Case No: 1403994/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr N Kelly**

Respondent: **Sunrise UK Operations Ltd**

Heard at: **Bristol (remotely by Cloud Video Platform)**

On: **8, 9, 10 November 2021**

Before: Employment Judge Midgley
Mrs Christine Lloyd-Jennings

Mr Geoff Crowe

Appearances
For the Claimant: Mr I Wheaton, Counsel
For the Respondent: Mr Chadwick, Consultant

REASONS

Judgment having been handed down orally on 10 November 2021, and written reasons for that Judgment having been requested, the following written reasons are provided pursuant to Rule 62(3).

Claims and Parties

1. By a claim form presented on 22 September 2019, the claimant presented a claim alleging that he was unfairly dismissed on grounds that he had made a protected disclosure, and, on the same grounds, that he had suffered unlawful detriment. The respondent resisted those claims in a response presented on 18 November 2019.

2. The claimant was employed by the respondent as a Support Worker, the respondent carries on business as a Care Home provider.

3. At a case management hearing before Employment Judge Dawson on 25 March 2020, the claims were clarified, and the issues identified as recorded in the case management summary of that date.

4. The claimant clarified that the protected disclosure he relied upon was a contained in a letter dated 21 July 2019. He argued that as a result he was subjected to the four unlawful detriments which are detailed in the case management order. However, during cross examination in this hearing, the claimant clarified that he was not alleging that three of those detriments were in any way caused by the protected disclosure. Consequently, following a concession to that effect by Mr Wheaton, the number of detriments for us to consider were reduced to a single allegation which was recorded by EJ Dawson as follows:

   'The head of care, Francis Bosompin, attempted to intimidate [the claimant] by sending a letter on 29 July 2019 in which he referred to a formal hearing that had taken place on 26 July 2019, when in fact, the claimant says, there was no formal hearing but only an informal chat. In that letter Mr Bosompin recorded various matters which had been discussed.'

5. The claimant alleged that he had resigned because of that detriment, which he argued amounted to a fundamental breach of the implied term that the respondent would not act in a way calculated or likely to destroy or seriously damage the mutual relationship of trust and confidence between him and the respondent.

6. At a preliminary hearing on 26 January 2021 before Employment Judge Maxwell, the claimant's application to amend his claim to clarify the date of the protected disclosure was granted so that the allegation was then 'on or about 21 July 2019.' No application was made to amend the claim to add additional protected disclosures whether to allege that further disclosures were made in an oral discussion with Miss Haskell or in a handwritten letter given to her both of which occurred or about 15 July 2019, (as the evidence before us tended to show) or otherwise. Similarly, no application was made to amend the detriment claim, so to include an allegation that Mr Bosompin had failed reasonably to investigate the incidents of alleged abuse which the claimant reported to him, so as to suppress any systematic failings in the respondent's care system or personal failings in management by Mr Bosompin in his role as Head of Care.

Procedure, Hearing and Evidence

7. The hearing was conducted remotely using CVP.

8. The parties had agreed a bundle of approximately 184 pages of relevant documents. The claimant had prepared a statement, and the respondent had prepared statements from Mr Bosompin and Mrs Audley. The claimant gave evidence and answered questions from Mr Chadwick and the Tribunal. Mr Bosompim gave evidence and answer questions from Mr Wheaton and the Tribunal. The respondent relied upon elected not to call Mrs Audley given the reduction in the allegations as detailed in paragraph 4 above. Both Mr Chadwick and Mr Wheaton prepared helpful written submissions which they expanded upon in their oral arguments.

9. The Tribunal took time to deliberate. When, towards the end of the second day of the hearing, the Tribunal indicated that it proposed to deliver an extempore

Judgment on the morning of the third day, Mr Wheaton requested that the Tribunal should provide a précis of the Judgment and Reasons. We acceded to that request with the caveat that the extempore reasons would take precedence.

The Issues

10. The issues are those set out in the case management order of EJ Dawson, subject to the reduction of the detriments claim as detailed above.

Factual Background

11. Having considered the documentary and witness evidence, we make the following findings on the balance of probabilities.

12. The claimant was employed by the respondent between 10 June 2019 and 28 August 2019 as a Support Worker at its premises known as Sunrise of Bassett, located at 111 Burgess Road, Southampton (hereinafter referred to as "Sunrise").

13. The claimant had previously had a long career in social care and special education which had led him to develop an interest in person-centred working, and in particular the use of music and art in memory therapy with dementia patients.

14. During his interview, which was conducted by Lisa Haskell, the claimant expressed his interest in developing memory therapy within the respondent's care system. She was enthusiastic and indicated that she believed it would be a welcome addition to the care provided for the respondent's service users at Sunrise. Subsequently, following his appointment, the claimant was allocated to the Reminiscence Suite to care for eight service users each of whom was affected by dementia.

15. However, shortly after the claimant's employment began on 10 June 2019, the respondent restructured its care system and reallocated the carers to different units, intending that they should develop skills in each area of the respondent's care provision, with the consequence that the claimant was moved from the Reminiscence Suite to another area. The claimant was unhappy with the change given he believed he was appointed, at least in part, because of the memory therapy work which he wished to develop, and the change of location frustrated that work.

16. In addition, the claimant observed what he regarded as poor practice by the care workers. The claimant first raised concerns as that practice orally to his line manager, Lisa Haskell, on or about 15 July 2019. Predominant amongst them at that stage was a concern that carers were adopting a systemic approach by which the service users were "raced to bed" in order to enable the carers to focus their attentions upon other activities and tasks. That concern arose from an incident in mid June at approximately 9 PM after the claimant had asked a male service user whether he wished to go to bed, and had been told that he did not. Subsequently a different carer took the resident by the hand and led him up to bed saying to the claimant

words the effect that 'because of his dementia he didn't know what he wanted' and he needed to go to bed.

17. Miss Haskell acknowledged the concern but explained that some service users had specific bedtimes identified in their care plans, and that on occasion a carer might form the view that the service user lacked the necessary capacity to provide consent, and therefore could override their stated choice to provide personal care which was in the service user's best interests.

18. The claimant's frustration with his inability to develop the memory therapy grew. In addition, the claimant observed two further incidents which were of considerable concern to him. Firstly, he witnessed another carer, "B", mock a service user "J", who was doubly incontinent, by creating a juvenile rhyme to the effect of "J poops and piddles, J poops and piddles" or "J poops and pees". Secondly, the same carer, when endeavouring to put J to bed, told J to remove her underskirt before getting into bed. J was unwilling to do so, and B spoke abruptly and shortly to her, which caused J to be distressed and to shape as if to strike B. The claimant intervened and was able to reassure and calm J.

19. On the 13th and 14th of July the claimant took annual leave, returning to work on 15 July. On 16 July, the claimant attended a day's training.

<u>The protected disclosure</u>

20. On 17 July 2019 the claimant typed a letter which he hand-delivered to Joanne Audley, the respondent's General Manager at Sunrise. The letter consisted of personal grievances in respect of the claimant's work and what were described as 'public interest disclosures'. The claimant delineated between the two in the letter, using red font for public interest disclosures and black font for his grievances, which he described as matters of 'dignity at work'. The public disclosures consisted of the three allegations he made against the carers (as detailed above). The claimant requested "customary employment protection under "whistleblowing" protocol." [Sic].

21. He then addressed the dignity at work complaints which focused largely upon his inability to use his skills in music, craft, and creative writing as part of the memory therapy for service users with dementia. In addition, he complained about the staff Rota; that it was mistakenly believed that he had not turned up for work following his period of annual leave on the 15th and 16th July; and the fact he and others had had to wait 45 minutes for their induction. He requested that his complaints should be dealt with under the grievance procedure and asked that he should be allocated to a role that suited his needs and preference.

<u>The respondent's policies</u>

22. The respondent had in place both a whistleblowing and a grievance policy. The whistleblowing policy stated that:

Once a concern has been raised, Sunrise will assess it and consider what action may be appropriate. This may involve an informal review, an internal inquiry or a more formal investigation. Individuals will be provided with a contact that will be handling the matter and will be advised of any further assistance that may be required from them. A timetable for feedback will also be agreed.

Feedback on the outcome of any investigation will be shared with the individual raising the concerns, wherever possible however, it may not be possible to share precise actions as this could infringe on the duty of confidence owed to others.

23. The policy did not therefore require a specific meeting at which the employee's concerns would be discussed but rather provided considerable flexibility in the approach that could be adopted, so as to enable the respondent to respond sensibly to the nature of the concern.

24. The grievance policy distinguished between informal and formal complaints. A formal grievance would be instigated where the informal process had been exhausted or were a formal complaint was made in writing. The policy provided that:

Before proceeding to a grievance hearing, it may be necessary to carry out an investigation into the complaint. Investigations will always be carried out as confidentially as possible. In some cases, Sunrise may need to meet with the team member raising a complaint before investigating in order to clarify the nature of the complaint and acquire specific details relating to concerns that would assist with any subsequent investigation.

25. The policy, as is customary in almost all grievances policies, provided for a hearing in circumstances where an allegation had been made against an employee; for the employee to be provided with the evidence gathered as part of the investigation prior to that hearing; for the employee to be accompanied by a work colleague or trade union official; and for the employee to be provided with a written outcome and the right of appeal against it.

<u>The investigation</u>

26. The claimant's letter was passed to Mr Bosompim, the respondent's Head of Care at Sunrise. Simultaneously, the claimant began a period of sickness absence due to stress (from which he was not to return prior to his resignation in August 2019).

27. Mr Bosompim endeavoured to contact the claimant but, due to a change in his mobile number that was not reflected on the respondent's records, he was unable to contact him by phone. In consequence Mr Bosompim elected to avoid delay and to speak to the claimant's line manager, Miss Haskell, interviewing her on 18 July 2019. He produced a record of that discussion.

28. It is unclear whether Mr Bosompim conducted that interview to investigate the matters addressed in the claimant's grievance, or to investigate the matters raised as public interest disclosures, or both. The only incident, of

the three described by the claimant in his letter of 17 July, which Mr Bosompim discussed with Miss Haskell was the incident in which the care user had been escorted to bed by a carer, having only moments before told the claimant that he did not wish to do so.

29. Miss Haskell explained that the claimant had raised that concern with her, and that she had told him that it was important for him to recognise that some residents responded differently to different staff members given that they adopted different approaches and, furthermore, that some of the service users with dementia might lack capacity in relation to personal care and might not initiate such care of themselves if they were not supported to do so. However, Miss Haskell had told the claimant she would look into the incident.

30. Miss Haskell then discussed the claimant's concerns about his move from the Reminiscence Suite with Mr Bosompim.

31. On 22 July Mr Bosompim wrote to the claimant's home address acknowledging his letter of 17 July, and indicating his desire to arrange a convenient time to discuss the claimant's concerns as part of his investigation. A further approach to the claimant was made by Julie McDonald, the respondent's Business Office Coordinator, in which she again referred to Mr Bosompim's desire to conduct an investigation meeting with the claimant in relation to his concerns. The claimant subsequently requested that he should be accompanied by a work buddy, but neither he nor the respondent identified a particular individual. In consequence the claimant was not accompanied to the meeting that took place on 26 July 2019.

32. On 25 July Mr Bosompim emailed the claimant asking whether he wished to meet at 11 AM or 2 PM. The meeting took place on 26 July 2019. The minutes of the meeting describe it as a grievance meeting. The respondent accepts that the title, 'Grievance,' was in error given that the subject of the meeting covered both the claimant's public interest disclosures and his personal grievances.

33. During the meeting the incidents which formed the subject of those disclosures were discussed. The claimant described how B had become increasingly impatient with J because J was unwilling to remove her underskirt, and how J had become tearful, and raised her hand as if to hit B when J's back was turned, leading the claimant to intervene and put his arm between J and B. The claimant expressed concerns that J's reaction suggested that she had become used to such treatment. He also described the occasion on which B had mocked J in relation to her double incontinence during the same shift. When asked, the claimant said that there was no resident in the immediate area, but J was "far somewhere in front of us" and did not appear to have heard. Lastly the claimant gave a short description of the occasion when a resident had been led to bed, stating that she had taken the resident's hand "not in a malice way" [sic] and led him to his bedroom, but the manner in which the resident did not object to the treatment was a further cause of concern to the claimant because the care workers could at times be "overbearing and insisting" and had lost sight of

the need to ensure that the resident's dignity and respect were at the centre of the care practice.

34. Mr Bosompim then discussed the claimant's grievances with him, ending the meeting by advising him that he would take the letter very seriously and would "be investigating [the concerns] in the most professional and confidential way so that we can move forward positively.

35. Mr Bosompim did not, however, conduct any further investigation, he did not speak to B, or the care worker described as a Romanian in relation to the third incident that had been discussed. Instead, on 29 July he produced an investigation report, which noted that he had spoken to the claimant and Miss Haskell, but not to others.

36. Under the heading "Analysis: key findings of fact," Mr Bosompim recorded each of the three allegations. In respect of the first incident, he noted that there was no record of any distress having been logged in J's care records on 10 June 2019, when the incident happened. In relation to the allegation of mocking J, Mr Bosompim focused on whether the mocking had been overheard either by J or by anyone else, noting that it was unclear whether there was a resident "around at the time of the incident" and that no resident had shown any distress. In relation to the last incident, he observed that the claimant's description did not include an allegation of violence, nor was there evidence that the care user was distressed because he had been led to bed. Lastly he noted that although the claimant raised concerns with Miss Haskell, he had not escalated them to senior management in accordance with the respondent's code of conduct.

37. However, in cross examination, Mr Bosompim conceded that each of the incidents described could constitute a breach of the Health and Social Care 2008 (Regulated Activities) Regulations 2014, in particular regulation 13, the prevention of abuse and improper treatment of service users, subsection 4(b), control or restraint that is unnecessary or a disproportionate response to a perceived risk of harm and (c), is degrading for the service user (hereinafter referred to as "the Regulations").

38. On 29 July, Mr Bosompim sent the claimant a written outcome to "the grievance hearing". The outcome letter failed to make any reference to the incident in which B had mocked J in relation to her double incontinence. Insofar as Mr Bosompim considered the other two incidents as allegations within the confines of the grievance procedure, he concluded as follows:

39. In relation to the incident in which J shaped to strike B, Mr Bosompim rejected the claimant's grievance. The basis of the rejection was that the claimant had provided two contradictory accounts of the incident and it was unclear whether J had hit or punched B; suggesting inaccurately that the claimant had stated in one report that the service user had resisted and punched B. The claimant had never made that suggestion. Mr Bosompim did not assess whether there had been any breach the Regulations by reference to J's care plan or B's explanation for her actions.

40. In relation to the incident where the male service user was taken to bed Mr Bosompim again rejected the complaint on the sole ground that there was no deliberate act which could constitute abuse. That was to misinterpret the claimant's acceptance that there was no malice, but that was a separate point as to whether the removal of personal choice constituted a breach of the Regulations which, again, required analysis of the service user's care plan and the carer's explanation for their actions.

The claimant's challenges to the process and outcome

41. On 1 August 2019 the claimant wrote to Mrs Audley, the General Manager of Sunset, but it was unclear whether he was seeking to appeal the outcome or merely to complain about events. He argued that Mr Bosompim's approach and outcome letter failed to distinguish between the personal grievance and the public interest disclosure. He complained that Mr Bosompim had failed to address the incident of B mocking J, and had misreported the claimant's complaint in relation to other incident where J nearly struck B.

42. The respondent was unclear as to the purpose of the letter and, on 8August 2019 emailed the claimant extending the date for appeal until the 9

August 2019.

43. The claimant replied by email that day raising a further grievance against Mr Bosompim in relation to the process he had adopted.

44. On 8 August 2019, Mrs Audley emailed the claimant indicating that anappeal be scheduled in respect of his grievance, but not the public interest disclosure, providing a copy of the grievance policy. She observed that Mr Bosompim had complied with the grievance procedure as he had been invited to a meeting to discuss his hearing and was provided with a written outcome.

45. The claimant replied in an email dated 15 August 2019.

It is impossible to deny in Francis's two letters the meeting which took place between he and I was transformed in his muddle-headed thinking. In his first letter it was as you say set up as a simple meeting. However, in his second missive the meeting had become a full blown hearing that i could have attended with a Union rep or some other person in support In the plain speak of the average intelligent person - HE HAS CREATED AN INDISPUTABLE LIE. One must ask oneself with the public interest in mind, is the presence of such a person conducive with the safeguarding of vulnerable people

46. He suggested that Mr Bosompim was referred to the CQC.

47. On 16 August 2019 Mrs Audley emailed the claimant that the appeal would be limited to the grievance and would not address the public interest disclosures.

48. On 20 August 2019, Mrs Audley emailed the claimant and advised him that the respondent had completed an internal investigation and had reported its

outcome to the senior leadership team and had informed the local adult social services team.

49. Three events occurred on 28 August 2019. First, the claimant attended an appeal hearing, which was limited to his personal grievances. Secondly, the claimant resigned by letter, stating that the reason was “the perpetuation of Bosompim lie” (regarding the categorization of the meeting as a hearing) which had caused him to lose trust and confidence in the respondent. Lastly, Mrs Janet Ogburn, the respondent’s HR Business Partner wrote to the claimant addressing his complaints about the process that had been adopted by Mr Bosompim. She stated,

    I also appreciate that you raised concerns about the confusion over the investigation and grievance process and the status of your previous meeting with Francis Bosompim. As advised I do not believe there was any dishonest or other negative intent in this although there was very clearly a lack of understanding around the process. This has been addressed with the individual concerned and I am aware that managers in general do need more coaching in these procedures.

50. The claimant was sent a written outcome to his grievance on 3 September 2019.

51. On 12 September 2019 the respondent wrote to the claimant accepting his resignation with effect from 28 August 2019.

The Relevant Law

52. The concept of "protected disclosure" is defined by section 43A of the 1996 Act:

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

53. A qualifying disclosure is in turn defined by section 43B:

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

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

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

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

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

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

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

54. The disclosure must be a disclosure of information. In practice, many whistle-blowing disclosures raise concerns, or complaints, or make allegations. This does not, however, prevent them from falling within the terms of the section. As Sales LJ observed in Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; [2019] ICR 1850 at para. 35, the question is whether the statement or disclosure in question has "a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in the subsection". He added that whether this is so "will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case" (para. 36). A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly not suffice; by contrast, one which also explains the basis for this assertion is likely to do so.

55. Whether such words are to be regarded as “disclosure of information” within the meanings of ERA section 43B(1) depends on the context and the circumstances in which they are spoken. The decision as to whether such words which include some allegations cross the statutory threshold of disclosure of information is essentially a question of fact for the Employment Tribunal which has heard evidence (Eiger Securities LLP v Miss E Korshunova [2017] ICR 561 EAT at para 35).

56. Where a claimant argues that the information tended to show a breach of legal obligation, “Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. …” see Blackbay Ventures Ltd v Gahir [2014] IRLR 416 per HHJ Serota QC at paragraph 98.

57. However, neither the EAT in Blackbay nor in Eiger Securities was referred to Babula v Waltham Forest College [2007] ICR 1045, CA and, although it was referred to in NASUWT v Harris (2019) UKEAT0061/19, Soole J did not in his Judgment in Harris address the potential inconsistency and tension between those cases (see para 62 of Harris). Blackbay was relied upon by the EAT in Harris and applied to allegations of the commission of criminal offences.

58. The identification of the obligation “does not have to be detailed or precise but it must be more that a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. The decision of the ET as to the nature of the legal obligation the Claimant

believed to have been breached is a necessary precursor to the decision as to the reasonableness of the Claimant's belief that a legal obligation has not been complied with" Eiger Securities LLP v Miss E Korshunova [2017] ICR 561 EAT at paras 46 to 47.

59. In Twist DX v Armes UKEAT/0030/20/JOJ (V) Linden J returned to the question of disclosures of information. He concluded that it is not necessary that a disclosure of information specifies the *precise* legal basis of the wrongdoing asserted.

60. The worker does not have to show that the information did in fact disclose wrongdoing of the kind enumerated in the section; it is enough that he reasonably believes that the information tends to show this to be the case. As Underhill LJ pointed out in Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979; [2017] IRLR 837 at para.8, if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable.

61. Having reviewed the law we conclude that the following propositions apply when considering whether a claimant has made a protected disclosure;

61.1. First there must be a disclosure of information. That may include allegations, complaints and allegations, provided the combined effect has a "sufficient factual content and specificity" (Cavendish Munro Professional Risk Management Ltd v Geduld [2010] ICR per Sales LJ at para 35;

61.2. Secondly, that information must objectively tend to show, in the claimant's reasonable belief that one of the qualifying grounds exists. The Tribunal's task is to assess the information in context and against the prevailing circumstances. Those circumstances:

61.2.1. Permit a higher objective test where the individual is a professional (see Korashi v Abertawe Morgannwg University Local Health Board [2012] IRLR 4 per HHJ McMullen at para 62);

61.2.2. Permit the Tribunal to read across documents and consider statements to create an objective picture of what would reasonably have been believed to have been understood from a written or verbal statement.

61.3. Thirdly, where the qualifying ground relied upon is a breach of legal obligation:-

61.3.1. *Either* the information must identify the legal obligation, although the "identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong" Eiger Securities LLP v Korshunova [2017] ICR 561 paras 46-47;

61.3.2. *Or*, if the obligation is not identified it must be objectively "obvious" from the information disclosed (Blackbay per HHJ Serota QC at para 98);

61.4. Fourthly, it does not matter whether the claimant's belief is wrong, if objectively his/her belief that he/she has identified a breach as detailed above is reasonable (Babula per Wall LJ at para 79 and Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73 per Elias LJ at para 21.)

61.5. Finally, the articulation of the breach of legal obligation in that sense is a "necessary precursor" for a claimant to establish a *reasonable* belief that the information tends to show that there had been such breach.

Detriment

62. In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the viewpoint of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law, and it has the same meaning in whistle-blowing cases. In Derbyshire v St. Helens MBC [2007] UKHL 16; [2007] ICR 841 paras. 67-68 Lord Neuberger described the position thus:

"67. … In that connection, Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13 at 31A that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".

68. That observation was cited with apparent approval by Lord Hoffmann in Khan [2001] ICR 1065 , para 53. More recently it has been cited with approved in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"."

63. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective.

"On the ground that"

64. There must be a link between the protected disclosure or disclosures and the act, or failure to act, which results in the detriment. Section 47B requires that the act should be "on the ground that" the worker has made the protected disclosure. The leading authority is the decision of the Court of Appeal in Manchester NHS Trust v Fecitt [2011] EWCA 1190; [2012] ICR

372 where the meaning of this phrase was considered by Elias LJ (atpara.45):

"In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower."

65. As Lord Nicholls pointed out in Chief Constable of West Yorkshire v Khan [2001] UKHL 48; [2001] ICR 1065 para.28, in the similar context of discrimination on racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a "reason why" test:

"Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [2001] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

66. Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B.

S.103A

67. Section 103A 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.”

68. “This creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it seems to me that it is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law” see Kuzel v Roche Products Ltd [2008] ICR 799 per Elias J at para 44.

69. The focus must be on the knowledge, or state of mind, of the person who actually took the decision to dismiss, as, “by S.103A, Parliament clearly

intended to provide that, where the real reason for dismissal was whistleblowing, the automatic consequence should be a finding of unfair dismissal. In searching for the reason for a dismissal, courts need generally look no further than at the reasons given by the appointed decision-maker. …[however] If a person in the hierarchy of responsibility above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decisionmaker adopts, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination." Royal Mail Group Ltd v Jhuti 2019 UKSC 55, SC.

Discussion and Conclusions

Protected Disclosure

70. The respondent accepts that the letter of 17 July 2019 contained information which related to the qualifying grounds s.47B(1)(b) and (d). The claimant also relies upon 47B(1)(a) criminal offence, which the respondent disputes.

71. The respondent's challenge is directed to two matters; first whether the claimant reasonably believed that the information tended such show one the qualifying grounds in s.47B because the incidents the claimant described were so minimal.

72. We remind ourselves that this is not a question of motive for making the disclosure, but the test is rather that described in Chesterton, namely if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable.

73. The respondents argument does not survive Mr Bosompim's concession that each of the incidents could constitute abuse; if the respondent's Head of Care reasonably believed that the incidents could be constitute breach of the Regulations, that serves to demonstrate that the claimant's belief was potentially reasonable. In that context, it was not suggested to the claimant that he did not honestly believe that the incidents could constitute abuse. Consequently, given the information had sufficient factual detail to be capable of articulating abuse, in our view, the claimant's belief that his letter tended to show the relevant qualifying grounds was reasonable.

74. The second argument is that the claimant could not reasonably have believed that the disclosure was in the public interest. That is, shortly, a very difficult argument to advance given the spotlight directed at social care, and the recent scandals and inquiries in relation to abuses in care homes. Furthermore, it was not suggested to the claimant that he made the disclosure for the purpose of personal gain. Nevetherless, we consider the factors in Chesterton. First, the number of people effected by the breach which formed the subject of the disclosure included the service users immediately effected, those in Sunrise (given the complaints of a system approach amongst carers despite their training), the families of those whose loved ones were cared for in Sunrise and, at the extreme extension, the public at large who may yet require care in a care

home, given the allegations as to a systemic approach amongst carers which was described as a 'race to bed.'

75. The nature of the interests effected is the need for proper care in a highly regulated sector, and the Article 3 prohibition on degrading or inhuman treatment and the Article 5 right to liberty. Mr Bosompim's concession that the allegations would constitute a breach of the Regulations necessarily engages those rights, and that is the nature of the wrongdoing disclosed. It matters not, of course, whether the claimant was mistaken in his perception of what he saw: a mistaken belief may nevertheless be reasonable.

76. Taking all those factors into account we are satisfied that the disclosure wasin the public interest.

<u>Detriment</u>

77. It is important to focus to upon the specific detriment which the claimantidentified which we repeat for ease of reference here.

> 'The head of care, Francis Bosompin, attempted to intimidate [the claimant] by sending a letter on 29 July 2019 in which he referred to a formal hearing that had taken place on 26 July 2019, when in fact, the claimant says, there was no formal hearing but only an informal chat. In that letter Mr Bosompin recorded various matters which had been discussed.'

78. The claimant's complaint is that what began as an informal was later described as a formal one, and the intention was to intimidate him. Whilst as a

matter of general principle a reasonable worker might form the view that such a change in name was to their detriment, moreso given the effect was to remove a stage of the process to which they were entitled, we are not persuaded that that is in fact what occurred in this case.

79. First the claimant had initialised the complaint informally by raising it orally with his manager, Lisa Haskell. Subsequently, he formalised the complaint by writing the letter of 17 July 2021. He was told in the respondent's letter of 22 July 2021 that there will be an investigation meeting; it was clear that the claimant recognised the formality of the meeting given his request for a buddy which was only permitted under the formal section of grievance policy. Further, there was nothing in Mr Bosompim's suggestion that the meeting could be at 11am or 2pm to counter the clear and accepted formal process, rather Mr Bosompim was only seeking, as often happens, to find a mutual convenient time for the meeting. Whilst it is true that the grievance policy required that Mr Bosompim would usually be accompanied by a noter taker and he was not, the nature of the introduction and the discussion at the meeting on 26 July 2019 was consistent with a formal meeting, and it was understood by Mr Kelly to be as much.

80. Secondly, the respondent's whistleblowing policy provides no entitlement to a hearing at all, whether formal or informal; rather there might be a meeting at which the concerns raised could be discussed with the employee to understand

the nature of the concerns raised. The grievance procedure entitles an employee to a meeting at which their concerns can be discussed where the formal process is followed; that meeting might be given the title of a 'hearing' but there is no distinction in the policy.

81. Consequently, notwithstanding the low nature of the test of detriment, on the facts the claimant was not subjected to the detriment he alleges and the claim fails on that basis.

<u>Causation</u>

82. Even if we have erred in that conclusion, we would have rejected the claim on the grounds that the protected disclosure was not more than a trivial influence on the format of the hearing and the title given to it by Mr Bosompim in his letter of 29 July 2019. First, we note that there is nothing or little to be gained by Mr Bosompim referring to a 'hearing' if what occurred was in fact a 'meeting' given the nature of the respondent's policy. In so far as the grievance was concerned, the claimant was in any event permitted a further grievance hearing and an appeal, thus if the 'gain' intended were to deprive the claimant of a stage of the proceedings the events demonstrate that was not what occurred. The claimant's argument that we should draw an inference that Mr Bosompim adopted the approach he did because he wished to sweep the matters raised in the disclosures under the carpet, given they reflected on the care provided under his watch was therefore misconceived in so far as the pleaded detriment was concerned. We declined to draw an inference from that evidence that the protected disclosure was an inference on the decision's of Mr Bosompim in question.

83. Secondly, and critically, the evidence available identifies a separate reason unconnected to the protected disclosure. The claimant himself ascribed the cause of Mr Bosompim's actions to "muddle headed thinking" in his email of 15 August 2019. That view was one shared by Mrs Audley who in her email of 28 August 2019 noted,

> *I do not believe there was any dishonest or other negative intent in this although there was very clearly a lack of understanding around the process. This has been addressed with the individual concerned and I am aware that managers in general do need more coaching in these procedures.*

84. The import of that email is twofold, first in so far as Mr Bosompim's actions are concerned, Mrs Audley identifies a lack of understanding of the process, and, secondly, she identifies that shortfall in knowledge as being one was common amongst 'managers in general.' We find that the 'lack of understanding' was the reason for decisions in question taken by Mr Bosompim. That being that case, we cannot draw the inference argued for by Mr Wheaton in any event.

85. The claim for unlawful detriment is therefore not well founded and is dismissed.

<u>S.130A ERA 1996</u>

86. The claimant's case in relation to dismissal is focused and limited. He says that the detriment he was subjected to amounted to a breach of the implied term of

mutual trust and confidence. Given that we have found that there was no detriment and that the protected disclosure was not a material influence on the acts said to be a detriment in any event, it follows that this claim is not well founded and must also fail. It is dismissed.

Employment Judge Midgley
Date: 11 November 2021

Reasons sent to parties: 3 December 2021

FOR THE TRIBUNAL OFFICE