EMPLOYMENT TRIBUNALS

Claimant:	**Mrs M Jeruszka**
Respondent:	**The Good Care Group London Ltd**
Heard at:	**London South Employment Tribunal (Hybrid hearing: Employment Judge and Claimant in person, all others by video link)**
On:	**31 August 2021, 1 – 3, 6 September 2021**
Before:	Employment Judge Dyal, sitting with Dr Von Maydall-Koch and Ms Khawaja
Representation:	
Claimant:	in person
Respondent:	Mr Peter Starcevic, Counsel

RESERVED JUDGMENT

1. The Claimant was constructively dismissed but no part the reason for the dismissal was that she made a protected disclosure.
2. The Claimant was not subjected to any detriment on grounds of making a protected disclosure.
3. The Claimant was not subjected to discrimination because of race or age.

REASONS

Introduction

The issues

1. The issues were identified at a Preliminary Hearing before Employment Judge Sage on 19 April 2019. At the outset of this hearing we checked with the parties whether they agreed that these remained the issues; they did.

2. After the tribunal had done its pre-reading a couple of points of clarification arose. These were raised with the parties at the outset of day two. Following that discussion we were able to agree the list of issues as follows:

Public interest disclosure detriment

1. Did the Claimant make a protected disclosure within the meaning of section 43A Employment Rights Act 1996?

    a. She relies upon a conversation with Elaine Paton in May 2018, in which she told Ms Paton that the Respondent was putting clients at risk and that it was covered up by the carers. She told Ms Patton that other carers were sent to the placement too late, that they failed to comply with directions and the clients were not eating what they expected to. Further, the Claimant says she told Ms Paton that she would bring these matters to the attention of others outside of the company.

2. Was the Claimant subjected to a detriment on the ground of making a protected disclosure. The detriments relied on are as follows:

    a. suspension
    b. being subjected to a disciplinary process
    c. being dismissed
    d. being asked to cover up which included being asked to falsify documents retrospectively which she refused to do.

Automatic unfair dismissal, s103A ERA

3. Was the Claimant constructively dismissed?

    a. Was the Respondent in repudiatory breach of contract:
        i. the Claimant relies upon the implied term of trust and confidence.
        ii. the particulars of breach are the PID detriments complained of above and/or the discriminatory treatment complained of above.
        iii. The final straw was being reinstated but with a written warning rather than no sanction.
    b. Did the Claimant resign in response to the breach?
    c. Did she do so without delay or waiver?

4. If the Claimant was dismissed, what was the reason or if more than one, the principal reason for dismissal? In particular was it a protected disclosure?

Direct race and/or age discrimination, s.13 Equality Act 2010

5. Was the Claimant subjected to the following treatment:

a. a delay of seven weeks in investigating her grievance, in contrast to Ms Livingstone's grievance which was investigated the following day after being presented;
b. failing to conduct the grievance investigation well;
c. suspension;
d. being subjected to a disciplinary process;
e. dismissal (it was agreed on day two, that this was a reference to both the express dismissal and the alleged constructive dismissal).

3. We note for completeness that on 25 September 2019, the Claimant sent an email to the tribunal stating that she would rely upon her written grievance of 10 May 2018 as a protected disclosure. In so doing she purported to be 'clarifying' the issues identified at the Preliminary Hearing referred to above. At a further Preliminary Hearing, on 29 June 2020, this matter was considered and Employment Judge Balogun who decided that the Claimant was not permitted to rely upon this written grievance as a protected disclosure.

4. The Respondent submitted that it was sensible to defer questions of remedy, including *Polkey* and *Chagger* until liability had been determined. In essence because remedy was complex, time-consuming and demanding to deal with and may require further medical evidence to be gathered to be dealt with properly. The Claimant was neutral. We considered the matter and ultimately agreed with the Respondent's position. Since the claims have failed there is no need to consider remedy.

The hearing

5. *Documents before the tribunal*:

5.1. *Main bundle*. The Claimant did not agree this bundle because it omitted a number of documents that had been exchanged in the disclosure exercise. Those documents (save for a piece of correspondence from the Coroner of the Isle of Man dated 23 May 2018 which the Respondent was unable to find) were produced separately in the further bundles referred to below;
5.2. *Supplementary bundle.* This bundle was produced by the Respondent overnight on day one. It was sent to the Claimant and the tribunal electronically. The judge also printed the bundle and gave the Claimant a hard copy of it;
5.3. *Claimant's bundle.* Overnight on day one the Claimant sent an email to the Respondent and the tribunal with four separate documents attached. The judge collated these documents into a single paginated bundle and arranged for it to be sent as a PDF file to the parties. The judge also printed the bundle and gave the Claimant a hard copy of it;
5.4. An email dated 22 May 2018 that among other things related to the Claimant's suspension. The Respondent sent this to the tribunal over lunch on day 4 and the tribunal in turn sent it to the Claimant by email and gave her a hard copy;
5.5. Written closing submissions from the Respondent and a bundle of authorities;

5.6. Written closing statement from the Claimant.

6. *Witnesses the tribunal heard from*:

6.1. The Claimant;

6.2. For the Respondent:

6.2.1. Ms Rebecca Malone-Robertson, Registered Operations Manager;
6.2.2. Ms Louise Holmes, Regional Manager (now retired);
6.2.3. Ms Janet Bill, Managing Director;
6.2.4. Ms Louise Joslin, Registered Manager and Head of Learning & Development (now in a different role).

7. *Adjustments to hearing:*

7.1. The Claimant faced a number of additional challenges to full participation in the hearing including:

7.1.1. Being a litigant in person in a complex case and one in which the Respondent was represented by experienced solicitors and counsel;
7.1.2. Speaking English as an additional language. Based upon our observations over the course of the trial the Claimant's ability to read written English (subject to vision problems described below) is excellent while her spoken English is of a good conversational standard. When expressing complex matters orally she needs more time to find the right words but is able to do it;
7.1.3. A vision problem, she described as extreme short sightedness which she has had since childhood, that makes it uncommonly hard for her to read small text;
7.1.4. Post-traumatic stress disorder arising out of traumatic events she witnessed in Poland at the time Communism fell. There were moments during the hearing when this appeared to be triggered particularly when there was a loud noise, whether police sirens coming from outside or feedback loops on the video-call.

7.2. The tribunal was self-consciously attuned to these additional needs and did all it properly could to facilitate the Claimant's full participation in the proceedings, put her on a more even footing with the Respondent in accordance with the overriding objective and to make reasonable adjustments:

7.2.1. The hearing, though originally listed as an in person hearing in 2019, was converted (as almost all cases at London South ET currently are) to a remote hearing by CVP. The Claimant objected to this in part on grounds of her vision problems and in part because she had made travel/hotel arrangements and wanted an in-person hearing. Regional Employment Judge Freer considered representations from both sides and decided to convert the hearing from fully remote to hybrid. Thus the Claimant attended in person as did the Judge. The lay members, the

Respondent's counsel and witnesses attended remotely. The tribunal room is very well equipped for a hybrid hearing. Those participating remotely are shown on huge screen which also has good quality audio. There are desktop microphones for those attending in person which work very well, as well as a high-quality camera. On the first day of the hearing, the tribunal canvassed the possibility of the judge joining the hearing from his chambers rather than being in the tribunal room with the Claimant as this would have been logistically more convenient. The Claimant preferred the judge to be in the tribunal room so that remained the arrangement.

7.2.2. On the morning of the third day of the hearing the Claimant said that she had almost had a panic attack on the second day of the hearing and that she might have one in the remainder of the hearing. (There had been an occasion on which she left the room urgently and we agreed to take an extended break. We only resumed after checking that the Claimant was ready to/wished to continue. She said that if she had a panic attack it could resemble a heart attack or a stroke. She had forgotten her paper bag and asked that the Judge either to give her a paper / plastic bag to breath in or hold her coat over her mouth for her to breathe through. The tribunal took an adjournment in order to put some safety measures in place. The first aiders were identified and put on notice that they may be needed. The first aiders considered it would be appropriate to give the Claimant a bag to breath in and she was supplied with a couple of plastic A4 document wallets for that purpose. She gratefully received them and spent some time breathing into one of them before we re-commenced the evidence. The judge also arranged for the tribunal's clerk to remain in the hearing room for full duration of hearing in order to be on hand to provide assistance if required.

7.2.3. As above, the tribunal ensured that the Claimant always had both electronic and hard copy versions of all of the documents, including by printing documentation for her. It was the Claimant's preference to have the documents in both forms to enable her to read them. The Claimant used a large magnifying glass as required for hard copy documents and used her own laptop for electronic copies.

7.2.4. The tribunal's staff assisted the Claimant to set up a 'Gov' wifi account so that she could connect to the internet for free in the tribunal building (including the hearing room);

7.2.5. The Claimant did not find it easy to ask questions of witnesses in cross-examination. This was in part because she is untrained in cross-examination and in part because English is an additional language for her. She tended to approach the task by making a number of statements and in the course of doing so asking several questions at a time. The judge listened carefully to what the Claimant had to say and reflected it back to the Claimant and the witness in clearer single questions for, firstly, the Claimant to confirm her sentiment had been captured and, secondly, for the witness to answer;

7.2.6. The tribunal allowed the Claimant a great deal of leeway in the questions she asked;

7.2.7. As noted, there were a few occasions during the hearing on which the Claimant was visibly affected by loud noises. The judge asked

everyone on the video call to turn off any applications they had that could not be silenced to avoid audible alerts being heard (a few were heard nonetheless, though this was no doubt accidental). The judge always checked with the Claimant if she was ready to continue before doing so and offered her breaks.

Findings of fact

8. The tribunal made the following finds of fact on the balance of probabilities.

9. The Respondent is a care provider providing care services for care users throughout the United Kingdom and the Isle of Man. At the time of the events that are material to this claim, it recruited about 70% of its carer workforce from outside of the UK. It therefore had a particularly multi-racial workforce. Poland was one of the main EU countries from which the Respondent recruited.

10. The Claimant is Polish. Her employment began in May 2017. She was employed as a carer. Around four months into her employment she was assigned to provide live-in care to an elderly couple, Mr and Mrs S, on the Isle of Man ('the Placement'). She had therefore been at this placement for approximately eight months when the events most material to this claim took place. She was 59 years old. She puts herself in a 56 to 61 age bracket.

11. Care at the Placement was provided by three carers. Two day-carers and one night carer. The day shift ran form around 7 am to 7 pm; the nightshift from around 7pm to 7am. Relief carers assisted as required.

12. Immediately prior to the events material to this case the core team comprised the Claimant, Zuzanna Rogaszewska and Enrika Bankauskaite. On 2 May 2018, Ms Bankauskaite was replaced by Ms Ruth Barry and on 3 May 2018 Ms Rogaszewska was replaced by Ms Nicola Livingstone.

13. Ms Livingstone is English, speaks English as a native language, and according to the Claimant is in the 26 – 31 age bracket. Ms Barry is British, speaks English as a native language and is in the 55 to 60 bracket. This account of protected characteristics comes from the Claimant's unchallenged evidence which we accept.

14. The Claimant and Ms Livingstone were the day-shift carers; Ms Barry the night-shift carer. To put it neutrally, and mildly, the new team did not gel well at all and did not get on. There was friction between them almost immediately and they struggled to cooperate with each other. From the Claimant's point of view she did nothing wrong and it was Ms Barry and Ms Livingstone's fault. They in turn had the opposite view.

15. The handovers to Ms Barry and Ms Livingstone were difficult. Ms Barry arrived very late, owing mainly to transport delays although she may have been a little late even if her flight had arrived on schedule. By the time she arrived, the previous night carer had already left the placement. A night-carer to night-carer handover was thus not possible, and it was the Claimant who had to handover to

Ms Barry. The Claimant resented this and did not consider it to be her job. Ms Livingstone arrived part way through one of the Claimant's shifts and it was difficult for the Claimant to bring her up to speed whilst dealing with Mr and Mrs S.

16. On 4 May 2018, Mr S had at least one fall. Whether he had more than one fall is unclear. The Claimant duly reported the fall she was aware of to the Respondent's carer services department. Ms Barry was aware that Mr S suffered a fall on that date. She did not report it. Whether it was the same fall that the Claimant was aware of or a different one is not very clear on the evidence we have heard and it is not a matter we need make a finding about.

17. On 5 May 2018, Mr S fell and suffered serious injury (a broken hip). This occurred at around 6 am. Ms Barry was on shift at the time. She called the Claimant for assistance. The Claimant was not on shift, but she was on site because that is where she lived (and she, and Ms Livingstone were due to start their day shifts at 7 am).

18. Ms Barry called the Claimant and she attended the scene. There are differing accounts of exactly what happened when the Claimant attended the scene. The Claimant and Ms Barry each later accused the other of attempting to use an unsafe lifting technique to move Mr S. In any event, Mr S was attempting to get up and he was ultimately assisted onto a low chair.

19. An ambulance attended the scene and the paramedics decided to take Mr S into hospital. At around this time Ms Livingstone also attended the scene. It was agreed that the Claimant would accompany Mr S to hospital. She did so and spent many hours there with him. He was admitted.

20. On Claimant's return to the placement it became clear to the Claimant that the fall and the fact Mr S had been taken to hospital (where he remained) had not been reported either to the family or to the Respondent's carer services. The Claimant then reported the matter. This was about 14 hours after the fall. There had a been a misunderstanding between the three carers as to who would report matters.

21. In the meantime Mrs S remained at the Placement. Her medication chart is blank on 5 and 6 May 2018. On 5 May 2018, Ms Livingstone was caring for Mrs S whilst the Claimant was in hospital with Mr S. On 6 May 2018, both Ms Livingstone and the Claimant were caring for Mrs S.

22. It is unclear whether or not Mrs S was actually given her medication on those dates. The Claimant was taught the mantra '*if it's not written down, it didn't happen*' and before us tended to take that literally. On that basis she took it as a fact that medication had not been given. In fact, it is of course possible that Mrs S was given her medication on those dates but that no entry was made on her chart.

23. As noted, Mr S's fall was reported to carer services. However, 5 May 2018 was the Saturday of a bank holiday weekend. Not much happened therefore until 8 May 2018 when the Respondent activated its serious incident procedures.

24. On 8 May 2018, the Claimant spoke to Elaine Paton, Care Manager, a number of times. In the course of doing so, we find that, among other things she disclosed the following information:

    24.1. the other carers were not following the placement directions properly, namely, preparing medication for the clients, assisting the clients to take their medication and keeping proper notes of the care provided to them;
    24.2. the other carers were not providing appropriate meals for the clients and thus put the clients at risk of choking;
    24.3. the Respondent had not made proper arrangement for the handovers to the new carers.

25. We make these findings because they are consistent with the Claimant's evidence which we largely accept on this point. It was only weakly challenged in cross-examination and it withstood that challenge. We did not hear from Elaine Paton. We note that she made a record of a conversation she had with the Claimant on 8 May 2018 and that the record implies that the Claimant had complained about the handover to the new carers. It does not record the other matters the Claimant says she raised with Elaine Paton. Nonetheless we think the Claimant raised those matters and Ms Paton's note is simply incomplete. It is a very short note and we think that the Claimant's evidence to us about what she told Ms Paton is more probative than the content of the note.

26. We are satisfied that the Claimant believed that the information she disclosed to Ms Paton was true. In broad terms the reasons she had those beliefs were:

    26.1. there were gaps in the daily care notes and medication charts which implied that the other carers were not preparing and giving medication;
    26.2. there had been disagreements with Ms Livingstone about what food the clients should be given. The Claimant had seen Ms Livingstone prepare food that she did not think was soft enough for Mrs S to eat and presented a choking hazards;
    26.3. Ms Barry had arrived late for her placement. Even if she had not the overlap between her and the previous night carer was tiny so there would have been insufficient time for a handover.

27. We find that there were mixed reasons why the Claimant made these disclosures:

    27.1. it was partly because it was clear that the Placement was now under scrutiny and the Claimant wanted to protect her position;
    27.2. it was partly (and this was a significant part) because the Claimant had genuine concern for Mr and Mrs S, their well-being and safety.

28. However, we do not think that the Claimant said or implied at this stage that she was going to raise the matters externally. We found the Claimant's evidence on

this point less clear and we think it is unlikely that, at this point, the Claimant would have said this. She had little reason to do so at that point in time.

29. We make the following findings in relation to knowledge of the above disclosures. The findings are based upon the respective witnesses' oral evidence:

    29.1. Plainly Ms Paton was aware of them because they were made to her;
    29.2. Ms Malone-Robertson had no knowledge of the disclosures. All she was aware, from Ms Paton's note on the system, was that the Claimant had complained that she had been required to do a handover. This was not, however, in the note on the system, couched as a health and safety issue or anything other than a gripe about being asked to do something that was strictly someone else's job;
    29.3. Ms Holmes knew nothing at all of the disclosures;
    29.4. Ms Bill knew nothing at all of the disclosures.

30. On 9 May 2018 Ms Livingstone made an informal written complaint about the Claimant by email to Elaine Paton care manager. Among other things she complained that:

    30.1. There had been minimal handover when she arrived at the Placement;
    30.2. The Claimant did not offer Mr and Mrs S fluids except at lunch and supper;
    30.3. The meals the Claimant cooked were poor and that she did not offer any choice;
    30.4. The Claimant sometimes spoke to Mrs S with a raised voice;
    30.5. The Claimant was abrupt, uncooperative and would not listen;
    30.6. There were no books for the carers to make notes in, with the implication that the Claimant was responsible for this.

31. On 10 May 2018, Ms Malone-Robertson telephoned the Placement and conducted interviews with Ms Barry and Ms Livingstone. She was primarily investigating Mr S's fall on 5 May 2018 and the circumstances surrounding it rather than the complaints the carers had made.

32. There is a dispute as to whether Ms Malone Robertson attempted to interview the Claimant on this occasion. She says she did but the Claimant was unwilling. The Claimant denies this. On this matter we prefer Ms Malone-Robertson's evidence. This is because we think it is highly likely that Ms Malone-Roberston would have wanted to speak to the Claimant to hear her side and because in her investigation report (see below) she recorded that the Claimant had declined to give a statement at this time. We think that relatively contemporaneous document is probative. It would a be a bizarre thing for Ms Malone Robertson to have recorded had it not been true.

33. In her interview, Ms Barry gave an account of 5 May 2018 and repeated complaints about the Claimant. She also indicated that Ms S had had a fall on 4 May 2018 and that his mobility was not as good thereafter. She said she had not reported the fall and apologised for not doing so.

34. Also on 10 May 2018, the Claimant emailed the Respondents carer services to make a complaint about Ms Barry and Ms Livingstone. Among other things she complained that:

    34.1. Ms Barry had assaulted her in the presence of Ms Livingstone on 9 May 2018. The detail of the letter makes fairly clear that she was alleging an assault comprised of an aggressive verbal outburst rather than a physically violent assault. In essence, she alleged that Ms Barry had cornered her and screamed at her over a minor issue;
    34.2. relations between the three carers had broken down and her suggestions were met with hostility;
    34.3. that Ms Barry had shouted at her in front of Mr and Mrs S saying that the fall had been her fault;
    34.4. that Ms Livingstone and Miss Barry did not write daily notes, did not report the clients falls and injuries and did do not make medication entries.

35. On 11 May 2018, Ms Barry made an informal written complaint about the Claimant. Among other things she complained that:

    35.1. the Claimant had prepared inappropriate food for Mrs S;
    35.2. the Claimant had not given her an adequate induction/introduction to the placement;
    35.3. the Claimant was difficult, awkward and aggressive with her and Ms Livingstone. She complained that the Claimant had shouted at her, not the other way around.

36. On 12 May 2018 Ms Barry was stood down from the placement with Mr and Mrs S.

37. On 17 May 2018, which was a Thursday, the Claimant was stood down from the placement. We make the following findings about the circumstances of this:

    37.1. The Claimant spoke to Ms Paton towards the end of her shift. Ms Paton told her that she was being stood down from the placement but that she should finish her shift. This was in the early evening, probably close to 7pm.
    37.2. The Claimant told Ms Paton that she may need to stay one more night to arrange transport home. Ms Paton did not raise any concern about that.

38. In the event, the Claimant did not leave until the Sunday 20 May 2018. This was because she had some problems with her bank card and because it was difficult to arrange transport to get off the island. She therefore stayed, with the express permission of the S family.

39. On 17 May 2018, a disciplinary case was opened against all three carers although the Claimant was not aware of this at the time. An entry in a document in the Claimant's bundle, which we understand to have been cut and pasted from the Respondent's contemporaneous records states "*disciplinary case 00223289 – concerns regarding professional conduct and management of fall incident – suggestion that carer moved client from floor".*

40. On 18 May 2018 Mr S, sadly, died in hospital.

41. On 22 May 2018, there was a Serious Incident meeting between Zoe Elkins (Head of Care Strategy), Janet Bill and others. It was decided at this meeting that both Ms Barry and the Claimant would be suspended. An email distributed after the meeting records the following: "*Ruth [Barry] to be suspended by Rebecca – HR to support process. Malgorzata is off shift until mid June but would be suspended if investigation is ongoing at that point, or sooner if new risks emerge. Emma/Rebecca to update as part of the weekly investigation update."*

42. Janet Bill's evidence was that the reason for deciding to suspend the Claimant was twofold. Firstly, the Claimant's involvement in the manual handling after the fall. Secondly, to protect the Claimant since, being investigated was a difficult thing to go through. Combining that with working as a carer was undesirable. She also said that the Respondent routinely suspended employees where there was a concern that a client had been put at risk of harm.

43. Ms Barry was suspended on 23rd May 2018. The letter of suspension indicated that the Respondent had become aware of serious allegations regarding her conduct in the workplace in particular that she had allegedly placed a vulnerable at risk of harm and that an initial investigation had established a prima facie case to answer and full investigation would follow.

44. By this stage, the coronial proceedings into Mr S's death had been opened and the Police Coroner's office had requested witness statements from the three carers.

45. On 23 May 2018 Ms Barry produced a formal witness statement regarding Mr S's fall for the Police Coroner. Among other things she alleged that her position immediately following the fall had been that it was better not to move Mr S but that Mr S wanted to get up and the Claimant helped him.

46. On 24 May 2018 Ms Livingstone produced a formal statement for the Police Coroner. She had not witnessed the fall and had little to do with the immediate aftermath of the accident.

47. On 25 May 2018 the Claimant produced a witness statement for the Isle of Man constabulary in respect of Mr S's fall (p215). In that statement the Claimant said when she attended the scene on 5 May 2018, Mr S had been desperately trying to get up. She said that she refused to use banned manual handling techniques and this led to a dispute with Ms Barry. She also gave evidence that implied that the other two carers had witnessed Mr S have several other falls but had not reported them.

48. On 25 May 2018, Mr and Mrs S's children made written complaints to the Respondent about the standard of care their parents had received. The complaint balances both positive and negative feedback about the care provided. It praises the Claimant. It is clear from the terms of the complaint that some of what it says repeats allegations that they could have no direct knowledge of but that the Claimant must have told them (this is not a criticism). It also expressed a concern

that there may have been an attempt to cover up failures by completing notes after the event.

49. On 31 May 2018 and 6 June 2018, Ms Malone Robertson interviewed Ms Barry again. In the interview Ms Barry among other things admitted to raising her voice to the Claimant on one occasion, being the day after the fall (6 May 2018). There is an odd passage in the notes which records this:

> *Ms Malone Robertson: I have the placement booklet now you said you didn't keep notes but there are notes in the booklet. How are they there?*
> *RB: I thought you asked me to fill in the book sorry I filled these notes in after I thought that's what you said the hearing was bad I could hardly hear you on the phone*
> *Ms Malone Robertson: I asked if you had kept daily care notes you answered no"*.

50. Ms Malone Robertson asked Ms Barry what happened on 9 May 2018 which was the date on which the Claimant alleged Ms Barry assaulted her. Ms Barry denied raising her voice on that occasion. However, it does not appear that Ms Malone Robertson asked any relevant follow up question to try and test the veracity of that answer or to build a picture of what happened that day.

51. Ms Malone Robertson interviewed the Claimant again on 19 June 2018. The Claimant described Mr S attempting to get up after his fall and described how she attempted to assist him. She alleged that Ms Barry had tried to get Mr S up by putting her arms under his arms. C said there was no agreement about who would call the family but it was nightshift duty. She also explained why she had not left the placement immediately. Her explanation was that she had problem with her bank card; that she did not have transport and that on 18 May 2018 the family had arrived and wanted her to answer questions following Mr S's death that day. She was asked why she had not contacted carer services if she has having difficulty and she said that she had spoken to Elain Paton and told her that it would take some time to arrange transport.

52. On 19 June the Claimant was interviewed by Ms Malone Robertson. Among other things, she alleged that Ms Barry had three falls on the night of the index fall which Ms Barry and Ms Livingstone had been aware of but had failed to report. She also gave an account of how she had assisted Mr S to a low chair following the fall and alleged that Ms Barry had wanted to put her arms under Mr S's arms to lift him.

53. The Claimant was suspended by letter dated 20 June 2018. The letter stated "*you will be aware that a serious allegations have been brought to our attention regarding your conduct in the workplace in particular that you have allegedly placed a vulnerable adult risk of harm. We as employers are under a duty to fully and properly investigate this matter. We have already carried out an initial investigation to establish whether there is a prima facie a case to answer that initial investigation shown there is a point prima facie a case were now proceeding to a full investigation*".

54. It was entirely unclear from this letter what the Respondent was referring to when it said that the Claimant was aware of an allegation, she had placed a vulnerable adult at risk of harm (though it was clear that this must relate to Mr and/or Mrs S). It did not say that this related to manual handling of Mr S after his index fall. There had been no particular emphasis on that in the Claimant's discussions with Ms Malone Robertson. There was simply no way of the Claimant appreciating that this was the essential reason why she was being suspended. It must be remembered that Mr S had recently died in hospital following his fall on 5 May 2018. In the meantime, the Claimant had been working at the placement caring for Mrs S (also a vulnerable individual) until she was stood down for reasons that had nothing to do with health and safety on 17 May 2018.

55. This poorly explained suspension placed the Claimant under extreme stress. It implied in some unspecified way that she may be responsible for the harm that had come to Mr S and that an initial investigation had established this to be the case. The Claimant found this devasting.

56. On 2 July 2018 the Claimant was invited to attend a grievance meeting on 5 July 2018 with Ms Malone Robertson. Matters took an unforeseen turn in the meeting when the Claimant admitted to making secret recordings in the workplace. The notes of the meeting, which we appreciate the Claimant did not sign, but which we find are nonetheless broadly accurate, record the following:

> *Ms Malone Robertson In your statement you write thanks to state of the art technology what do you mean by that?*
> *MJ Because I complained about some carers who are shouting and behaving like this so somebody thinks maybe I am complaining about everybody because I was very happy working with other carers so I keep an eye on myself on my mental health because I'm nearly 60 and I know I can get dementia and start to behave irrationally so I keep control of my behaviour*
> *Ms Malone Robertson What did you mean by technology?*
> *MJ I often record conversations just to go through this later on if something happens bad if I really said something stupid and it was my fault or I forgot about something so I make extra recordings to keep an eye on my mental state*
> *Ms Malone Robertson Did you have recordings of conversations with carers in Spencer placement?*
> *MJ For myself*
> *Ms Malone Robertson Ok*
> *MJ Not private I don't record anything which is private like in bedrooms but when we are working and I am officially in the kitchen when somebody starts shouting at me*
> *Ms Malone Robertson Ok*
> *MJ It is only for me because I don't want to get paranoid so this one is only for me*

57. Ms Malone Robertson arranged a further meeting the following day to discuss this further. The notes of the meeting, again unsigned, but we find broadly accurate, record the following:

> *Ms Malone Robertson-In your grievance email you stated that you were grateful for state of the art technology, I asked you in your grievance hearing on the 05th July what you meant this. You stated that you sometimes record conversations, who have you recorded conversations with?*
> *MJ- I have recorded conversations with Ruth Barry. I have not recorded any conversations within the spencer household.*
> *Ms Malone Robertson- Have you recorded in any other placement?*
> *MJ- No never*
> *Ms Malone Robertson- Have you recorded conversations with anyone else?*
> *MJ- No. I haven't,*
> *Ms Malone Robertson-Why did you record Ruth Barry?*
> *MJ- I recorded then because I was in the corner and I already had a bad experience and Nicola didn't help me. The landline was behind Ruth so I couldn't call for help If it became worse. So my mobile was next to me so it was my only ally. She saw me that I pressed recorder. She knew and it didn't stop her,*
> *Ms Malone Robertson-Did you tell the person you were recording them?*
> *MJ- I didn't say anything I was scared.*
> *Ms Malone Robertson- Was this the only conversation that you recorded of RB?*
> *MJ- Yes.*

58. Ms Malone produced an investigation report on 6 July 2018. The report covered a lot of ground. Of prime importance it found that Mr S's index fall could not have been prevented. It also exonerated both the Claimant and Ms Barry in relation to manual handling following the fall. On that it found that Mr S had communicated that he was uninjured and that he was trying to get up independently and that the carers had assisted minimally using a chair.

59. In relation to the allegation that Mr S had suffered unreported falls prior to the index fall, it found this unproven. In her oral evidence to the tribunal, Ms Malone Robertson was asked why this was so given that Ms Barry had apparently made a concession that she had been aware of a fall which had not been reported on 4 May 2018. Ms Malone Robertson's evidence was that it had been unclear whether the fall Ms Barry had witnessed but had not reported was the fall of 4 May 2018 which the Claimant reported. If so, then there was no disciplinary issue since it was unnecessary for the fall to be reported more than once.

60. The report identified potential safeguarding or gross misconduct concerns in respect of Ms Barry and the Claimants but not in respect of Ms Livingstone. The report recommended that:

    60.1. Ms Barry proceed to the disciplinary stage for failure to report the index fall and failing to write daily care notes or report lack of Internet access;

60.2. the Claimant proceed to the disciplinary stage for failure to report the fall; unprofessional conduct and behaviour; failing to adhere to a reasonable manager request to leave the placement having been stood down; failing to respond to contact following a serious incident;
60.3. Ms Livingstone have informal action in the form of a verbal warning regarding the completion of daily care notes and the reporting of concerns.

61. One particular curiosity of the report was that it "upheld" (in the sense of found that there was a case to answer) the allegation that the Claimant had failed to report the index fall. This was curious because Ms Malone Robertson's report stated in terms: *"Allegation upheld – but it is acknowledged that MJ was not on shit at the time and it was fair to assume RB would report the fall".* In her oral evidence Ms Malone Robertson mistakenly thought that she had not upheld this allegation.

62. By letter dated 6 July Ms Malone Robertson sent the Claimant a grievance outcome letter. The outcome letter said as follows

> *"This means only part of your grievance is accepted as valid by the Company, namely that part relating to* [the sentence ends here with no further words or full stop]
>
> *The reasons for this decision are as follows:*
>
> *While we agree that there was an incident in which cross words were said, we do not agree with your assessment that It amounts to assault. There is nothing to corroborate this serious allegation.*
>
> *What was evident from the grievance meeting is that tensions were running extremely high at the placement. Whilst understandable, it is disappointing that a certain level of professionalism was not maintained on this occasion considering you are employed as a professional carer, our clients expect a certain level of professionalism and professionalism is one of the company's values.*
>
> *You have the right to appeal against the Company's decision if you are not satisfied with it. If you do wish to appeal, you must inform the Company in writing in accordance with the Company's Grievance Procedure, a copy of which is attached for your information. If you do appeal, the Company will then invite you to attend a grievance appeal meeting, which you must take all reasonable steps to attend.*

63. On 6 July 2018, Ms Malone Robertson wrote to Ms Livingstone indicating that no formal disciplinary action would be taken against her. However, she was advised that the Respondent would continue to monitor her conduct and that a repeat of similar conduct or any other instance of misconduct would likely lead to formal disciplinary action being taken.

64. On 9 July 2018 the Respondent wrote to Ms Barry inviting her to a disciplinary hearing to consider the following disciplinary allegations:

    64.1. alleged Failure to Complete Statutory/Company Records
    64.2. alleged Failure to Report Serious Incident [fall of 5 May 2018]
    64.3. alleged Failure to Report to your Care Manager or Carer Services that you were experiencing

65. By letter dated 9 July 2018 the Claimant was also invited to a disciplinary hearing this was to consider allegations as follows:

    65.1. alleged unprofessional behaviour;
    65.2. alleged breach of privacy
    65.3. alleged failure to adhere to a reasonable manager request
    65.4. alleged failure to report serious incident in a timely manner
    65.5. alleged failure to respond to request for contact following reporting a serious incident

66. The disciplinary hearing was originally scheduled for 11 July 2018. It was rearranged 13 July 2018 to enable the Claimant's representative to attend.

67. On 10 July 2018, Ms Barry submitted a written statement in response to the disciplinary allegations. In her statement she alleged

    67.1. The Claimant had told her that she would report Mr S's fall to the family on the way to the hospital as Ms Barry was not used home phone;
    67.2. She also stated that her name had been put against the MAR chart. She stated this was not her and that she had never administered any medications to Mr S. She was not even on shifts during those times.
    67.3. She stated in conclusion that she would use the learning to improve her care documentation and conduct in reporting any potential instance in future assignments

68. Ms Barry attended a disciplinary hearing with Ms Louise Holmes regional manager on 11 July 2018. At the meeting Ms Barry said that she had kept her own handwritten daily care notes for Mr S and had subsequently uploaded them on the chrome book. She suggested that the bluebook have been kept from her by the Claimant. In respect of reporting Mr S's fall, Ms Barry's account was that she had been allowed to use the house phone because it was not for private calls and also that the Claimant has said that she would ring the family and had told her not to use the house phone. It was put to Ms Barry that it had been her responsibility to report the incident as she had found Mr S and had been on shift at the time.

69. On 11 July 2018 Ms Barry was given a formal written warning. The basis of the warning was:

    69.1. failure to complete statutory company records;
    69.2. failure to report serious incident;

69.3. failure to report to your care manager or carer services that you are experiencing issues completing daily care notes.

70. The Claimant's disciplinary hearing took place on 13 July, also with Ms Holmes. The disciplinary allegations were discussed. The Claimant essentially denied the disciplinary allegations. However, in relation to recording Ms Barry, her account moved on again:

> *MJ I didn't shout at her and later I was accused of recording the shouting. I recorded it but for me it was proof I didn't shout I would record myself it would be against me. She knew I was recording because I was trapped in the corner. I don't know the carer I seen her for only a few days and I don't know what she is capable of. You don't know what to expect. So every night I had to be scared and same time Nicola was sitting at the table and she didn't say anything to her friend to stop…*
>
> *[…]*
>
> *MJ I took her phone and I pressed record*
> *LH So she saw you press record*
> *MJ No I pressed record, she was shouting and there wasn't proper ground for conversation*
> *LH Did you say I'm going to record this conversation is that ok? Did you get permission?*
> *MJ No, not like this*
> *LH That is a breach of privacy.*

71. We accept that the notes are broadly accurate save that we do not accept that the Claimant said she took Ms Barry's phone. She did not take Ms Barry's phone, she did not say she did and we do not think that Ms Holmes understood her to say that at the time of this meeting. The notes are simply inaccurate. If she had, the allegation of breach of privacy would not really have made sense, unless it was suggested that the Claimant had not only made a recording on Ms Barry's phone but also retained the phone, and of course there is no such allegation.

72. On 17 July 2018, the Claimant was summarily dismissed. The letter of dismissal identified the reason for the dismissal as:

> *"breach of privacy- you admitted that you record a conversation with your colleagues without expressly asking their permission to do so first"*
>
> *"failure to adhere to a reasonable manager request- you remained in placement two days after being requested to leave by a regional manager and did not inform her or carer services that you are unable to acquiesce to the reasonable request."*

73. Oddly, there was no resolution of the remaining 3 disciplinary charges one way or the other. They were not commented upon at all.

74. The Claimant appealed against her dismissal by letter dated 23 July 2018. The grounds of appeal were:

    74.1. issues are not dealt with fairly and consistently;
    74.2. there was by some fairness among the original decision-makers
    74.3. there was a breach of my rights to privacy and confidentiality by the employer while dealing with the disciplinary procedures [this related to the Respondent addressing the Claimant's letter of dismissal to the wrong address]
    74.4. the employer has not taken into account previous exemplary disciplinary record;

75. The Claimant's appeal hearing was chaired by Ms Bill and heard on 7 August 2018 by telephone conference. The Claimant was accompanied by a representative from the GMB.

76. The Claimant's evidence around recording Ms Barry was rather slippery at this meeting. It was put to the Claimant that at the grievance hearing she had told the chair that she recorded the conversation. The notes, which we find to be broadly accurate, record as follows:

MJ I didn't say that -
JB Okay - in your words then what did you say? Did you notify your colleague know that you were recording the conversation
MJ Of course she knew
JB Did you tell her?
MJ She shouted so loudly I doubt she heard it
JB Did you tell her?
MJ Yes
JB You're telling me you expressly told her you were recording her?
MJ Yes
JB That is different to what was originally said to RM on the 06/07/20I8, when you were asked that question you said you hadn't said that you were recording her - I need it to be clear what actually happened.
MJ I never got a policy
JB Can you answer my question - did you tell her you were recording her?
MJ It wasn't a conversation
JB The monologue
MJ She was talking I couldn't get anything in
JB I need you to answer the question; did you tell your carer colleague you were recording the conversation?
MJ Not a conversation
JB Okay, In the monologue - did you tell her you were recording this?
MJ You are changing the meaning of words - I will not answer
JB I don't know how else to describe it - the crux of the matter is however was your colleague told you were recording her?
MJ Yes, I said stop shouting or I will record you
JB Did you say I am recording this?

MJ Why didn't you ask me at the time?
JB We did - in the meeting with the RM, you did say that you did not tell her and now you are telling me you did tell her. I need to understand what happen.
MJ She didn't stop shouting
JB Understand but did you tell her?
MJ After two months I don't remember - English is my second language and I don't remember the grammar I used
JB Don't think I can make a decision on that
Companion What did you think you may have said?
MJ I don't remember, I may have said I will record you or I may have said I'm recording you
Companion Do you think the lady saw you press the button to record?
MJ Yes, she saw - she is hard of hearing so visually is very important for her

77. In relation to the allegation that the Claimant had failed to follow a management instruction, the Claimant stated that she had got a call on the Friday [although in fact it was on the Thursday], it was a bad reception and she been asked to finish a placement the next morning. Her position was that she had been asked to finish the placement but that she had not been asked to leave. She explained it had been difficult to find accommodation or get a taxi. She did not have any money (bank card problem) and it was difficult to arrange transport. She had left as soon as she been able to.

78. The appeal outcome was given by letter dated 15th of August 2018. The decision was to downgrade the disciplinary decision to a written warning which would be live for a period of 12 months. The reason for the decision was stated as follows:

> *We accept the Management instruction to leave the placement was not explicit enough in regard to timing. It should have been made clearer that it was not acceptable to remain in the property following your being stood down - However, it is important moving*
> *Whilst we do take all breaches of privacy extremely seriously, upon reflection it is difficult to prove or disprove that your carer colleague was not made aware that they were being recorded however, moving forward, unless you have obtained express permission to do so, you must not make any recording of interactions with your colleagues or clients.*

79. The Claimant resigned by letter dated 16th of August 2018 upon a month's notice to expire on 15 September 2018 (p302). In the letter she stated "I have no option but to resign. The gravity of your actions during the recent months are such that the trust and confidence placing you as my employer has been completely undermined." She did not give further details in the letter; however we find that the matters that the Claimant had in mind were:

    79.1. being suspended;
    79.2. being subjected to disciplinary proceedings;
    79.3. being expressly dismissed; and
    79.4. being reinstated but with a disciplinary warning.

80. On 21 August 2018, Ms Rebecca Ryan wrote to the Claimant and stated that the Respondent was dissatisfied with her decision to resign and characterised it as 'heat of the moment'. She invited the Claimant to attend a grievance meeting to discuss the matters raised in the resignation letter with a view to the Claimant returning to work. It was clear from the letter that the Respondent wanted the Claimant to withdraw her resignation and continue her employment.

81. The Claimant responded on 28th of August 2018 indicating that it had not been a heat of the moment resignation and that she would never be able to trust the Respondent again. She complained that she had exposed the wrongdoings of the Respondent outside of the company to the client's family and that the Respondent had then used her vulnerability to suspend her before the investigation and take disciplinary action based solely on made up groundless accusations.

82. On 26 September 2018 the Claimant wrote to Ms Ryan again and raised concerns about the Respondent's food handling and hygiene training during inductions and various issues in her first placement. She also complained that she been asked to work outside of the UK in the Isle of Man were to contract indicated that she would not be required to work outside the UK.

83. The Claimant was invited to attend a grievance meeting on 28 September 2018 with Ms Louise Joslin. Ms Joslin produced a grievance outcome letter dated 18 October 2018. The Claimant responded with annotations on the letter. A grievance appeal hearing took place on 14 November 2018 and was chaired by Mr Rory MacLauchlan. The appeal outcome, it was rejected, was given by a letter dated 21 January 2019 (380).

84. Finally, we deal with the Claimant's allegation that Ms Paton asked the Claimant to falsify documents retrospectively which she refused to do. On this matter we found the Claimant's evidence vague. On balance, we do not think Ms Paton asked the Claimant to do this. There is some evidence of notes being completed retrospectively but that of itself is not necessarily an indicator of any sort of wrongdoing. The Claimant herself quite often completed her formal notes retrospectively for instance after a shift. She was in the habit of taking quick informal notes during her shift and writing them up another time. Further, we think it is inherently unlikely that Ms Paton would have asked the Claimant to *falsify* notes. Firstly, because that is a very serious thing to do. Secondly, because it was extremely obvious to anyone that this is not something that *the Claimant* would do. There would be no point in asking and asking would simply lead to complaint. The Claimant was obviously someone who would refuse to do such a thing and this would have been particularly clear to Ms Paton.

Law

Public interest disclosure

85. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. A qualifying disclosure is defined by section 43B, as follows:

> *(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—*
> *[…]*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *[…]*
> *(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.*

86. In *Williams v Michelle Brown AM*, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> *'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'*

87. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> *'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other […]*
> *31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.*
> *[…]*
> *35. In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).*
> *[…]*

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case.
[…]
41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the Cavendish Munro case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.'

88. The issues arising in relation to the Claimant's beliefs about the information disclosed were reviewed by Linden J in *Twist DX Ltd*, from which the following principles emerge.

    88.1. Whether the Claimant held the belief that the disclosed information tended to show one or more of the matters specified in s.43B(1)(a)-(f) ('the specified matters') and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant's beliefs (at [64]).
    88.2. It is important for the ET to identify which of the specified matters are relevant, as this will affect the reasonableness question (at [65]).
    88.3. The belief must be as to what the information 'tends to show', which is a lower hurdle than having to believe that it 'does show' one of more of the specified matters. The fact that the whistleblower may be wrong is not relevant, provided his belief is reasonable (at [66]).
    88.4. There is no rule that there must be a reference to a specific legal obligation and/or a statement of the relevant obligations or, alternatively, that the implied reference to legal obligations must be obvious, if the disclosure is to be capable of falling within section 43B(1)(b). Indeed, the cases establish that such a belief may be reasonable despite the fact that it falls so far short of being obvious as to be wrong (at [95]).

89. The Court of Appeal considered the 'public interest' test in *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731. The following principles emerge.
    89.1. The Tribunal must ask: did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest (at [27])? That is the subjective element.

89.2. There is then an objective element: was that belief reasonable? That exercise requires that the Tribunal recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest (at [28]).

89.3. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it (at [30]).

89.4. 'Public interest' involves a distinction between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest (at [31]).

89.5. It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest (at [36]).

90. S.47B(1) ERA provides:

> *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.*

91. Care must be taken to establish the 'reason why' the employer acted as it did. The 'reason why' is the set of facts operating on the mind of the relevant decision-maker, it is not a 'but for' test. The correct test is whether 'the protected disclosure materially influences (in the sense of being more than a trivial influence on) the employer's treatment of the whistleblower (*Fecitt v NHS Manchester* [2012] IRLR 64 at [45]).

92. S.48 ERA provides:

> *(1A) A worker may present a complaint to an employment Tribunal that he has been subjected to a detriment in contravention of section 47B.*
> *[…]*
> *(2) On a complaint under subsection […](1A)[…] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

93. If an employment tribunal can find no evidence to indicate the ground on which a Respondent subjected a Claimant to a detriment, it does not follow that the claim succeeds by default. In *Ibekwe v Sussex Partnership NHS Foundation Trust*, UKEAT/0072/14/MC EAT adopted the same approach as that taken by the Court of Appeal in *Kuzel* (see below). In *Ibekwe*, the EAT concluded that there were no grounds for interfering with the tribunal's unequivocal finding that there was no evidence that an unexplained managerial failure to deal with an employee's grievance was on the ground that the grievance contained a protected disclosure.

94. It is unlawful for another worker of the employer to subject the Claimant to a detriment during the course of their employment, on the ground that they made a protected disclosure (s.47B(1A) ERA). This may include deciding to dismiss an employee as well as steps prior to dismissal (*Timis v Osipov* [2019] ICR

655 at [68 and 77]). The employer is vicariously liable for any such detriment (s.47B(1B) ERA).

Automatically unfair dismissal

95. There is an important distinction between detriment cases, where it is sufficient that the disclosure is a material factor in the treatment, and dismissal cases, where it must be the sole or principal reason (*Fecitt v NHS Manchester* [2012] ICR 372 CA).

96. S.103A ERA provides:

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

97. Where, as here, the Claimant does not have two years of continuous employment, the burden of proving that the reason or principal reason for the dismissal in a claim for automatic unfair dismissal is upon the Claimant (see *Smith v Hayle Council* [1978] IRLR 413 CA; *Ross v Eddie Stobart* UKEAT/0068/13).

98. The approach to the burden of proof in section 103A claims was summarised by Mummery LJ in *Kuzel v Roche Products* [2008] ICR 799 as follows:

'[…]

[52] Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.

[53] Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.

[…]

[57] I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

[58] Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

[59] The ET must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET

to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, it is not necessarily so.

[60] As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence, in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.'

99. For the purposes of section 103A, the 'employer' will include the dismissing officer, but it may also include others who 'substantially influenced' the decision-maker, including managers with some responsibility for the investigation (*Royal Mail Group v Jhuti* [2020] ICR 731 at [53]).

Constructive unfair dismissal

100. The essential elements of constructive dismissal were identified in *Western Excavating v Sharp* [1978] IRLR 27 as follows:

> *"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".*

101. It is an implied term of the contract of employment that: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (*Malik v BCCI* [1997] IRLR 462).

102. It is for the tribunal to decide whether or not a breach of contract is sufficiently serious to amount to a repudiatory breach. However, a breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: *Morrow v Safeway Stores* [2002] IRLR 9.

103. In *Gogay v Hertfordshire County Council* [2000] IRLR 703 upon the analysis of Hale LJ (as she was):

103.1. The test for a breach of the implied term is a severe one [55].

103.2. Even if the employer acts in a way that is calculated or likely to undermine trust and confidence there is no breach of the implied term if the employer has reasonable and proper cause for what is done [53].

104. The implied term can be breached by a single act by the employer or by the combination of two or more acts: *Lewis v Motorworld Garages Ltd* [1985] IRLR 465.

105. Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. *Leeds Dental Team v Rose* [2014] IRLR [25] and the authorities cited therein.

106. Mr Starcevic initially submitted that this test was akin to the range of reasonable responses test that applies to s.98(4) ERA. The judge drew his attention to *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445 which makes clear that the objective test of reasonable and proper cause should not be conflated with the range of reasonable responses test. The 'unvarnished' *Malik* test must be applied. On reflection Mr Starcevic accepted this.

107. In *Amnesty International v Ahmed* [2009] IRLR 884, Underhill J gave importance guidance on the relationship between discrimination and constructive dismissal:

> *…The provisions of the various anti-discrimination statutes and regulations constitute self-contained regimes, and in our view it is wrong in principle to treat the question whether an employer has acted in breach of those provisions as determinative of the different question of whether he has committed a repudiatory breach of contract. Of course in many if not most cases conduct which is proscribed under the anti-discrimination legislation will be of such a character that it will also give rise to a breach of the trust and confidence term; but it will not automatically be so. The question which the tribunal must assess in each case is whether the actual conduct in question, irrespective of whether it constitutes unlawful discrimination, is a breach of the term defined in* Malik*. Our view on this point is consistent with that expressed in two recent decisions of this tribunal which consider whether an employee is entitled to claim constructive dismissal in response to breaches by the employer of his duty under the Disability Discrimination Act 1995: see* Chief Constable of Avon & Somerset Constabulary v Dolan *(UKEAT/0522/07) [2008] All ER (D) 309 (Apr), per Judge Clark at paragraph 41, and* Shaw v CCL Ltd *[2008] IRLR 284, per Judge McMullen QC at paragraph 18.*

108. The employee must resign in response to the breach. Where there are multiple reasons for the resignation the breach must play a part in the resignation. It is not necessary for it to be 'the effective cause'. See e.g. *Wright v North Ayrshire Council* [2014] ICR 77 [18].

109. In a constructive dismissal case, the reason for dismissal in such a case is the reason that the employer did whatever it did that repudiated the contract and entitled the employee to resign. See *Beriman v Delabole* [1985] IRLR 305 [12 – 13].

Equality Act 2010 complaints

110. Section 13 EqA provides: *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."* Sexual orientation is protected characteristic.

111. Section 23 EqA provides as follows:

> *(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.*
> *(2) The circumstances relating to a case include each person's abilities if – on a comparison for the purposes of section 13, the protected characteristic is disability…*

112. In *Nagarajan v London Regional Transport* [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

113. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [11-12], Lord Nicholls:

> *'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*
>
> *The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'*

114. Since *Shamoon*, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in *Martin v Devonshire's Solicitors* [2011] ICR 352 at [30]:

> *'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'*

Burden of proof and inferences

115. *Igen v Wong* [2005] IRLR 258 and *Madarassy v Nomura International PLC* [2007] ICR 867 are the leading cases on the burden of proof. These cases, the tribunal accepts and directs itself, authoritatively explain how the burden of proof operates. The tribunal considered in particular the annexe to the judgment in *Igen* which spells the matter out and was endorsed by the Court of Appeal again in *Madarassy.* In *Madarassy* the Court of Appeal emphasised that a difference of treatment and a difference of protected characteristic status is not enough to shift burden of proof of itself. It gives rise to a mere possibility of discrimination.

116. In *Deman v Commission for Equality and Human Rights Commission & others* [2010] EWCA Civ 1279, Sedley LJ (giving the judgment of the court) said this:

> *We agree with both counsel that the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.*

117. Thus where there is a difference of treatment and a difference of status it does not take much more to shift the burden of proof.

118. However, discrimination cases do not always turn on the burden of proof provisions. In *Hewage v Grampian* [2012] IRLR 870, Lord Hope said this:

> "*It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*".

119. The tribunal reminds itself that direct evidence of discrimination is rare and that discrimination is often sub-conscious. For this and other reasons establishing discrimination is usually difficult and tribunals should be prepared, where appropriate, to draw inferences of discrimination from the surrounding circumstances or any other appropriate matter. These points are made, in among other places, *Amnesty International v Ahmed* [2009] ICR 1450.

120. In *Anya v University of Oxford* [2001] ICR 847 the Court of Appeal emphasised that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts. The Tribunal should consider indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by unlawful factors.

Discussion and conclusions

121. We complete our analysis of the case by:

121.1. Deciding whether the Claimant made a protected disclosure;
121.2. Standing back from the evidence and considering what inferences should be drawn from the primary facts;
121.3. Tackling the complaints on the list of issues.

Did the Claimant make a protected disclosure?

122. We find that the Claimant did make a protected disclosure on 8 May 2018. In our findings of fact we set out what the Claimant disclosed to Ms Paton. That was on any sensible view 'information' that tended to show that there was a risk to Mr and Mrs S's health and safety.

123. We are satisfied that the Claimant believed that the information disclosed tended to show that there was a risk to Mr and Mrs S's health and safety and that it was in the public interest to disclose this. She did have mixed motives for making the disclosures, but we have no doubt that one of the main reasons for making the disclosures was that she did not want Mr and Mrs S to come to any harm and she thought they may do if she did not take raise the information disclosed. For that reason she believed it was in the public interest to make the disclosures.

124. We are also satisfied that the Claimant's believes were reasonable. Firstly, there was a reasonable basis for her to believe in the factual accuracy of what was disclosed and her belief that it tended to show a risk to health and safety. The Claimant based her disclosure on her lived experience of working at the placement and her interpretation of those experiences. That interpretation was a reasonable one (though not necessarily the only one) and had some external corroboration in the wider evidence:

124.1. there were gaps in the daily care notes and medication charts;
124.2. there had been disagreements with Ms Livingstone about what food the clients should be given as corroborated by Ms Livingstone's complaint;

124.3. Ms Barry had undoubtedly arrived late for her placement. Even if she had not the overlap between her and the previous night carer was tiny so there would have been insufficient time for a handover.

125. Secondly, the matters disclosed were of a sort that it was inherently in the public interest to be disclosed. It is obvious that if a professional carer believes that other professional carers are putting vulnerable clients at risk there is an overwhelming public interest in a disclosure of that being made to the mutual employer of the carers.

Inferences

126. Having made our primary findings of fact we reminded ourselves that discrimination, and equally public interest disclosure victimisation, are almost always hidden or sub-conscious. In light of that, the absence of any direct evidence of the same is routine rather than dispositive of the issues I the case.

127. We therefore stepped back from all of the evidence and asked ourselves what inferences we should draw from the primary facts. In that regard, the following merit special mention:

127.1. The timing of the Claimant's suspension (1) differed to Ms Barry's and (2) post-dated the material events by some considerable time;
127.2. The express reasons given for the suspension were opaque;
127.3. Ms Livingstone was not suspended or subjected to disciplinary proceedings;
127.4. It was hard to see any proper basis for proceeding with the allegation that the Claimant had failed to report the index accident in light of the investigator's analysis;
127.5. Dismissal was very harsh;
127.6. Ms Barry was not dismissed;
127.7. The disciplinary warning upon reinstatement was poorly reasoned;
127.8. The Claimant's grievance was not well investigated.

128. We have given the matter anxious consideration but on balance do not think it would be right to draw adverse inferences of discrimination or public interest disclosure detriment in this case:

128.1. The timing of the Claimant's suspension is well explained. Once the decision to suspend had been taken, the Claimant was on leave and on a natural period of off rota time. Deferring the suspension until what would have been her return to work made sense and was in accordance with the Respondent's Carer Suspension Policy;
128.2. Although the express reasons given to the Claimant for suspension were opaque, the terms in which she was suspended were the same as Ruth Barry. Both suspension letters were poorly drafted but we are satisfied this was poor drafting rather than anything worse. (We deal below with the true reason for the suspension).
128.3. Although Ms Livingstone was not suspended or subjected to disciplinary proceedings there were some important points of distinction in her case.

128.3.1. It is true that she did not report either the index fall or Mr S's hospitalisation. However, Ms Livingstone had much less to do with the index events than the Claimant and Ms Barry did. Like the Claimant she was not on shift when the fall happened; unlike the Claimant she had little to do with the aftermath of the fall (although we acknowledge she was present shortly prior to and when the ambulance arrived). Ms Livingstone's understanding was that the Claimant would do the reporting. Thus, while Ms Malone Robertson thought that Ms Livingstone *could* have reported the fall, she did not think that she was culpable in failing to do so. We remind ourselves, however, that Ms Malone Robertson also thought that it was reasonable for the Claimant to have assumed someone else would report the fall but that she nonetheless concluded the disciplinary charge against the Claimant was 'upheld' (in the sense of there being a case to answer at a disciplinary hearing). This is undoubtedly odd. However, we decline to draw an adverse inference because we think it highly improbable that if the Claimant's age, race or protected disclosure were operating on Ms Malone Robertson's mind that she would have exonerated the Claimant in her actual analysis of the disciplinary charges.

128.3.2. Although the Claimant impugns Ms Livingstone because Mrs S's medication chart is blank on 5 May 2018, the fact is that on 6 May 2018, when both the Claimant and Ms Livingstone were caring for Mrs S, the medication chart is also blank. Further, the issue of whether or not Ms Barry and Ms Livingstone were giving meds and recording it in notes was explored in the investigation process. In essence, the evidence Ms Malone Robertson had from those two carers, the one corroborating the other, was that the Claimant was making it difficult to do those things. That formed the basis of a disciplinary charge against the Claimant. We do not think that it would be appropriate to draw an adverse inference from this matter.

128.3.3. The Claimant complains that she overheard Ms Barry and Ms Livingstone speaking about having connections to gangs in Liverpool. To the Claimant this was a serious disciplinary matter. However, we do not think this is something that the Respondent could have done anything about or with. There was no suggestion or evidence that Ms Barry or Ms Livingstone were themselves involved in organised crime. At worst the spoke about knowing gangsters. That is not a disciplinary matter;

128.3.4. The Claimant contends that Ms Livingstone in effect impugned herself in her complaint of 9 May 2018 in that she referred to Mr and Mrs S not being offered fluids save at mealtimes. The Claimant's point is that Ms Livingstone should have offered the clients fluids. This is not a good point. Ms Livingstone's complaint clearly records what she claims she observed the Claimant doing/not doing rather than admitting anything about what she herself did/did not do.

128.3.5. There was a suggestion that Ms Livingstone, and indeed Ms Barry, had failed to report falls prior to the index falls. Ms Malone Robertson did deal with this. She found that the allegations were unproven.

There was in fact very little evidence that Ms Livingstone had failed to report a fall. The case against Ms Barry was much stronger. In so far as it might be said that Ms Malone Robertson took a lenient view here, in our judgment far the most plausible explanation is that Ms Malone Robertson was taking a defensive approach in the interests of the Respondent who would presumably be vicariously liable for its carer's failings in respect of falls (if any). It is *far, far* more likely that this explains any leniency on her part than the Claimant's age, race or protected disclosure. Notably, Ms Malone Robertson exonerated all of the carers in all respects with regards to falls.

128.3.6. The disciplinary sanction of dismissal was very harsh and this troubled us perhaps more than any other matter. That said, as anyone with significant experience of the employment tribunal knows, views differ widely about when dismissal is and is not appropriate. In this case, Ms Holmes gave us what we think was a truthful explanation for the decision she reached. In essence, she did not think that the Claimant was contrite in any way. She had no confidence that the Claimant would not repeat similar behaviour (recording a colleague without consent and failing to follow instructions) in the future. It must be said that the Claimant's account of whether she had secretly recorded colleagues at work was internally inconsistent and at times evasive. It is clear that this had a significant impact on how Ms Holmes thought of the Claimant. On the other hand, she detected contrition on Ms Barry's part, both from what Ms Barry said (she did make partial admissions) and from her presentation/demeanour at her disciplinary hearing (she was extremely distressed). Thus whilst not ourselves agreeing with the decision to dismiss the Claimant, we think the harshness of the decision has been explained in a truthful way and one that is unrelated to proscribed factors.

128.3.7. The disciplinary warning upon reinstatement was poorly reasoned. The letter suggested that upon appeal, the two disciplinary charges which had led to dismissal were unproven. On that basis, it was hard to follow why any sanction was imposed. However, there is also an explanation for this. In essence, Ms Bill's oral evidence, which we accept, is that her reasoning was that the Claimant was culpable in respect of the disciplinary charges but that they had not been proved to sufficiently high standard to make her comfortable with dismissal. Thus Ms Bill did actually privately think the Claimant was culpable. However, she also thought that the dismissal was too harsh a sanction in any event because she recognised mitigating circumstances such as a lack of clarity about the instruction to stand down from the placement. We think that was a truthful explanation.

128.3.8. The Claimant's grievance was not very well investigated. There was no grievance investigation meeting with Ms Barry or Ms Livingstone. Although they had been interviewed for other purposes those interviews did little to investigate the Claimant's grievance. However, on balance we do not think that this is matter from which to draw adverse inferences. What is clear is that Ms Malone Robertson did not have a very forensic investigation style, whether in respect of the

Claimant's grievance, the informal complaints made by the other carers or indeed any matter. She was new to her job and moreover was overloaded. She ended up having an unenviable array of tasks to deal with concurrently in addition to her other workload:

128.3.8.1. To investigate the fall of 5 May 2018 as a serious incident.
128.3.8.2. to investigate the informal complaint of Ms Livingstone of 9 May 2018
128.3.8.3. to investigate the Claimant's grievance of 10 May 2018
128.3.8.4. To investigate the informal complaint of Ms Barry of 11 May 2018
128.3.8.5. to investigate the S family complaint;
128.3.8.6. to decide whether there were any disciplinary issues;
128.3.8.7. to assist in coordinating the Respondent's response to requests for evidence form the Police Coroner's office.

In our view, Ms Malone Robertson tried her best. However, the above portfolio of tasks would have been too much for anyone but a highly skilled and experienced investigator. With respect, Ms Malone Robertson was not that; her investigation skills were moderate. We are satisfied that no inferences fall to be drawn from the quality of the grievance investigation.

128.4. There are also some more general factors that we think strongly indicate that there was no proscribed reason for the Claimant's treatment:

128.4.1. The fact that none of the decision makers knew the Claimant had made the disclosures that she did on 8 May 2018 (save that Ms Malone Robertson knew that the Claimant had made some complaint about handovers);
128.4.2. Ms Paton was aware of the disclosures, but there is not evidence that she was 'pulling the strings', or influencing or making the decisions that are relevant in this case;
128.4.3. The fact that the Claimant was re-instated;
128.4.4. The fact that the Respondent tried to get the Claimant to withdraw her resignation. This is highly significant. It is deeply implausible that the Respondent would have done this if there was an ulterior agenda against the Claimant;
128.4.5. The fact that the Respondent had a multi-racial carer workforce with some emphasis on recruitment from Poland (relevant to race discrimination in particular).

129. We stress that in considering inferences and fact finding generally, we have stood back and looked at the evidence as a whole. The above reasoning which explains why inferences were not drawn from particular matters should be understood in that context.

Suspension

130. In our judgment the reason why the Claimant was suspended was because she had been involved in manually handling Mr S after his fall and assisted him to get up. Generally, carers are trained not to get clients up after a fall, particularly not if there may be an injury.

131. The timing of the suspension, as noted, occurred because the Claimant was on a period of leave and then off-rota time after the decision to suspend was taken.

132. The Claimant relies upon Ms Livingstone as an actual comparator. We think Ms Livingstone's circumstances were materially different to the Claimant's. She was not involved in manually handling Mr S.

133. Critically: the Claimant's suspension was wholly unrelated to her age, race or protected disclosure.

134. We consider that the reason for the suspension identified above, gave the Respondent reasonable and proper cause to suspend the Claimant. However, we think the failure to properly explain the reason for the suspension to the Claimant was, objectively, something that was likely to cause someone in her position significant additional distress. There was no reasonable and proper cause for this and it is a matter that can and did contribute to a breach of the implied term. It was not quite serious enough to breach the implied term by itself.

Being subjected to disciplinary process

135. The reason why the Claimant was subjected to a disciplinary process was because the investigator, Ms Malone Robertson, held that there was a case to answer in respect of the matters that then proceeded to the disciplinary process.

136. The reasons for Ms Malone Robertson's decision in this respect are contained in her investigation report, save that the investigation report does not deal with the privacy issue (recording Ms Barry). That latter came to light initially in the Claimant's grievance investigation meeting. It was added to the disciplinary charges because Ms Malone Robertson considered there was evidence of significant misconduct.

137. This gave the Respondent reasonable and proper cause to subject the Claimant to disciplinary proceedings, with one exception. There was no reasonable and proper cause to pursue a disciplinary charge in respect of failing to report the fall. Ms Malone Robertson's analysis, which was correct, exonerated the Claimant and there was basis for taking this matter forwards.

138. Ms Livingstone was not subjected to a disciplinary process. We are alive to that but have already considered above why we do not think that inferences should be drawn from the difference of treatment between her and the Claimant.

A delay of seven weeks in investigating her grievance, in contrast to Ms Livingstone's grievance which was investigated the following day after being presented

139. We do not think this allegation is factually well founded.

140. Ms Livingstone's complaint was not treated as a formal grievance, unlike the Claimant's. Thus Ms Malone Robertson did not follow the grievance procedure at all in relation to Ms Livingstone's complaint. Instead, the issues it raised were wrapped into the investigation into Mr S's care around the time of his fall. This made good sense. The priority issue had to be the fall and the care leading up to the fall. As regards the care leading up to the fall, there was of course allegation and counter-allegation between the three carers.

141. Although the Claimant raised a number of issues in her complaint of 10 May 2018, not all of those issues were treated as a grievance. Only the allegation of assault/being shouted at by Ms Barry was treated in that way. The other issues, which related to care for Mr S at and around the time of his index fall, were wrapped into the investigation of the fall.

142. In any event, we are entirely satisfied that the timing of the grievance investigation had nothing at all to do with age, race or the Claimant's protected disclosure. It related to the prioritisation of the serious incident investigation (Mr S's fall) and issues central to that.

143. As noted, Ms Livingstone's circumstances were materially different to the Claimant's in that the complaint she made, although in writing, had a more informal quality to it. Moreover, it was treated as an informal complaint and not as a formal grievance. Therefore no grievance procedure was followed at all in relation to it.

Failing to conduct the grievance investigation well

144. In our analysis of inferences above we found that the grievance investigation was not conducted well and found why that was so. The reason in short that Ms Malone Robertson did not have a forensic style of investigation, was overloaded with tasks and did not have the skills needed to conduct a good investigation in the circumstances.

145. This had nothing to do with race, age or the Claimant's protected disclosure.

146. The failure to properly deal with the Claimant's grievance was a matter that objectively was seriously damaging to trust and confidence. There was no reasonable and proper cause for it and it was thus a breach of the implied term. The additional steps that were needed to investigate the Claimant's grievance properly and produce a proper outcome letter could reasonably and properly be expected of this employer. This could have been achieved among other ways by assigning more than one person to the many tasks Ms Malone Robertson was required to complete as a composite investigator, providing her with more support, or assigning the matter to a more experienced and skilled investigator.

Dismissal

147. The Claimant was dismissed and the dismissal and the dismissal was, in our

view, very harsh. The reason why the Claimant was dismissed was because Ms Holmes found two disciplinary charges to be upheld. She thought they were very serious matters and did not have any confidence that the Claimant would behave differently in the future.

148. The reason for the dismissal was unrelated to race, sex or the Claimant's protected disclosure.

149. Summarily dismissing the Claimant was very obviously a matter that, objectively, was likely to seriously damage or destroy trust and confidence. The Respondent did not have reasonable and proper cause for this.

150. Firstly, it was not right or fair to say that the Claimant had failed to follow a reasonable management instruction. She was instructed to stand down from the placement and of course that implied that she would have to leave. However, no instruction was given implicitly or expressly that it was essential for her to leave immediately or within a timeframe shorter than she in fact did. The Claimant had good reasons for remaining at the placement: the family wanted to talk to her; she had a problem with her bank card; and there were difficulties in arranging to get transport off of the Isle of Man. She also had the S family's permission to stay until Sunday.

151. Secondly, we do not agree that recording Ms Barry in the workplace was an act of serious misconduct. The circumstances of the recording were either that Ms Barry was shouting aggressively at the Claimant (the Claimant's account) or Ms Barry and the Claimant were engaged in an argument (broadly Ms Barry's account). This was in the presence of Ms Livingstone. Either way, Ms Barry could have no reasonable expectation of privacy in those circumstances. Further, there did not appear to be any internal policy prohibiting a recording being made in these circumstances nor, more significantly, indicating that it would be treated as a serious/gross misconduct offence.

152. Altogether, we do not think that either of these matters, nor the combination of these matters, was anything like serious enough to give the Respondent reasonable and proper cause to dismiss the Claimant.

Being asked to cover up/ falsify documents retrospectively

153. We have found as a fact that this did not happen.

Being reinstated with but with a disciplinary sanction

154. The Claimant was reinstated with dismissal commuted to a warning. The reason why the Claimant was reinstated was because Ms Bill thought the decision to dismiss was too harsh and because she did not think that the disciplinary allegations had been proven to a sufficiently high standard to justify dismissal in any event.

155. Ms Bill's decisions were entirely unrelated to race, age or the Claimant's protected disclosures.

156. The appeal outcome letter was confusing. It essentially said (1) that the instruction to leave the placement was not clear enough and (2) that the allegation of breach of privacy could not be determined either way. It therefore did not appear to leave any culpable conduct on the Claimant's part standing. Despite that a written warning was imposed with no further right of appeal.

157. In our view, conclusion to the appeal against dismissal, which is the one the Claimant was presented with, was objectively speaking apt to seriously damage trust and confidence. A warning is a serious matter, particularly for a carer who works with vulnerable people. It affects the carer's standing and reputation. There was no reasonable and proper cause for presenting the appeal outcome in this way. Either the Claimant ought to have been properly exonerated with a reinstatement with no warning; of if she was to be given a warning the basis of it should have been clearly stated. This was a breach of the implied term.

Constructive dismissal

158. In our view the Respondent was in breach of the implied term of trust and confidence which is, necessarily, a repudiatory breach of contract. The breach was comprised by the cumulation of the matters identified above, which to recap were:

158.1. The Claimant's suspension, in that the basis of it was not properly explained;
158.2. Subjecting the Claimant to a disciplinary charge in respect of not reporting the index fall;
158.3. Dealing with the Claimant's grievance in an inadequate way;
158.4. The express dismissal;
158.5. Reinstatement with a warning, the basis of which was unclear in the appeal outcome.

159. In case it is of relevance we would hold that the third, fourth and fifth items on that list were each of themselves repudiatory breaches (in addition to being the end points of a series of events comprised of the above list that cumulatively amounts to a repudiatory breach).

160. The Claimant resigned in response to the breach. Each of the above matters were a material part of the reason for her resignation. There is no real issue of affirmation in this case, but even if there were we would hold reinstatement with a warning was an apt final straw. The Claimant resigned very shortly thereafter in circumstances in which there could not possibly be any issue of affirmation.

161. The Claimant was, thus, constructively dismissed.

162. There were mixed reasons for the repudiatory conduct each of which has already been identified above. Crucially, no part of those reasons has anything to do with the Claimant's race, sex or protected disclosure.

Conclusion

163. The complaints of race and age discrimination fail as do the complaints of public interest disclosure detriment and dismissal.

164. The Claimant was constructively dismissed. However, unfortunately for her she did not have sufficient qualifying service to complain of 'ordinary' unfair dismissal. She also did not make a claim for notice pay. Therefore, despite the constructive dismissal, there is no remedy the employment tribunal can award her; save of course for recording in this public document that she was constructively dismissed.

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Employment Judge Dyal
Date: 23 September 2021