Case Number: 3329308/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Gary Pammen	**v**	Jeesal Ackman Care Corporation Ltd. (Hospital Division)

Heard at: Bury St Edmunds **On**: 30 & 31 July 2018

Before: Employment Judge Laidler

Appearances
For the Claimant: In person
For the Respondent: Ms G Roberts, of Counsel

JUDGMENT

1. **The claimant did not make protected disclosures within the meaning of section 43A of the Employment Rights Act 1996.**

2. **The claimant did not reasonably believe there were health and safety concerns within the meaning of section 44 (1) c), d) or e) of the Employment Rights Act 1996**

3. **In any event the claimant was not treated detrimentally or dismissed for raising such concerns and all claims are dismissed.**

RESERVED REASONS

1. This is the claim of unfair dismissal of Gary Pammen, received on 7 December 2017. The claimant alleged that he had raised a number of concerns with the company which were not treated seriously, that he was then treated as absent without leave, (AWOL), and dismissed at a probationary hearing. He stated, *"I believe the company removed me to avoid having to conduct the serious investigations."*

2. In more detailed grounds of complaint attached to the ET1 the claimant set out a list of disclosures which he alleged were made under the Employment Rights Act 1996 and which, *"afforded him protection against detriment and dismissal".* These he asserted amounted to protected disclosures under section 43B of the Employment Rights Act 1996, (ERA) and went to show that the health and safety of an individual had been, or is being, or is likely to be endangered, and / or that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject. The claimant relied upon section 47B and section 103A, the rights not to suffer a detriment, or to be dismissed for making such disclosures.

2. The claimant also relied upon section 44(1)(c) and section 100(1)(c) having he alleged raised such health and safety concerns, within the meaning of those provisions.

3. The claimant invoked ACAS Early Conciliation and the dates on the certificate are 17 October and 17 November 2017.

4. In its response the respondent defended the claims stating that the claimant had been dismissed for failing to attend work and for failing his probation period. He had only attended for one day of work. It was denied that he made any protected disclosures but further that he had not been treated detrimentally in any way whatsoever had he done so.

5. Standard directions were made for the listing of the case which was to be heard on 19 March 2018 in the Norwich Employment Tribunal.

6. By letter 23 February 2018, the respondent's representative applied for that hearing to be vacated and a two-day hearing to be relisted. The respondent intended to call three witnesses, the claimant was in person and it believed one day would be insufficient to conclude the case in its entirety. The matter was therefore relisted taking account of the parties' dates to avoid for the 30 and 31 July 2018.

7. There had been some difficulties between the parties over documents and by letter of 24 July 2018, Employment Judge Postle directed that *"it is not for the respondent or a claimant to decide a document is not relevant*. *The respondent must add the claimant's additional disclosure of documents to the joint bundle without further delay*." At the outset of this hearing, the claimant asserted that there were still some documents which had not been included and these were handed up in a separate plastic wallet. They contained a further index, an extract from a BBC on-line website headed, *"Face down restraint continuing in NHS mental health wards"*, a letter to the claimant from the Care Quality Commission which appeared to deal with a Freedom of Information request, and a paragraph which appeared to be from a website about a patient sectioned under the Mental Health Act. There was also a page of what appeared to be from the CQC assessment of the respondent's home in 2017, (although this is not clear

from the page itself), and an extract from the claimant's contract of employment.

7. At the outset of the hearing the Judge raised with the parties that under the Employment Tribunals Act 1996 it appeared that as this was a case in relation to which the claimant raised detriment claims, the tribunal should sit as a full panel, namely a Judge and two non-legal members. The position was explained to the claimant and counsel for the respondent took time to consider the position herself. She agreed that it did not appear to come within the jurisdictions in relation to which a Judge could sit alone but suggested that the parties may be prepared to provide written consent under section 4(3)(e) so that the case could proceed. The position was explained fully to the claimant who was prepared to give that consent and the signed consent order that has been retained on the tribunal file. The claimant specifically stated that if the case could go ahead he would be 'more than happy to do so'.

8. There was then a discussion of the issues in the case.

The issues

9. The claimant raised concerns which he says amount to protected disclosures being matters of health and safety and a failure to comply with legal obligations. These were also matters, he asserts, that were harmful to health and safety that he brought to his employer's attention. He relies on matters raised with his email of the 30 August 2017 headed 'Issues of Concern'. It became apparent during this hearing that he also relied on a document headed 'Summary' and attached to his email of the 6 September 2017.

10. He alleges that as a result he was subjected to the following detriments:

    10.1 That he was treated as absent without leave;

    10.2 That he was subjected to a probationary review hearing, whereas if the respondent was treating his absence without leave as gross misconduct this should have been dealt with under their disciplinary procedure;

    10.3 His dismissal.

11. The judge then took time to read the statements which were taken as read and the witnesses cross examined on them. There was also a bundle of 404 pages, (in addition to the claimant's extra documents set out above), but it was not necessary for the tribunal to consider a vast majority of those documents.

12. The tribunal heard from the claimant and from the following, on behalf of the respondent:

12.1 Perry Hamilton, formerly Human Resource Manager for the respondent;

12.2 Vivienne Moore, Deputy Ward Manager;

12.3 Andrew Gordon, Director of Business Development, Communications and Training.

13. At the outset it is necessary to state something about credibility and the way the witnesses gave their evidence. The respondent's witnesses all gave their evidence in a moderate, fair and honest manner designed to assist the tribunal. Vivienne Moore and Andrew Gordon had extensive experience of working as nurses with people with learning disabilities. Ms Moore is a qualified nurse and specialised in learning disabilities and has worked in other hospitals for those with such prior to joining the respondent in 2013. Mr Gordon had also been a nurse specialising in learning disabilities as well as a university lecturer in learning disabilities and mental health. He was at the University of East Anglia as a lecturer before joining the respondent as a director four years ago. They clearly had a wealth of experience between them. The claimant on the contrary had never worked in the care sector before. He had undertaken three weeks of training before he commenced employment with the respondent. He worked for them for one day, yet he believed he knew far more about the role and running the home than they did. He behaved at this hearing in a similar manner to the way in which Mr Hamilton found him at the review meeting when he talked over him. The Judge on several occasions had to ask the claimant to lower his voice as the level at which he was speaking was becoming more and more intimidatory. He seemed to have very little empathy for the patients at the hospital who were there with learning disabilities and under the care of multi-agency teams, in certain circumstances led by a psychiatrist. He continued to call them, *"dangerous"* when this was something that Mr Gordon had picked him up on after the appeal and set out in his appeal outcome letter, that they were actually vulnerable adults under regulated and legal conditions and under no circumstances would they describe them as dangerous. He stated in his outcome letter of 6 October 2017, that he found the claimant's use of the terminology unacceptable and that the services provide care assessment and treatment of the individuals described as having, *"behaviours that challenge"*.

14. The Judge also had to remind the claimant, on numerous occasions throughout the hearing, that the issues that he wanted to raise were not within the ambit of these Employment Tribunal proceedings. The role of the tribunal was, as set out in the issues above, to determine whether the claimant had raised protected disclosures or matters related to health and safety and whether if he had, within the meaning of the Employment Rights Act 1996, he had been treated detrimentally and / or dismissed. The claimant appeared to wish to enlarge the hearing into virtually a public enquiry on the workings of the respondent and how the concerns he raised

had been investigated. The claimant was reminded throughout that that was not the role of this tribunal. Where the evidence of the claimant conflicted with that of the respondent's, the respondent's evidence was to be preferred.

The facts

From the evidence heard, the tribunal finds the following facts:

15. The claimant made much, as indicated above, about the type of hospital that he was employed at by the respondent. He took the tribunal to an extract from the website of the respondent and this described the Jeesal Group as having been established over 30 years ago by those who had, *"dedicated their lives to providing person centred care for people with learning disabilities".* The claimant also wished the tribunal to examine the CQC reports and it could be seen from that of the 16 February 2018, that the overall rating had been good. The way that the CQC summarised the services provided was as follows: -

"Jeesal Cawston Park provides a range of assessment, treatment and rehabilitation services for adults with learning disabilities and autistic spectrum disorder. The patients receiving care and treatment in this service have complex needs, associated with mental health problems and present with behaviours that may challenge.

The service is registered with the CQC for the assessment or medical treatment for persons detained under the Mental Health Act 1983 and the treatment of disease, disorder and injury."

16. The claimant explained to the tribunal that he had run two electrical companies when he was younger and then had been the head supervisor of a security firm. He had never worked in the care sector. He was attracted to the respondent as it was two minutes from his home and he believed the respondent had a good record of promoting from within. As stated in his ET1: -

"Jeesal offered great career prospects. I am naturally a caring person and I envisaged a job in management there, which I had hoped would have been within a relatively short time having had previous experience of company management and supervisory positions. Being as I am almost 57, I was looking forward to long term and sustained employment providing for my family through to retirement".

The claimant was to be paid £8.46 per hour and it seems highly unlikely that he would have very quickly worked his way up to management. This is another matter that the tribunal has considered when concluding that the claimant's evidence lacked credibility.

17. There is a dispute as to the date of the claimant's interview. Vivienne Moore and Jim Jacques produced interview questions in tabular form on which they had written the actual responses. They record the date of the interview as the 7 July 2017. The offer letter to the claimant was 12 July 2017. It provided his start date as 7 August 2017.

18. The claimant in his witness statement was adamant that these questions were not filled out on the day of his interview, *"as they were not there"*. He asserts that, *"a notepad on which notes were taken by Jim Jaques, were later transferred and altered to fit a company agenda to make it appear I was told about, "challenging behaviour" and shifts which I, "happily" accepted on the day of the interview. Despite company claims there were no mention of shifts on the day, the questionnaires don't mention 12 or 2 hour. Questions were asked, but they were a variant on the actual ones seen on the papers".*

19. The tribunal accepts Ms Moore's evidence that the interview took place on 7 July and that she did not fabricate her notes of that interview. Nicholas Hall, recruitment officer of the respondent wrote and offered the claimant the position in an email on the 7 July 2017 at 15.11. The claimant replied on the 7 July 2017 to Nicholas Hall stating 'Thank you so much. Look forward to working for the company.' When this document was referred to in Ms Moore's evidence, the claimant put it that she had been dishonest in dating the interview forms the 7 July. The tribunal accepts her evidence that she had not been at all and that they had called Nicholas Hall straight away to tell him that they had offered the claimant the job there and then. She then sent the documents to Nicholas. The claimant was told at the interview he had got the job.

20. When pressed by the Judge the claimant endeavoured to explain why Ms Moore would have altered the interview records. It was on the claimant's case to try and justify the shifts that he was to work and to justify that there was no proper investigation of his complaints and no complaints procedure. When asked by the Judge how the change of date would help the respondent in that respect, the claimant said he had told Mr Hamilton that he was given no information with regards to shifts, so he knew this. To justify the shifts, they have put the interview date before his conversation with Mr Hamilton. They didn't realise he had the interview on the 4th and put it on the 7th.

21. Ms Moore explained in cross examination, and the tribunal accepts that they did explain to the claimant that there are shifts to be worked and they would be long days and nights. The respondent's shift pattern is a long day and night and not a day shift and afternoon shift and the tribunal is satisfied that it would be important to make that clear at interview. The claimant agreed to that. The claimant was asked if he had any questions and as there were no questions then nothing could be put on the page of the interview questionnaire which called for that (page 116).

22. The claimant entered into a written contract of employment, providing that his employment commenced on the date in the schedule which was 7 August 2017. It did provide he would be working a *"minimum"* of 37.5 hours per week.

23. The first six months of the employment were probationary and could be extended for up to a further six months at the employer's absolute discretion. The company reserved the right to extend the employee's probationary period and to terminate the employment during, or at the end of the probationary period with one week's notice.

24. There was a specific clause headed, *"hours and duties of the employee"* which provide as follows:-

> *"4.1 The normal working hours for the Employee shall be those set out at item 5 in the Schedule hereto. By virtue of the employee's position of responsibility and seniority, the employee should expect to work additional hours outside these hours, in a variety of situations, to ensure the proper performance of his / her duties and the proper supervision of the employee staff. The employee should be aware that his / her hours, by virtue of the nature of the employer's business, will need to operate over a 24 hour period and are unlikely to follow a guaranteed pattern."*

25. The rate at which the claimant was to be paid was set out in the schedule, which was £8.46 per hour. In clause 5.3 it was made clear that the employee would be entitled to extra payment in respect of hours worked outside normal working hours remunerated at the employer's basic rate. The employer would provide as much notice as possible if over time requirements. However*, "it is hereby acknowledged and agreed that there may be occasions (by virtue of the nature of the employer's business) that such prior notification is unable to be given and the employee is expected to be flexible in this regard".*

26. This contract was signed by the employer on 12 July and by the claimant on 14 July. The claimant has at no time suggested that this document did not represent the contractual terms entered into between himself and the respondent.

27. In an associated job description, the claimant's job title was stated to be support worker.

28. In the person specification, again signed by the claimant on 14 July, it provided that one of the essential criterion was to, *"Help patients with transferring and lifting, raising patients as required. The post holder will be expected to apply restraints or other approved physical intervention techniques as directed."*

29. Regarding the claimant's hours the tribunal accepts the evidence of Perry Hamilton, then the Human Resources Manager, when he explained to the

tribunal that the employee's hours would average out at 37.5 hours a week as there would be three shifts one week and four the next.

30. The claimant queried with Mr Hamilton, in cross examination, that in his letter to him of 4 September 2017, Mr Hamilton had stated: -

"Your contracted hours per week are clearly defined in your contract of employment as 37.5 hours per week. There is no set work pattern defined in your contract of employment, nor is there any legal requirement for this to be defined; companies regularly withhold specific work patterns from contractual hours to enable a higher degree of flexibility in their workforce. You have made reference to your annual leave entitlement being 28 days, (inclusive of bank holidays), with a day being defined as 7.5 hours per day. It is intended that shift workers receive the equivalent of 28 7.5 hour days as their annual leave entitlement. However, your concerns have highlighted that there is no specific statement in the contract to communicate this to employees; in the interests of best practice this is being addressed with an amendment to the contract."

31. Mr Hamilton explained to this tribunal, as he had in his email, that the contracts were designed to be used across all locations and that annual leave was the equivalent of 28 x 7.5 hour days.

32. On commencing employment, the claimant underwent three weeks of offsite training from 7 August to 25 August 2017. The tribunal accepts the evidence given by Mr Hamilton that this is a robust training course specifically including training on the management of violence and aggression. The training included 'breakaway' training for such instances of violence, safe-hold techniques and discussions on the nature of vulnerable adults with mental health issues and learning disabilities. The claimant passed the course and attended for his first day of work on 28 August 2017.

33. The next day, 29 August 2017, was the claimant's scheduled day off.

34. In her witness statement Ms Moore gave an account of the claimant's attendance at work on the 30 August. The tribunal accepts this evidence. The claimant attended for work at 07.30 and asked other staff if Ms Moore was in. When told she did not start until 9.00 he left site, leaving the other team members short of staff as he was due to be part of the numbers for that day.

35. The claimant returned at 9.30 and asked to talk to Ms Moore. He explained to her that he had spoken to his partner and that he could not work long days and that 'the job was not for me'. He accepted in cross examination that if he had to work a 12 hour shift it was not a job he wanted. Ms Moore said she could speak to HR and see what they could do. They briefly discussed looking into the possibility of alternative roles. The claimant accepted in cross examination that she mentioned a gardening role.

36. Ms Moore acknowledged that the claimant had said he could not work with dangerous patients. She explained that they were not dangerous and discussed the training he had had. The claimant said words to the effect that he had nothing against Ms Moore but he could not put his life at risk by working with these patients.

37. The claimant then handed back his security badge. He accepts he did that but states he did it as having worked in security he considered it appropriate to do so as he did not know when he would be back. The claimant left telling Ms Moore he would email HR and copy her in with his resignation. She relayed the conversation and the claimant's resignation to Nicholas Hall. The tribunal is satisfied that Ms Moore genuinely believed that the claimant did not want the role of support worker and had resigned.

The claimant's email, 30 August 2017.

38. This email was sent by the claimant at 11:51 hours and needs to be set out in full: -

"Hi Nicholas,

I have just spoken to Vivienne. She told me she had mentioned the shift at the original interview. It wasn't made clear to me then as I wouldn't have raised the issue on day one. Do you have a recording of the interview perchance? I certainly wouldn't have accepted the job on those terms. Clearly there is no mention of the shift of 12 hours in the contract. The holiday clause clearly says 7.5 hours and 12 is not specified. I understand from Vivienne that they (bungalows) only have a 12 hour shift pattern. I raised a couple of concerns with Vivienne I have about the safety of the work. In view of the nature of the patient's unpredictability. Vivienne said the patients are 'not dangerous' only G who is in seclusion (my choice of words not Vivienne), but free to move within bounds. I pointed out his jumping over the fence was a real issue and the fence should be raised. She assured me this was about to happen. Yesterday by a support worker I was told it had been mentioned but was not being dealt with. I assume he was not aware the work is about to be done. We also discussed E. Vivienne told me he warns people he is going to hit them if he doesn't like them, which I found surprising in view of what I had been told previously by a member of staff. We also discussed the situation of myself being left alone with D whilst the support worker cut up his food. Vivienne felt I should have gone with the worker and cut up the food. I was told to watch D in his room by the support worker. I was clearly left in a vulnerable position. We clearly feel differently about the danger represented by the patients. Vivienne pointed out because I had MVA training this enables me to cope if any situation arises. Because of the dangers and shift patterns the job of support worker is not suitable. However, I am open to another position within the company but something with more suitable hours and without the high risks attached.

The recollection of my conversation with Vivienne is accurate, if not word for word but a generalised overview. I have covered the important issues raised. Vivienne had NOT seen my list of concerns at our brief meeting but asked to be kept up to date on my situation. Hence, sending her a copy of this email.

I have enclosed a list of concerns.

I strongly feel the risks should be made a point of reference in your Job Description. Contract hours should also be clearly defined on your contract of employment. And before you even get offered the position giving informed choice. If you feel they are clearly defined could you please give me the points of reference.

Yours Sincerely,

Gary"

It is of note that the claimant did state to Mr Hall that in view of the dangers and the shift pattern the job of support worker was not suitable, which is consistent with Vivienne Moore's evidence.

39. With that email the claimant sent a document headed, Issues of concern: -

"Issues of concern

1) Dangerous patient G sometimes jumps the fence – Fence should be made higher. At present it is keep an eye on him and if he jumps over use a CODE RED.

2) One patient I was told killed a staff worker.

3) Another patient physically assaulted a member of staff knocking him to the ground. Police were called and a Policeman assaulted. I spent sometime with this patient myself again unaware beforehand of his tendency to violence.

4) One person at training spoke of her assault by a patient telling me she took the person to court.

5) At training you were told basically "you take a punch for the team". This is totally unacceptable.

6) I raised the issue during training of how much force as a support worker you could legally use should someone be strangling a member of staff and that person was in imminent danger. I never did get the question answered.

7) Not made aware in contract that there is a very high risk of physical assault. The dangers of being left alone with the patient are very

obvious. To minimise the risk with a person prone to violence and unpredictable behaviour a two person team would be more sensible.

8) On day one I personally was left on my own with no phone, no alarm with patient. Staff member was preparing his meal while I sat alone with him. I had no way of knowing the danger I was in. Shortly afterwards we took patient out for a walk when he suddenly and for no apparent reason turned very aggressive and abusive. We kept three arms **[' deleted]** length away for safety. I was **not** made aware this could happen when alone with him.

9) Dangers of being on your own in the job with a patient as a support worker for up to two hours (sometimes dependant on staffing levels much longer) who represents a very high risk. You can prepare yourself by studying the patient care plan to some extent, but it is the unpredictability which makes you very vulnerable.

10) Lack of breaks seems to be an issue. Staff I spoke to would take their lunch break whilst eating with the patient.

11) Very long hours and fatigue would certainly be an issue.

12) A support worker in this environment not only has a demanding role but at times a dangerous and high risk one. This should be made clear before employment commences."

40. Prior to having sent that email, on the day of his induction the claimant had shadowed a senior support worker. He had met a patient D and was left with D whilst the support worker cut up his food. The claimant, in his witness statement, said that the support worker then sat and ate his food with the patient, *"which I felt was unacceptable"*. He accepted in cross examination that the door to the kitchen was left open and the other worker approximately 30 feet away. They then took the patient for a walk, *"where he became very aggressive and abusive"*, the claimant alleges he was told by the support worker to, *"stay three arm's length back for my own safety. I quickly realised how very fortuitous I was not to have been attacked when left alone with him".*

41. The claimant then asserted he was left with another patient E who the support worker **~~said was~~** (a really nice man) **~~but~~** told him how, he had *"hit him knocking him to the ground and then assaulting a police officer attending the incident for refusing E an energy drink".*

42. The claimant also stated in his witness statement, he was shown another patient G behind, *"a door with a slot cut out to feed him. I was told by manager Moore, to look at a 24 hour monitor specifically for him. I was told if he jumps over the fence you must immediately sanction a "code red"."* The claimant alleged a senior support worker had told him that the

issue of G jumping the fence was mentioned but not dealt with. The claimant, *"couldn't believe this wasn't being done as a matter of extreme urgency. Patient G was clearly dangerous, which is why he is locked up with a slot cut out of the door to feed him. His escaping place staff, general members of the public and the patient himself at great risk. The dangerous Cawston Road is a mere stone's throw away. The dangers of this and the other things mentioned were obvious."*

43. Vivienne Moore explained that she had met the claimant that morning and he had said he was happy with his induction. She had asked the senior support worker to give him a folder that contained all the patient care plans and asked the claimant to read the individual treatment and support plans. Later that day, she had another discussion with the claimant and explained his shift pattern. She explained that during the first week when he was supernumerary he would be working 9 to 5 but then he would normally be working long days which meant 0730 hours to 1945 hours. The claimant had told her that was not in his contract.

44. Ms Moore explained in cross examination that she expected the claimant to take time to read the care plans over the week that he was 'supernumerary'. She would not have expected the claimant to read all the care plans that first day. It was a continuous thing to do. They must be read during the first five days when they are shadowing another support worker.

45. Although not addressed to her, the claimant forwarded his email to Mr Hall to Vivienne Moore a few minutes after the initial one was sent.

46. Mr Hall did not immediately reply, and the claimant wrote to him again on the 4 September asking that he be informed of the progress with regard to the matters raised.

47. The claimant had written another email on 29 August when he stated to Mr Hall he was disappointed to learn that his 37.5 hours would include shifts of 12 hours long. He stated that his contract did not stipulate that. This would create difficulties to him in juggling with the hours that his wife worked and their child's schooling. He asked if there was anything that could be done, *"part-time or something more suitable to change the shift pattern"*. He looked forward to his comments.

48. Mr Hamilton, in his witness statement, stated that he received notification via email from Nicholas Hall on 30 August of an email received from the claimant. At the same time as sending the email, Mr Hall had verbally told him that his understanding was that the claimant had resigned. He asked Mr Hall how he had come by that information and he explained it was by a telephone call with Vivienne Moore. Mr Hall had recounted to him how Ms Moore had explained her interaction with the claimant on that day and that this included the claimant stating the job was not for him and that he had returned his identification badge and keys. It was indicated that the business was awaiting written confirmation of the claimant's resignation.

49. Mr Hamilton believed that the claimant had resigned and that as the majority of the issues of concern raised by the claimant did not fall into the remit or responsibility of human resources, responding to the claimant was not a priority. When he received the claimant's chasing email of 4 September, he then replied.

50. Mr Hamilton stated in that reply that he would like to apologise for any occasions when the claimant felt that his safety, or the safety of other staff or patients, may have been compromised. The aim of the respondent is to take every available measure to ensure that the staff are well supported and that patients receive the highest possible quality of care and he therefore said he would ensure that the procedural concerns were passed to the quality assurance team.

51. Mr Hamilton then dealt with the contractual hours point as already set out above, issues about lack of breaks and long hours and then concluded that his understanding was that the claimant had submitted his resignation and left the employment of the respondent. He still said that he would, as detailed above, pass the claimant's concerns to the relevant department for investigation, recommendation and action. If the claimant wished to change his role or location, he would need to apply and proceed through the normal recruitment process.

52. In reply, the claimant stated in an email of the same date at 17:12 hours that there was something wrong with the communication at the respondent as, *"I certainly have NOT resigned and am still very much in your employment".*

53. He stated that as an employee, he had a right to details of the investigation being carried out into his concerns and: -

> *"I will inform the various and appropriate authorities if I find you do not have a full investigation into my concerns. You have a '*duty of care*' to employees and this was sadly lacking and certainly in my case being left alone with a potentially violent and aggressive patient on my first day showed a prime example of failure. …*
>
> *Clearly I was never told the shift pattern either in writing or verbally before agreeing to take the job. In your terms dated 12 July 2017,* 'in offer of employment' *see shift pattern – TBC – to be confirmed. Implication it was not yet defined. …*
>
> *It should be noted that on signing the contract of employment you are told if you leave before the six months' probation is up you will be liable to pay the full cost of training. …"*

54. The claimant then raised concerns he had about that.

55. Mr Hamilton replied the next day, 5 September, and apologised for the confusion concerning the claimant's employment status. He was aware that on Wednesday 30 August the claimant had expressed the opinion that the job was not right for him, had declined to consider other employment that Vivienne Moore suggested, handed in his badge and left site. He was also aware the claimant had not attended scheduled shifts for the 31 August and 1, 4 and 5 September. As none of those days were requested as annual leave and the claimant had not followed the sickness absence procedure it was reasonable, he stated, for the business to assume that the claimant's actions on 30 August constituted a verbal resignation with a written resignation to follow. If, as the claimant appeared to be stating, he had not resigned then his failure to request annual leave or report as sick during these shifts meant he was considered as absent without leave from the business. As such he would be invited to a meeting to review his performance during his probationary period. An attached letter was enclosed. He then addressed the other points raised by the claimant in his letter.

56. The letter inviting the claimant to the probation review was dated 5 September 2017, (page 161), and stated that he was invited to a probationary review meeting to discuss his performance and progress to date. The meeting would take place at the respondent's premises at Cawston on 8 September 2017. Vivienne Moore would chair the meeting and Mr Hamilton would be present to provide HR support and to take summary notes of the meeting. The claimant was advised of his right to be accompanied.

57. There was further email correspondence between the claimant and Mr Hamilton on 5 September. The claimant wrote to him: -

"It is all rather simple. Let me explain it to you. If you read my email to Nicholas dated 29 August 2017, it clearly states, [the claimant then set out that email].

58. He continued to Mr Hamilton: -

"This email was not replied to. Or my email the very next day. Neither Nicholas or Vivienne responded. Clearly I had not and have NOT resigned. In fact I heard nothing from the company until your email a full 7 days later. No response to concerns, no official letter, nothing. And you only replied because of the seriousness of my allegations. Let me put you straight. I have NOT gone absent without leave, no need to take holidays, I am not sick so I wouldn't take sick leave. Vivienne is fully aware I have not resigned. The security badge was handed to Vivienne to avoid any issue in security NOT because I had left the job. I stipulated to her that I cannot work until my hours are readjusted and I have heard back from Nicholas. I also requested as per contract I do 37.5 hours per week and that I would not be put at personal risk doing my work. Vivienne suggested I could do the gardening job advertised at Cawston but with the greatest of respect I am not a gardener. The contract clearly stipulates

either employer or employee must give one week's notice in writing for termination of contract 10 10.2. It is obvious the company is trying every trick in the book but at the end of the day it will have to put its hands up!

Probationary review in three days? The company have major issues that need resolving. Happy to see you all in Court if that is the way we are heading. I have spoken to Acas twice and from advice they have given I see no problem in taking the case up fully with them either. I feel we can resolve all this amicably but your company is clearly not being honest in these matters, whether that be one individual or several. At best communication is deeply flawed. In view of this any meeting I attend will need to be filmed and recorded. Perhaps members of authorities such as Health and Safety, CQC could also attend.

regards,

Gary"

59. It is of note that as early as the 5 September before the claimant had even gone to the scheduled probationary review meeting he was referring to court proceedings. He suggested that any meeting he attended should be both, *"filmed and recorded. Perhaps members of authority such as health and safety, CQC could also attend".*

60. Mr Hamilton replied at 2.04pm assuring the claimant that they were taking his complaints seriously and again stating that the reason he was not contacted immediately after he left site on Wednesday 30 August was as his line manager was anticipating receipt of a written notice of resignation. He acknowledged that the claimant stated he had not resigned and as such he was therefore still subject to the contract of employment and the respondent's policies and procedures. He set out his response to the other issues the claimant raised about his terms and conditions of employment.

61. The claimant replied at 16:16 hours the same day stating they would have to disagree with regard to the contract hours and the length of the shift. He went on: -

*"Your tactic of me going AWOL has one serious flaw and that is that you have not followed correct procedure. I live two minutes away from Cawston Park, I have had no emails in seven days, no official letters, no telephone calls. The assumption I had resigned, the apparent AWOL, lack of communication from the company along with the concerns found, lack of '*duty of care*', neglect of responsibility, putting me in serious harm's way on day one as a newbie and the way you as a company has handled my situation is nothing short of shambolic, not only in general but its management. Sadly a lack of trust as now resulted in the company. Will you notify the owners of Jeesal of this mess? If not then perhaps you should. I am sure they will be delighted.*

I may at some point require a contract address for them."

62. He then suggested that Mr Hamilton read his definition of AWOL that he set out, but it is not clear where he has taken that quote from.

63. The claimant then stated he would need to consult with his legal representative regarding the meeting. He asked that it be rearranged to give him time to do so. He stated: -

"Please bear in mind your company have not followed correct procedure, so it's validity is also in doubt and the intent of which you pursue this interest.

The whole episode has left a distinct bad taste. It has descended into farce. I should point out that Vivienne is not HR but is a nurse / line manager (unless offering job opportunities is part of her contract). It has caused enormous stress to my family myself with potentially loss of a job, loss of potential future earnings, the possibility of reduced chance of future employment, the endangerment of my physical well-being at the hands of a patient, the lack of duty of care to your employee etc. I will have further discussion with ACAS and I will consult a solicitor this week in an effort to move this forward."

64. Mr Hamilton replied asking the claimant to advise him of a suitable alternative date for the meeting. The claimant replied asking whether they could provisionally rebook for the 15 September. He would use a voice recorder should he be advised to attend. Minutes had to be taken for all parties concerned but if he was advised against it by his solicitor he would let them know as soon as possible.

65. Mr Hamilton stated he was not available on the 15th but would provisionally rearrange the meeting for 13 September. He asked for confirmation that date would be suitable for the claimant. It fell within his working pattern and as such was considered a time he should be available to the business. He continued: -

"I have been advised that your working pattern has you scheduled to work Saturday 9 September 2017 and Sunday 10 September 2017. As the meeting is postponed until after the weekend please be advised that your attendance on shift is still required as per your contractual requirement of 37.5 hours per week. I will reiterate that failure to attend shift without following the correct absence or leave procedure would be considered an unauthorised absence / AWOL."

66. Mr Hamilton further confirmed there was no right to record the meeting and that summary notes would be taken. The claimant or his chosen companion would have the right to make their own notes.

67. By email of 6 September it was confirmed to the claimant that the meeting would take place on 13 September.

68. The claimant replied that he would be producing a summary that afternoon, *"and it will detail clearly the situation, your responsibilities as a company and role in making things right. At the moment I feel you are not understanding where we are or where we are going with this. All I am reading is what I should be doing and warning me about my responsibility to the company. You appear to have completely misread the situation. My summary will bring great clarity for you and the company."*

69. On 5 September at 9:30 am the claimant had also sent another email to Mr Hamilton stating he had found some paperwork in his car that had reminded him of another issue. This was the induction checklist. He suggested that the senior support worker had skirted over it in 15 minutes or so. The claimant stated this was an important document and should not only be covered in detail but signed by the inducting staff member and the nurse in charge. He alleged that the senior support worker could not be bothered to sign it and the manager completely overlooked it. The claimant questioned whose responsibility this was and that he was reporting failings as he had been encouraged to do.

70. By email of the 6 September 2017 Perry Hamilton forwarded the claimant's concerns to the Group Head of Quality Assurance, Hannah Brookes.

71. Also, on the 6 September the claimant sent Mr Hamilton a Summary document. This repeated the initial 'Issues of Concern' from the 30 August document and added some further ones which the claimant seeks to rely on as protected disclosures. After some discussion during the claimant's cross examination it was confirmed that he relies on the following matters in that document:

6)…

*1) ***Detailed induction checklist which is a foundation of your employment not carried out properly, unsigned by both inducting staff and Line Manager. This was pointed out in an email I sent dated 5th September 2017…*

3) Not being shown the 'Patient Care Plan' and fully comprehending it before being taken to meet patients. Being left alone with one patient, D, this representing a very significant risk of serious, or life threatening injury. Patient showed signs of dep distress. A camera operation was in practice…

5) Shortly thereafter patient D was taken for a walk he became aggressive and verbally abusive. I was advised to stay three arms length from him. I was taken to see another patient E. Again not having seen or being able to fully comprehend the 'Patient Care Plan' I was told by a support worker E had previously punched him knocking him to the ground. He went on to assault a Police Officer called to the incident.

Nurse/Line Manager Vivienne told me later during our brief meeting on the 29 August 2017 and I quote 'He (E) tells you he will punch you, if he doesn't like you. This wasn't the case when SW was hit. He was hit when he refused him an energy drink.

7) One patient G held in a secure room with access to a garden had previously escaped by jumping a fence. How many times this has happened I am not sure. I was told by my Nurse/Line Manager 'you need to watch him on a monitor to make sure he doesn't escape by jumping over the fence'. Should this happen a CODE RED would be called. I find it astounding the fence was not raised as a matter of the utmost urgency when he initially escaped as the patient is extremely dangerous. This is clearly another example of a serious breach of the Health and Safety act…'

All of these matters are relied upon by the claimant as protected disclosures showing breaches of health and safety.

Probationary review meeting, 13 September 2017

72. Vivienne Moore chaired the probationary review meeting, Perry Hamilton was present with Kathryn Wright as a note taker. The claimant was there on his own. Minutes of the meeting were seen at page 182 – 196 of the bundle.

73. At the outset of the meeting the claimant was advised that he had the right to be accompanied but it had been noted that he was not accompanied and was happy to proceed and the claimant confirmed he was. Mr Hamilton explained that they considered the claimant's absence to be an unauthorised absence. Vivienne Moore would explain the impact this had on the staff team, management and patients.

74. Vivienne Moore explained that the claimant's shifts had been the Wednesday, Thursday and Friday of the first week of employment. The claimant had left the patients that he had to look after and this had had a huge impact on the company. The claimant was considered to have been absent without leave. She stated he had left the unit unauthorised and on Thursday and Friday did not turn up. Mr Hamilton explained that being absent without leave was regarded as gross misconduct and although this was not a disciplinary hearing he wished to give that indication of the view the company took on the matter.

75. The claimant stated, *"I handed in my badge to VM at 10:00am so it's obvious that there is an issue".* He then referred to the email that he had sent to HR and that the reason stated in it, *"meant that I could no longer attend work. I made that very clear. I am waiting for HR to contact me back, seven days I waited. I missed three shifts and you are saying that I*

am AWOL but legally you are entitled to contact me and find out why I am not in. You have to do that legally. I wasn't AWOL".

76. The claimant maintained he had been put in circumstances of danger and that the company should have followed a fair procedure.

77. Mr Hamilton explained that the details the claimant had provided had been passed to the Quality Assurance department. He acknowledged that under the Employment Rights Act 1996 the claimant could stay away in circumstances of danger, "*which the employee could not be reasonably expected to avert. We believe you were in a position to reasonably avert danger presented to you as a result of your full induction and training*".

78. In response to that, the claimant said, *"My solicitor will tell you rights and wrongs".* He maintained he had been put in a position of danger and that the company had been negligent. He stated he had been left in a position on his own with a patient while the other member of staff was doing the dinner and that, *"The patient is high risk and dangerous. That's true".* The claimant referred to that patient's care plan stating that it was known that he hit people with chairs. The claimant had gone for a walk that afternoon and, *"We had to walk three arms back, he was swearing and aggressive. The support worker told me that he damages cars too. His behaviours can change so quickly. It's very unpredictable. I do not know what is going to happen. I was placed in a position of danger."*

79. The claimant stated that they should not tell him he was wrong as ACAS agreed with him and so did the CQC. His solicitor also agreed with him and it was his solicitor and ACAS who had told him to contact the CQC. It was the company that had failed to contact him. He had sent an email to HR, Nicholas Hall and Vivienne Moore and, *"They both knew my problems. They knew the seriousness."*

80. Mr Hamilton stated that the claimant had handed in his badge to Vivienne and that had been taken as a, *"verbal resignation"*. As the claimant had left site Vivienne had been waiting for the claimant to confirm his resignation in writing and Nicholas was not the claimant's point of contact. The delay in responding was because the concerns were passed to the QA department because of their nature. The claimant's response was, *"You can tell the tribunal that".*

81. Mr Hamilton stressed that the claimant had had a three-week induction course which had included break away training. The claimant was reasonably expected to be able to avert danger through that training.

82. There was discussion about the claimant's induction and Mr Hamilton agreed that the claimant's induction had not been completed. Mr Hamilton acknowledged that he had apologised because the first day induction was not done. His concerns had been passed to the QA department and the claimant been asked to return to the site to complete his induction.

83. Ms Moore intervened in the discussion to state that she had met the claimant in one of the patient's rooms next to her office and asked the claimant if he had completed his induction and the claimant had said there were too many things to do. She had told the claimant to take his time and that there was no need to know everything that day. She told him to not just tick everything as there was a lot to do. Vivienne Moore had told the claimant to read the care plans in a grey folder. If the claimant had turned up for his shift she would have been able to support him.

84. Mr Hamilton had to say that the claimant must listen to him and not talk over him. He stated that the claimant had raised his voice from the moment he started talking and kept making sarcastic comments. The claimant replied: -

"*You take sarcasm to a new level. …"*

85. He then went on, *"You can't tell me that I am wrong. I won't be told. I am not wrong. It is negligence from the company. You sit there and say I am wrong but the solicitor didn't nor did CQC or ACAS. Of course, you think the way you perform as a company is right. Gary is wrong, ACAS is wrong, CQC is wrong. I'm just telling you that you haven't followed protocol."*

86. It was necessary, again, for Mr Hamilton to ask the claimant to stop speaking over him.

87. The claimant told Mr Hamilton that his argument was, *"meaningless"*.

88. The claimant later said again that he was, *"one hundred per cent right".* He went on: -

"In my contract, it says about the probationary review after six months. It doesn't say anything about any reviews before. Honestly, the staff know nothing. The people employed by your company, I wouldn't employ them. There are issues concerning the way the company is run, health and safety issues, CQC issues. Instead of me having a review, the managers need to have a review."

89. The claimant had said that it was not a review it was discrimination and Mr Hamilton asked him on what grounds. To which the claimant said it was obvious. Mr Hamilton asked him to explain, to which the claimant said: -

"It's the only way that you can get rid of me. You can say that I don't know enough but you also have a duty of care to employees. I passed 31 exams, worked for a law firm and you still think you can get rid of me because I was AWOL.

You said I had left the job. You made an assumption, not on facts at all. Then you say I've gone AWOL.

That's a good one. Let's have a look at the law on AWOL, yeah let's do that.

You have followed no fair procedure or even given me a chance."

90. Mr Hamilton suggested that the definition of discrimination was receiving detrimental treatment on the basis of a protected characteristic and the claimant said, *"Because I released the information I am protected",* and Mr Hamilton said he was not talking about whistleblowing. To that the claimant replied: -

"But, after I did that you suddenly decided that the man who passed 31 tests should come into a review?

Can you give me proof about the number of people who have a probationary review held after one day of being supernumerary?

I go on a three week induction and then I have a review. A review into what?"

91. Mr Hamilton replied that they were reviewing the claimant's performance to date, that his absence had been unauthorised and he had placed the business at risk.

92. Vivienne Moore took up a point with the claimant about the way he was describing the patients and said to him that they were still human beings, *"but not the way you have described them"*, they still had feelings and that it, *"makes my heart sink to hear you say that about them".*

93. Mr Hamilton and Ms Moore maintained that the claimant had received three weeks training to deal with the patients and was still in an induction process. The training had been recognised by the CQC, the claimant was not in danger because he was reasonably able to avert that. The claimant replied: -

"We'll see in a court of law. I have the money to take it all the way. If you are right I will congratulate you, if I am right I hope you do the same. My solicitor will take this forward."

94. At the end of the meeting there was an adjournment and then Mr Hamilton confirmed that he and Vivienne Moore had discussed the situation of the claimant's unauthorised absence and the claimant failed his probation. His employment terminated with effect from that day and he would be paid one week in lieu of notice.

95. It is quite clear to the tribunal that throughout that meeting the claimant kept raising his voice and speaking over others. He was argumentative and convinced that only he was in the right. He was already seeking advice and determined to commence court proceedings.

The claimant's appeal

96. By email of 14 September 2017, the claimant submitted his appeal against the termination of his employment. Clive Bugg acknowledged receipt by letter of 15 September 2017.

97. By letter of 18 September 2017, Mr Hamilton confirmed the outcome of the probationary review and that the claimant's probation had been terminated due to unauthorised absence.

98. The outcome letter was sent with notes of the meeting by email of 20 September 2017, (page 207).

99. By email of the same day, the claimant stated he could not accept these minutes and the meeting should have been recorded so that there was a verbatim record of the meeting.

100. By email of 20 September, the claimant also sent to Mr Bugg more detailed grounds of appeal. This included that: -

100.1 he had not been informed of 12 hour shifts.

100.2 he had been left on his own with a patient who had challenging behaviour and that was an act of negligence.

100.3 the induction had not been correctly carried out.

100.4 the company knew the reason for his non-attendance and failed to acknowledge his serious concerns for seven days.

100.5 The company neglected to address his concerns with immediate effect on health and safety grounds.

100.6 The company had deliberately planned to terminate his contract which was due not to being AWOL but an act of discrimination based on whistle blowing.

100.7 The claimant believed he had a case for unfair dismissal based on grounds of whistleblowing.

101. By letter of 25 September 2017, the claimant enquired whether the appeal hearing would be audio and / or video recorded. Would the notes be accurate? The reply was that the company did not permit video or audio recording of the meeting and that the claimant would not be able to do that. Notes would be a summary and would be able to be read by the claimant at the end of the meeting. He was reminded of his right to be accompanied by a trade union representative.

102. By letter of 25 September, the claimant was invited to an appeal hearing on 3 October. Mr Andrew Gordon confirmed he would be the appeal manager and he would be supported by an HR officer and HR business partner who would take summary notes of the meeting. The claimant was reminded of his right to be accompanied by a work colleague or recognised trade union representative.

103. On 22 September, the claimant emailed asking whom his solicitor should write to and that this needed to be a senior person in the organisation. He was advised by email of 25 September that during the internal process they did not communicate with outside agencies.

The appeal hearing

104. The appeal took place on 3 October and was heard by Andrew Gordon who also gave evidence to this tribunal. Having heard the appeal, Mr Gordon took time to consider the matter and then provided his outcome by letter of 6 October 2017.

105. He took issue with the frequent use of the word 'danger' and by the description of the patients as 'dangerous' and found the terminology to be wholly unacceptable. He stressed that the respondent provides care to vulnerable adults under regulated and legal conditions and under no circumstances would they describe them as 'dangerous'. There service provides care, assessment and treatment of individuals describes as having, *'behaviours that challenge'.* Regarding the claimant's induction he had taken on board what the claimant described and did feel:

"that we as a business did not exercise best practice in this regard. In light of this I will be conducting an investigation into exactly what we can do to improve the ward level induction and ensure that all necessary actions are completed in the appropriate time scales. As such I uphold your concerns that this process could be improved upon. However, I do not uphold that failure by the company to complete the ward level induction caused and maintained the working environment to be dangerous and as such I consider it to be a separate matter to your actions on 30 August 2017, whereby you left the site and subsequently failed to return to work despite later being advised in writing by Perry Hamilton to do so."

106. Having considered all matters and reviewed all available information he concluded that the decision reached in the probationary review to terminate the claimant's employment by way of failed probation was, *"proportionate and lawful based on your failure to attend work without following any leave or absence reporting procedure, resulting in unauthorised absence or absence without leave, (AWOL). I do not believe you were placed in* 'danger' *as completion of our comprehensive induction programme means the business can reasonably expect you to avert any*

danger should it arise." He did not therefore uphold the appeal and the decision to terminate the claimant's employment stood.

107. Throughout the hearing both in his own evidence and cross examination of the respondent's witnesses the claimant wanted this tribunal to consider matters that were not within its jurisdiction. For example, his Subject Access Request and how the Quality Assurance department investigated the claimant's concerns.

108. The claimant also accepted in evidence that he had not stated in writing that the reason he was not attending work was because he had raised protected disclosures, and/or he had left because of danger and couldn't return. He stated that he had felt that was obvious to the respondent.

Relevant law

109. The claimant relies upon s.100 and s.103A of the Employment Rights Act 1996.

110. Section 100, the Employment Rights Act 1996 provides:-

> **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, or

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

111. Section 103A, the Employment Rights Act 1996 provides: -

103A Protected disclosure.

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

112. Consideration must also to be given to s.43B of the Employment Rights Act 1996.

43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

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

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

113. The claimant did not have two years qualifying service to enable him to bring a complaint of ordinary unfair dismissal. The burden therefore falls on the claimant to show that the tribunal has jurisdiction to hear his complaint and that the circumstances fell within the automatically unfair grounds set out above which he relies upon. (Kuzel v. Roche Products Ltd [2008] IRLR 530)

114. The claimant also asserts he was treated detrimentally within the provisions of s.47B of the Employment Rights Act 1996, which provides: -

> **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.

And also: -

> **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—
>
> …
>
> (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, or

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

115. In a detriment case the test is whether the detriment was, *'on the ground that the worker had made a protected disclosure'.* In a dismissal case the test is more stringent, namely whether whistleblowing was the reason, or if more than one, the principle reason for the dismissal.

116. The statute calls for a disclosure of 'information'. This was considered in Cavendish v Munro Professional Risks Management Ltd v Geduld [2010] IRL 38 when it was made clear that:

> In order to fall within the statutory definition of protected disclosure, there must be a disclosure of information. There is a distinction between "information" and an "allegation" for the purposes of the Act. The ordinary meaning of giving "information" is conveying facts. For example, communicating information about the state of a hospital would be stating that: "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". However, an allegation about the same subject-matter would be "you are not complying with the health and safety requirements".

117. This requirement was emphasised further in Smith v London Metropolitan University [2011] IRLR 884, when it was stated that:

> 88 In our judgment the ET did not err in holding that the respondent's reason for dismissing the appellant was her misconduct. The misconduct was refusing to perform duties requested of her. Accordingly the ET did not err in failing to hold that the reason for her dismissal was that she had complained and raised grievances that she was being required to perform duties outside her contractual obligations. Even if the appellant had been dismissed because she raised a grievance about being required to perform duties she was not contractually obliged to perform and if the grievance was therefore of a failure to comply with a legal obligation, such a dismissal would not in any event have been for making a protected disclosure within the meaning of ERA s.43A for reasons explained in *Cavendish Munro*. The grievances were not a 'disclosure of information'.

118. The question is whether there is *sufficient* by way of information to satisfy s 43B and this will be very much a matter of fact for the tribunal. Clearly, the more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact.

119. In Fecitt and others and Public Concern at Work (intervener) v NHS Manchester [2012] IRLR 64, the Court of Appeal considered what was required in a case of alleged detriment and stated:

> 1) The NHS had not breached s.47B by redeploying or removing shifts from the claimants or by failing to take proper steps to prevent their victimisation by their colleagues following their whistleblowing acts.

With regard to the causal link between making a protected disclosure and suffering detriment, s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. If Parliament had wanted the test for the standard of proof in s.47B to be the same as for unfair dismissal, it could have used precisely the same statutory language. *Igen* is not strictly applicable since it has an EU context. However, the reasoning which informed the analysis in that case is that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions. That principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing. This creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, that is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law.

Where a whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer. However, it cannot be the case that the employer is necessarily obliged to ensure that whistleblowers are not adversely treated in such situations. That will sometimes be an impossible objective. Frequently there will be contending parties who each claim to be whistleblowers. In such circumstances, if the parties cannot work harmoniously the employer will necessarily have to separate them and subject one of the whistleblowers to a detriment. It cannot be assumed that the first to blow the whistle necessarily deserves the fullest protection. There will also be cases where it will not be practicable to resolve the dispute by removing from the situation those who are unsympathetic to the whistleblowers because of the potential damage it will cause to business. They may be key personnel in the operation of the business. These are extremely difficult conflicts for an employer to resolve…

In the present case, the NHS had discharged the burden of proof of causation by showing that the making of the protected disclosure had played no part whatsoever in the relevant acts or omissions. The redeployments had been done in order to resolve the dysfunctional working situation. Similarly, Mrs Hughes had not been denied the opportunity to work shifts because she was a whistleblower…

12
0. Darnton v University of Surrey {2003} IRLR 133 considered the statutory requirement of the 'reasonable belief' of the worker and stated:

…For there to be a 'qualifying disclosure', it must have been reasonable for the worker to believe that the factual basis of what was disclosed was true that that it tends to show a relevant failure, even if the worker was wrong, but reasonably mistaken. The determination of the factual accuracy of the allegations may be an important tool in determining whether the worker held the reasonable belief that is required by s43B(1), in that it is extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knew or believed that the factual basis was false. However, reasonable belief must be based on facts as understood by the worker, not as actually found to be the case.

121. In Babula v Waltham Forest College [2007] IRLR 346 the Court considered the requirement of reasonable belief holding as follows:

> **79**
> It is also, I think, significant that s.43B(1) uses the phrase 'tends to show' not 'shows'. There is, in short, nothing in s.43B(1) which requires the whistleblower to be right. At its highest in relation to s.43B(1)(a) he must have a reasonable belief that the information in his possession 'tends to show' that a criminal offence has been committed: at its lowest he must have a reasonable belief that the information in his possession tends to show that a criminal offence is likely to be committed. The fact that he may be wrong is not relevant, provided his belief is reasonable, and the disclosure to his employer made in good faith (s.43C(1)(a)).
>
> **82**
> In this context, in my judgment, the word 'belief' in s.43B(1) is plainly subjective. It is the particular belief held by the particular worker. Equally, however, the 'belief' must be 'reasonable'. That is an objective test. Furthermore, like the EAT in *Darnton*, I find it difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knows or believes that the factual basis for the belief is false. In any event, these are all matters for the employment tribunal to determine on the facts.

Submissions

For the respondent

122. The burden of proof falls on the claimant to show that his dismissal was automatically unfair as he did not have two years' service. The primary focus of the claimant appears to be that he raised protected disclosures and was then treated detrimentally. Alternatively, if he was dismissed for being absence without leave it was because he was removing himself from a dangerous situation. It was submitted that both are fundamentally flawed.

123. Where there are any disputes of fact the respondent submitted that the evidence of the respondent should be preferred, which was given in a calm manner and supported by the documents. The claimant's evidence was unreliable. It was irrational without considering its accuracy and the claimant jumped to conclusions that were not warranted.

124. Referring to the matters raised by the claimant in his, 'Issues of concern' document, the respondent accepted that point 1 and 3 were protected disclosures and being generous to the claimant could potentially have been matters that went to health and safety. The claimant had accepted that issues 2, 4, 5, 6, 11 and 12 were not protected disclosures. With regard to the others:

Point 7 is only an allegation;
Point 8 is not in the public interest;
Point 9 is not information, only an allegation;
Point 10 is not related to health and safety, or breach of a legal requirement.

125. Then dealing with addition points raised by the claimant, in the document on page 164:-

124.1 point 1 - Detailed induction – the respondent concedes that could be conveying information and a breach of health and safety.

124.2 point 3 - It is accepted that, not being shown the patient care plan and fully comprehending it before being taken to meet patients is a protected disclosure.

124.3 Points 5 and 7 it was submitted do not convey information.

126. The key point, and why the claim is fundamentally misconceived is that there is no evidence whatsoever the claimant suffered any detriment for raising these matters. The claimant has been labouring under the false assumption that having raised them he becomes immune from any procedure by the respondent.

127. The second set of disclosures, (page 164), arose after he had been invited to the probation review meeting and it is therefore inconceivable they had any bearing on the decision to terminate the probation.

128. The respondent dealt with matters raised by the claimant in an appropriate manner by referring them to their quality assurance department and the claimant was instructed in his induction on how to make complaints. Employees were encouraged to, *'to blow the whistle'*, counsel had lost count of the number of times in correspondence the claimant was told that his complaints were welcomed. It is obvious that they are not of such a nature that they would cause the respondent any difficulty at all. It is irrational and illogical that they would seek to remove the claimant because of them. What the claimant cannot do is provide any causal nexus with regard to the raising of his complaints and any detriment.

Detriment

129. The claimant says this was being invited to the probation review meeting and it was respectfully submitted this was, *"nonsense"*. He was invited as he had been absent without leave.

130. The review was undertaken using the probationary review rather than a disciplinary procedure as the claimant was in his probation period. It was in his favour for it to be dealt with on that basis as that way he received notice pay. It is fundamentally misconceived that if the disciplinary procedure had been used there would have been a broad investigation of his concerns. There would not have been. There was no detriment in not using the disciplinary procedure.

Dismissal

131. The dismissal was clearly because the claimant was not attending work even after he was instructed to do so. He was expressly instructed to attend work and still failed to. The respondent has established a reason not connected to the protected disclosure.

132. In applying the statutory provisions when dealing with the dismissal, it must be established that the protected disclosures were the principle reason and in relation to detriments that the employer was materially influenced by the disclosure. Neither of those have been established.

133. The second strand of the claimant's case is section 100(1)(c) of the Employment Rights Act 1996 and there is no evidence in relation to that at all. The respondent relies upon all the above submissions. It dealt with the claimant's concerns appropriately and there was no detriment.

134. With regard to section 100(1)(d) of the Employment Rights Act 1996, there was no 'serious and imminent' threat and the claimant did not reasonably believe he was in danger. It is clear from the first email that the claimant's concern was about his hours and that he did not know he had to work a 12 hour shift. He was not happy to work in a risky environment. This is so far below the statutory requirements that the claimant cannot get home on his case.

135. Even if the tribunal did accept that the claimant did not attend work because he reasonably believed he was in danger, it cannot be regarded as a reasonable belief. He had undertaken an induction and had worked for one day and had no experience. He has to assert that he knew better than the respondent with multiple years' of experience and all the medics and the CQC that approved the training. It was not reasonable for the claimant to believe, if he genuinely did, that there was serious and imminent danger. At its highest the claimant was on a sofa when another support worker was approximately 30 feet away and on the claimant's own evidence within eye sight of the patient; he cannot reasonably have feared for his safety. He did not raise that until later.

136. In the contemporaneous documents (at page 140 and 152), the claimant did not say he was staying away as the work was not safe. The claimant says it was obvious he was saying that, but it was not. He may wish he had said that, but he did not do so. His real reason for staying away was he wanted the hours changed and he was not prepared to work in an environment where there was risk, although there was no serious imminent danger. The claimant has embellished his story over time.

137. All the claims should be dismissed. The tribunal does not need to enquire into ordinary unfair dismissal. It is not for this tribunal either, to look at whether the respondent should have addressed the claimant's concerns.

For the claimant

138. The respondent never followed its own policy by conducting its own investigation into the claimant's concerns. The claimant should have been part of any such investigation before dismissal. The claimant believes the respondent acted dishonestly throughout and it has been a *"whitewash"*. They failed to recognise the obvious dangers and health and safety dangers. The respondent failed to comply with its own health and safety obligations to staff and its duty of care to staff and patients. The claimant's dismissal was solely due to the issues and complaints he raised. The claimant concluded by stating that was basically it and there was no point going on.

The tribunal's conclusions

139. It has already been recorded that where the evidence of the claimant conflicted with that of the respondent's, the evidence of the respondent was to be accepted. Vivienne Moore and Andrew Gordon between them had years of experience of working with those with learning disabilities. The claimant had three weeks induction and one day at work having come from a business background with no experience whatsoever of working in the care sector. He was of the view however that he knew better than anyone at the respondent. It is also of note that as early as the probationary review the claimant was referring to the legal advice he had received and to taking the respondent to a tribunal. There does not appear to be any genuine belief by the claimant in the matters he complained about. He is of the misconceived view that having raised concerns, then there was nothing that the respondent could do in relation to any other issues they had with him. He also appeared to believe that this tribunal would conduct some form of public inquiry into the concerns that he had raised. The tribunal had to remind him throughout the hearing that that was not its role.

The 'Issues of concern' Disclosure – 30 August 2017

140. The claimant raised various issues of concern and now relies upon only some of them as protected disclosures:

    (1) Dangerous patient G sometimes jumps the fence;
    (3) Another patient physically assaulted a member of staff knocking him to the ground.

141. The respondent accepted these could amount to protected disclosures. The tribunal accepts that the claimant was making a disclosure of information that the health or safety of any individual had been, or was likely to be, endangered.

142. The claimant did not seek to rely on items 2, 4, 5, 6, 11 and 12 accepting in cross examination they were not protected disclosures.

143. Item 7, *"not made aware in contract that there was a high risk of physical assault"* was only an allegation and not the provision of information.

144. Item 8, *"on day one I personally was left on my own with no phone, no alarm with patient. Staff member was preparing his meal while I sat along with him…"*. The respondent argues this was not in the public interest. The tribunal does not accept that. The claimant was providing information about the time he spent with that patient and it could be said that was in the public interest.

145. Item 9, *"dangers of being on your own in the job with a patient as a support worker for up to two hours who represents a very high risk"*, was only an allegation and did not provide information.

146. Item 10, *"lack of breaks seems to be an issue",* the respondent asserts this was not a health and safety matter or breach of a legal requirement. The tribunal does not accept that. It could be seen to be both but no information is provided.

147. Even where the tribunal has accepted that disclosures were made they were not protected disclosures within the meaning of s43B as they did not 'in the reasonable belief of the worker' tend to show one or more of the matters listed in subsection (1). The claimant had no such reasonable belief. He had never worked before in the care sector, had undergone three weeks training and worked in the home for one day. It is quite clear from his initial correspondence to Mr Hall of the 29 August 2017 that his concern was his hours and the length of the shift. He even said that it would create difficulties for him and his family to juggle his wife's working and child's schooling. He asked if there was anything they could do suggesting part time or a change of shift pattern. In his email of the 30 August 2017 (with which he sent he 'Issues of Concern') he stated that 'because of the dangers and shift patterns the job of support worker is not suitable'. He did not want the job he had applied for. Babula makes it clear that the subjective belief of the employee must be objectively justified. The claimant's beliefs were not.

148. Whether protected disclosures or not, the claimant was not treated detrimentally or dismissed because he raised them. The claimant had his probation terminated because he was absent without leave. What the claimant omits to recognise is that he was expressly told by Mr Hamilton, when it was appreciated that the claimant had not resigned, that he should attend for work on Saturday 9 and Sunday 10 September, (email 6 September 2017). He still did not do so. That email clearly stated that if he failed to do so then he would be treated as absent without leave.

149. There was no requirement on the respondent to deal with that under the disciplinary procedure. It was no detriment to the claimant that they did not

do so as he ended up being paid in lieu of notice when they dismissed him. Had they dealt with it under the disciplinary procedure he would not have been so paid.

150. The claimant appears to believe that if they had used the disciplinary procedure, each and every one of his allegations would need to have been investigated prior to any dismissal. That misses the point. The claimant was not being subjected to a disciplinary procedure because he had raised these matters, but because he had failed to turn up for work.

151. It goes without saying that, the respondent relies on its support workers to cover the required shifts to ensure that there are sufficient to cover the needs of the residents. When the claimant failed to attend that put them under strain. That is why they had to hold the review of the claimant's probationary period.

152. The second limb of the claimant's claim is that he brought to his employer's attention and/or removed himself from circumstances of danger which he reasonably believed to be 'serious and imminent' within the meaning of section 100 of the Employment Rights Act 1996. He did not reasonably have a belief that was the case. He cites the example of being with a patient on a sofa when the other support worker was within ear shot. The claimant had undergone training and knew how to deal with a threat. Nothing occurred. The claimant also relies upon taking one of the residents out walking with another support worker. Again, the claimant had spent three weeks in training when the challenges of these patients was described and discussed. That training had been approved by the CQC. The claimant did not reasonably believe that he was in serious and imminent danger such as to have to remove himself from the premises. The reason he was not at work was that he did not like the shift patterns. He refused to attend work when told to do so.

153. The claimant had already been invited to the probationary review meeting when he raised further matters in this letter of the 6 September. He was not therefore treated detrimentally by being called to that meeting for raising them. For all the reasons set out above they were not the reason for his dismissal.

154. It is quite clear from the statutory language and the authorities that in relation to the detriment claims the respondent has to have been materially influenced by the disclosures. That was not the case. What materially influenced the decision makers was the claimant not attending work when required to do so.

155. In relation to dismissal the disclosures must be the reason or if more than one the principle reason. Again, they were not. The failure to attend work was.

156. The claimant is of the view that having said he had raised disclosures there was nothing the respondent could do about his non attendance and that he

could dictate to them and be involved in how those concerns were investigated. He was clearly contemplating litigation at a very early stage and was threatening and aggressive in the way in which he responded at the review meeting. Whilst the tribunal did not hear arguments on causation and/or contribution or whether dismissal would at some stage have occurred in any event it will give an indication that had the dismissal been found unfair (which it has not) it is likely to have found a very high proportion of contribution and it also highly likely that dismissal would have occurred fairly within a very short period of time. The claimant did not want this role and it was highly unlikely this employment would in any event have lasted long.

157. It follows from those conclusions that all claims brought are dismissed.

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Employment Judge Laidler

Date: 10th September 2018
Sent to the parties on: 15 October 2018

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For the Tribunal Office