to hold us at ransom lol! He just seems to be calling all the shots at the moment."</i>
7/5/20 5.19pm (p178)	Ms Gorman	Miss Ingle, Mrs Clark and Ms Nkoma	<i>"...there's plenty of evidence us being reasonable and he is going to struggle to explain why he doesn't return after today's supportive message..."</i>

169. Miss Ingle stated during her oral evidence that:

169.1 the respondent was trying to get the claimant back into work and it was not fair for him to say he would not attend. She thought that the claimant could make the same argument every time he raised an issue or concern;

169.2 she felt that the respondent was doing all it could to support the claimant, but he was refusing to discuss ways in which he could return to work.

170. Mrs Clark said that she was copied into the emails because she needed to understand how the claimant was being managed because she needed to know, as Home Manager, if the claimant was returning to work or not. She did not discuss the emails with any of the other managers and did not respond to the emails referred to in any of the three allegations.

171. We have concluded that the respondent's managers did discuss the claimant in 'negative terms'. The wording of the emails clearly indicates that they took a negative view of the claimant's behaviour.

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Allegation 2 - deeming the claimant to be a ‘troublemaker’

Date	Email sender	Email recipients	Contents
7/5/20 4.12pm (p181)	Miss Ingle	Ms Gorman and Mrs Clark	<p><i>“Can I ask why we are allowing him unauthorised leave which would normally be addressed via awol or investigation as I made it clear to him during my initial email that he needed to work his contracted hours and he keeps getting around it?”</i></p> <p><i>“I think he’s going to cause a few issues once he is back in the home...”</i></p>

172. Miss Ingle stated during her oral evidence that she was referring to the claimant’s behaviour at that time. She said that the claimant was very angry with her and towards Mrs Clark and Mrs Marcu. Miss Ingle said that the claimant shouted at her during their meetings and that he was quite aggressive on the phone. She said that he apologised in the first meeting for being angry, but in the second meeting she had to ask him to calm down several times because she was unable to keep a note of what he was saying.

173. We also note Mrs Clark’s evidence in relation to Allegation 1.

174. We have concluded that Miss Ingle did view the claimant as a ‘troublemaker’. She was concerned that he was ‘getting around’ the need to work contracted hours and stated that she thought he was ‘going to cause a few issues’ once he had returned to work.

Allegation 3 – calculating how to end the claimant’s employment

175. The claimant referred to the emails below in support of his allegations.

Date	Email sender	Email recipients	Contents
7/5/20 4.21pm (p180)	Ms Gorman	Miss Ingle and Mrs Clark	<p><i>“...as he’s in a probation, we don’t need a disciplinary – we can fail his probation at a review meeting. I was aiming to have the grievance procedure completed first and demonstrate some support to mitigate the risk of unfair dismissal claims due to whistleblowing. I think it’s low risk, but I think it’s safer to try conclude the grievance first.</i></p> <p><i>We can proceed to dismissal now though, if you prefer.”</i></p>

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Date	Email sender	Email recipients	Contents
7/5/20 4.27pm (p179)	Miss Ingle	Ms Gorman, Mrs Clark and Ms Nkoma	<i>"I'm just worried that if he comes back and we conclude the grievance in say a week or so, we would then struggle to end his probation based on his awol as we have allowed him to work since?"</i>
7/5/20 4.39pm (p179)	Ms Gorman	Miss Ingle, Mrs Clark and Ms Nkoma	<i>"Being AWOL in probation is inexcusable but if Simona has behaved inappropriately, we should acknowledge that it would be difficult for him to continue working alongside her and support his return. It sounds like we have performance issues alongside the AWOL."</i>
11/5/20 2.59pm (p205)	Ms Gorman	Ms Nkoma, Mrs Clark and Miss Ingle	<i>"I think we are now in a position to proceed to an AWOL dismissal...We can then conclude his grievance post-employment."</i>
13/5/20 8.42pm (p224)	Ms Gorman	Miss Ingle	<i>"Yeah, it sounds like he is very much under the impression that he can refuse to work [...] while the grievance is ongoing... ...I think it will be fair to partially uphold the grievance and potentially include refusal to complete housekeeping records as part of the reason for dismissal..."</i>
14/5/20 7.56am (p235)	Miss Ingle	Ms Gorman	<i>"I really want to get this right to try to avoid him escalating this further. The grievance you sent me last night is one that I have never seen. I was [dated] 27th April.... Can you please check to make sure that you don't have anything else [from] him around the 30th as it may contain more info about Laura..."</i>

176. We note that during their oral evidence, the managers explained the emails as follows:

- 176.1 Miss Ingle said she did not suggest going through the AWOL route, although she was aware of what was going on. She said her emails consisted of her 'thinking out loud' – that they were 'just a thought', rather than a decided course of action. Miss Ingle also said that usually a probationary employee would have been dismissed 'a lot sooner' than the claimant was, under the AWOL policy;

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- 176.2 Miss Ingle's evidence was that Ms Gorman's role was to advise the Home on appropriate courses of actions and the risks involved, but that the decision was ultimately one for the Home to take;
- 176.3 the reference to 'performance issues' by Ms Gorman was an error – Miss Ingle, Mrs Clark and Ms Nkoma were not aware of any performance issues;
- 176.4 they discussed the timing of the grievance and the claimant's potential dismissal as part of the discussion around the appropriate course to take regarding the claimant's employment; and
- 176.5 Mrs Clark said that she could have commented on the discussions regarding the dismissal if she felt they were inappropriate. However, she felt that the procedure was appropriate. She said it was not acceptable for someone to keep refusing to attend work and that this was separate to the grievance issues raised. Mrs Clark the impact of the claimant's refusal to work was quite detrimental on the Home – the Home was running short of staff and had to keep getting agency cover which was difficult to manage.
177. We find that the managers discussed terminating the claimant's employment and the risks of doing so before concluding the grievance process. However, we find that the respondent was not 'calculating' how to dismiss the claimant under the AWOL policy. The respondent gave the claimant several opportunities to attend work before dismissal, despite believing that the probationary policy would have enabled them to dismiss him at a much earlier stage.
178. We note that Ms Nkoma's letters clearly set out the consequences if the claimant did not attend work for his scheduled shifts. We also note that Miss Ingle suggested that the claimant contact his GP if he were unwell, but he failed to do so.

APPLICATION OF THE LAW TO THE FACTS

DISCLOSURES, COMPLAINTS AND 'SERIOUS AND IMMINENT' DANGER

179. The claimant states that he raised the issues set out in Table A:
- 179.1 during his conversation with Mrs Clark on 23 April 2020; and
- 179.2 in his grievance on 27 April 2020, which was seen by Miss Ingle and Ms Gorman of the respondent's Human Resources department. We note that this grievance email was in fact sent to Mrs Clark, who forwarded it on to Miss Ingle (later that day) and to the respondent's Human Resources department (on 28 April 2020).

Did the claimant make any protected disclosures?

23 April 2020

180. We found that the claimant did mention to Mrs Clark that Mrs Marcu had initialled the sheet using his initials. However, their discussion on 23 April 2020 was brief and the claimant did not provide Mrs Clark with any further information on that date.

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181. We have concluded that the claimant's discussion with Mrs Clark on 23 April 2020 did not amount to a qualifying disclosure because the claimant did not disclose information tending to show (in accordance with s43B of the ERA) either:
- 181.1 that the health or safety of any individual has been, is being or is likely to be endangered; and/or
 - 181.2 that information tending to show that had been or was likely to be deliberately concealed.
182. The reason for our conclusion is that the claimant stating that Mrs Marcu had initialled the cleaning schedules using his initials was not sufficient in itself to tend to show either of the categories referred to above under s43B of the ERA.

27 April 2020

183. The claimant's grievance email of 27 April 2020 to Mrs Clark (which she forwarded to Miss Ingle and to Human Resources) contained further details of his concerns, including:

"Friday 17th April 2.45pm – I was told to sign sheets for things I hadn't done. I refused. The sheets were signed by head housekeeper in my initials. Was told if I want to work here I must sign."

184. We find that this email did amount to a qualifying disclosure for the following key reasons:

184.1 **Claimant's belief** – we accept the claimant's evidence that it was obvious to the respondent that the 'sheets' that he referred to consisted of the cleaning schedules. The reason why we accept this is that the claimant's only duties related to cleaning and he reported into Mrs Marcu, the head housekeeper. We accept the claimant's evidence that he believed that there were health and safety issues arising from the incorrect recording of cleaning schedules *'for things I hadn't done'*.

184.2 **Was that belief reasonable?** – we find that the claimant's belief was reasonable. The respondent regarded cleaning as one of the key tasks in the Home, which they audited on a regular basis by reference to the cleaning schedules. Miss Ingle understood that the claimant was referring to cleaning tasks not being undertaken, which is why she questioned the claimant on the specific tasks that he said had not been completed during the first grievance meeting. We also note that these events took place against the backdrop of the start of the Covid-19 pandemic in the UK. Cleaning and hygiene were publicly regarded as matters of paramount importance in infection control at that time.

184.3 **Public interest?** – we accept that the claimant believed that if the cleaning tasks were not carried out, this posed a risk of infection (both Covid-19 and other diseases) to the Home's residents, staff and visitors.

Did the claimant raise any health and safety concerns under s44(1)(c) ERA?

185. We find that the claimant:

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- 185.1 did not raise health and safety concerns on 23 April 2020; but
- 185.2 did raise health and safety concerns on 27 April 2020;
- for the reasons set out in relation to the question as to whether the claimant made a protected disclosure on those dates.
186. We find that those concerns were raised by the claimant using 'reasonable means'. The respondent accepted at the start of the hearing that it was reasonable for the claimant to raise health and safety concerns directly with his line managers, rather than to raise them via the respondent's national health and safety representatives' committee.

Did the claimant have a reasonable belief that there were circumstances of serious and imminent danger under s44(1)(d) ERA?

187. The claimant said in his oral evidence that the 'serious and imminent' danger that he believed to exist at the time consisted of the potential spread of disease (including, but not limited to, Covid-19) through residents, staff and visitors using the communal toilets. He said that the communal toilets were marked as cleaned on the schedules but had not in fact been cleaned.
188. The claimant also said in his oral evidence that the residents were the most at risk from the spread of disease. He said that he could not return to work because Mrs Clark had 'denied any forgeries' by Mrs Marcu on 27th April 2020. When asked why the risk to residents was any different on Saturday 25th April compared to on Monday 27th April 2020, he said that it was not – he said that he thought he could raise it with someone 'higher up' which is why he referred to the matter as 'whistleblowing'.
189. We find that the claimant was not in 'serious and imminent danger' in these circumstances at any time between 27 April and his dismissal with effect from 18 May 2020. We note that:
- 189.1 the claimant did not report Mrs Marcu initialling the cleaning schedules using his initials on 17 April 2020 until he was next working at the Home on 23 April 2020;
- 189.2 the claimant attended work on 25 April 2020, despite his altercation with Mrs Marcu on 24 April 2020, stating that he was able to work because Mrs Marcu was not on shift that day; and
- 189.3 refused to attend work after 27 April 2020 because he believed that Mrs Clark had 'denied the existence of any forged signatures and lied several times over the telephone', rather than due to any health and safety issues.

DETRIMENT ALLEGATIONS

190. There are three key questions that the Tribunal has to consider when dealing with the detriment allegations:
- 190.1 Did the respondent subject the claimant to the treatment alleged at Table B?

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- 190.2 By doing so, did the respondent subject the claimant to any detriments?
- 190.3 If so, were such detriments on the grounds of health and safety (under s44(1)(c)(i) and (d) ERA) and/or protected disclosures (the “**Alleged Grounds**”)?

The key issue under this question is whether the Alleged Grounds ‘materially influenced’ the claimant’s treatment by the respondent.

Did the respondent subject the claimant to the treatment alleged? If so, did this amount to a detriment?

Allegation 1 – discussing the claimant in negative terms

191. We found that the respondent did discuss the claimant in negative terms. The claimant regarded this as a detriment and a ‘reasonable worker’ would have also regarded this as a detriment.
192. However, we have concluded that the reason for this treatment was not due to any of the Alleged Grounds. The key reasons for our conclusion are:
- 192.1 the respondent was progressing its investigation into the claimant’s grievance during this period and regarded this as a separate matter to his continued absence;
- 192.2 the respondent had sought to support the claimant to return to work during the grievance investigation, including by: offering that he could work at another care home, scheduling him to work when Mrs Marcu was not on shift and enabling him to report to Ms Nkoma (rather than Mrs Marcu or Mrs Clark) if he needed any support during his shift;
- 192.3 the claimant refused to engage with any discussion about his return to work until his grievance was dealt with to his satisfaction; and
- 192.4 the claimant’s concerns around returning to work related to the potential impact on his mental health, however he had not sought medical advice on his condition despite Miss Ingle’s suggestion that he contact his GP.

Allegation 2 – deeming the claimant to be a troublemaker

193. We found that the respondent did regard the claimant as a ‘troublemaker’ because Miss Ingle’s email of 4.12pm on 7 May 2020 stated: “*I think he’s going to cause a few issues once he is back in the home...*”. The claimant regarded this as a detriment and a ‘reasonable worker’ would have also regarded this as a detriment.
194. However, the reason why the respondent regarded the claimant as a troublemaker was his continued refusal to attend work or to engage with any discussion about his return to work. It was not the Alleged Grounds. We note that:
- 194.1 all of the emails in the chain leading up to Miss Ingle’s email on 7 May 2020 discuss the claimant’s refusal to attend work;
- 194.2 we accepted Miss Ingle’s evidence that the claimant’s angry behaviour towards her and the other managers were causing communication problems; and

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- 194.3 the only mention of the Alleged Grounds in the email chain was in the claimant's email to Miss Nkoma at 2.56pm that day.

Allegation 3 – calculating how to end the claimant's employment due to AWOL

195. We found that the respondent was not 'calculating' how to end the claimant's employment due to AWOL, for the reasons set out in our findings of fact. We have therefore concluded that this alleged detriment did not take place.

AUTOMATIC UNFAIR DISMISSAL ALLEGATIONS

196. We have concluded that Ms Nkoma reached the decision to dismiss the claimant, but that she was influenced in her decision-making process by Ms Gorman and Miss Ingle (as demonstrated by the emails that they exchanged).
197. We have concluded that the reason or principal reason for the claimant's dismissal was neither:
- 197.1 the health and safety concerns that he raised; nor
 - 197.2 his protected disclosure;
- in both cases, as set out in his grievance email to Mrs Clark on 27 April 2020.
198. The key reasons for our conclusions are:
- 198.1 Ms Nkoma was consistent in her written and her oral evidence that the reason for the claimant's dismissal was his ongoing refusal to attend work, rather than his health and safety complaint or his protected disclosure. Miss Ingle, Ms Gorman and Mrs Clark were also of the view that it was appropriate to dismiss the claimant due to his ongoing refusal to attend work;
 - 198.2 the process that the respondent followed in dismissing the claimant did not fit neatly within its unauthorised absence policy because the respondent was in contact with the claimant throughout his absence and the claimant had explained why he was refusing to attend work. However, the claimant's managers reminded him on several occasions that he must work his contracted hours. The letters that Miss Nkoma sent to the claimant clearly warned him that he would be dismissed if he continued to refuse to attend work whilst his grievance was being investigated;
 - 198.3 the claimant was aware of the risks of refusing to attend work, as evidenced in his email of 15 May 2020 when he stated that he would attend work despite being 'damaged' by the respondent. He later changed his mind, as set out in his email of 16 May 2020;
 - 198.4 the claimant did not seek medical advice regarding his mental health, despite Miss Ingle's suggestion on 15 May 2020 that he contact his GP if he was unwell;

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- 198.5 the respondent did discuss the risks around dismissing the claimant before his grievance had concluded, but it is commonplace to seek HR advice on dismissals in any organisation. In any event, the respondent continued at the same time to investigate the claimant's grievance and had interviewed all apart from one witness at the time of the claimant's dismissal;
- 198.6 as a matter of good practice, the respondent should have concluded the grievance process before dismissing the claimant. However, the grievance outcome letter, which partially upheld the claimant's grievance, considered his complaints and the evidence obtained from the investigation in detail; and
- 198.7 we also note that the claimant stated in his appeal that he regarded the grievance outcome as 'unjust and wrong' and reiterated the points raised in his original grievance. The claimant also stated that he disagreed with the grievance outcome during his oral evidence to the Tribunal because the respondent 'denied the existence of any forgeries'. However, the claimant did not provide any new evidence for consideration at his grievance appeal.

CONCLUSIONS

199. The claimant's complaints of detriment relating to:
- 199.1 protected disclosures;
 - 199.2 health and safety concerns; and
 - 199.3 serious and imminent danger to health and safety;
- fail and are dismissed.
200. The claimant's complaints of automatically unfair dismissal relating to:
- 200.1 protected disclosures;
 - 200.2 health and safety concerns; and
 - 200.3 serious and imminent danger to health and safety;
- fail and are dismissed.

Employment Judge Deeley
12 March 2021

JUDGMENT SENT TO THE PARTIES ON
12 March 2021

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