EMPLOYMENT TRIBUNALS

Claimant: **Miss E Carradine**

Respondent: **(1) Star Care (Bristol) Ltd**
(2) Miss Tracy Alway

Heard at: **Bristol** **On: 29 and 30 November 2021**
1 December 2021 (Judgment)

Before: Employment Judge Midgley
Ms J Cusack
Mrs H Pollard

Representation
Claimant: In person
Respondent: Miss T Alway, Director

JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The claim that the claimant was automatically unfairly dismissed contrary to s.103A ERA 1996 because the reason or principal reason for her dismissal was the making of a protected disclosure is not well founded and is dismissed.

2. The claim that the claimant was subject to the unlawful detriment of dismissal on the grounds that she made protected disclosures contrary to s.47B ERA 1996 is not well founded and is dismissed.

3. The claim that the respondent failed to pay the claimant for accrued but untaken annual leave is well founded and the respondent is ordered to pay the claimant the sum of £[156.63].[1]

4. The claim that the respondent dismissed the claimant in breach of contract is well founded and the respondent is ordered to pay the claimant the sum of £182.74.

5. The claim that the respondent failed to provide the claimant with itemised pay statements is not well-founded and is dismissed.

[1] Less the sums already paid as annual leave on termination

Claims and Parties

1. By a claim form presented on 16 July 2020, the claimant brought claims of automatically unfair dismissal contrary to section 103A ERA 1996; unlawful detriment on the grounds of having made a protected disclosure contrary to section 47B ERA 1996; breach of contract in respect of notice pay; unpaid annual leave; and failure to provide itemised pay statements.

2. In addition, the claimant brought claims under the Equality Act of discrimination arising from disability contrary to section 15 and failure to make reasonable adjustments contrary to section 20. At a preliminary hearing before Employment Judge Reed on 3 August 2021, those claims were dismissed on the basis that they were brought out of time, and it was not just and equitable to extend time to enable them to be pursued by the claimant.

3. The First Respondent, Star Care (Bristol) Ltd is a company solely owned by the Second Respondent, Tracy Alway. Miss Alway is one of two directors of the company, the other being her daughter, Miss Charlotte Andrews. Miss Alway is the claimant's Aunt; Miss Andrews, her cousin.

4. The Claimant was employed by the First Respondent from the 3 June 2019 until the 31 March 2020 on a part-time basis, working 19 hours per week as a Care Assistant.

Procedure, Hearing and Evidence

5. The hearing was conducted by CVP.

6. The parties provided an agreed bundle (which contained the witness statements, pleadings, orders, and evidence of 299 pages).

7. We were provided with statements from the following witnesses: for the claimant a statement from Miss Carradine herself; for the respondent statements from the following witnesses:

   7.1. Miss Tracy Alway, a Director of the respondent;

   7.2. Mrs Patricia Fudge, the respondent's Care Co-Ordinator;

   7.3. Miss Charlotte Andrews, a Director and Assistant Manager of the Respondent.

8. All of the witnesses gave evidence by affirmation and answered questions from the claimant and Miss Always respectively, and from the Tribunal. The parties made short concluding statements.

Factual Background

9. We make the following findings on the balance of probabilities in light of the evidence we heard and read:

10. The First Respondent a limited company that provides care and support services to service users both at home and in the community within South Gloucestershire and Bath and North East Somerset. The Second Respondent is a director of the First Respondent; her mother (and the claimant's grandmother), Mrs Patricia Fudge, was the Care Co-ordinator at all material times. Miss Charlotte Andrews is also a director and was the Assistant Manager at all material times. As stated, she is the Second Respondent's daughter and the claimant's cousin.

11. For ease of reference in the remainder of the Judgment the First Respondent will be referred to as "the respondent" and the second respondent as "Miss Alway."

12. The respondent services include the provision of assistance to service users with everyday needs (such as bathing, showering, and getting dressed/undressed); and social interaction visits for reasons such as providing company at home, assistance with attending appointments and continuing hobbies, and company for service users whilst their family and friends attend to their daily chores.

13. The claimant was employed as a Care Assistant from the 3 June 2019 on a part-time basis working 19 hours per week across four or five days a week.

The claimant's contract

14. Upon her induction the claimant was provided with a copy of the respondent's standard contract of employment. The claimant signed a copy but did not return it to the respondent. The claimant was also provided with a copy of the respondent's Staff Handbook in accordance with the respondent's standard practice for inductions.

15. The contract provided that the annual leave year began on 1 January and ended on 31 December each year. The notice provisions in the contract accorded with the statutory entitlement, providing a week's notice for each continuous year of employment. The claimant was therefore entitled to a week's notice at the time of her dismissal.

16. The respondent outsourced its payroll function to a company known as 'ICT Bureau,' which was responsible for managing the respondent's rotas and providing its employee with copies. Employees were paid on a weekly basis and received four-weekly payslips. The payslips were generated electronically by the ICT bureau's systems and were emailed to the respondent's employees.

The claimant's role.

17. The claimant's role involved supporting the elderly, palliative care, social visits, and cleaning. Within those functions, she supported people with getting up in the mornings either by hoisting, slide sheets, wheelchair, or just holding their arm. She also bathed, showered, washed, dressed, and administered medication. In addition, she would tidy bedrooms and prepare breakfast and lunch. The claimant would also attend to tea visits and night visits.

18. The claimant was passionate in her role and was a very good carer. However, the claimant's passion could on occasion lead her to adopt intransigent positions and to express herself in a forceful and undiplomatic way in relation to service users' care and what she believed to be in their best interests. Historically that approach had caused friction with some of the families of the respondent's service users. The claimant was spoken to informally about those concerns, and the respondent resolved them by moving the claimant and reallocating a different carer to the service users involved.

19. The respondent operated a system of reporting whereby carers were required to report any issues, whether connected to the service users' welfare or care plans or more general safeguarding concerns, to the senior management of the respondent; whether Mrs Fudge, Miss Andrews or Miss Alway. Miss Andrews or Miss Alway, as directors of the First Respondent, would review and consider the reports and liaise with the relevant local authorities (South Gloucestershire and Bath and Northeast Somerset) or with the CQC as necessary. To that end the respondent had a duty phone which was used by the senior management on a rota basis, which carers could call to report concerns.

The protected disclosure of 20 December 2019

20. One of the service users for whom the claimant was primarily responsible was PS. At the time in question PS suffered from dementia, was bedbound and doubly incontinent. She was unable to communicate verbally and therefore lacked the capacity to make decisions about her care. As a consequence of her lack of mobility, she could suffer from bedsores. That was a situation that was exacerbated by her incontinence, and in consequence her family adopted a practice of removing the pubic hair from her genitalia to facilitate cleaning of the area and to reduce the risk of infection connected to her use of a catheter and more general. The respondent's management, the claimant and the clinicians responsible for treating PS were aware of the practice and neither the respondent nor the clinicians had raised or reported any safeguarding concerns relating to it.

21. PS's care plan with the respondent required personal care and continence management to be provided through visits three times a day. In order to perform personal care and to wash PS, the respondent used a hoist to transfer PS to a shower chair and/or to move her to her bed or a chair in the lounge. The use of the hoist was detailed in the care plan which specified that the activity was to be conducted by two carers, and that the hoist should only be used to move PS to the shower chair or other wheeled chair, which chair would be used to transport PS either to her bedroom or to the lounge where the hoist would again be used to transfer her to a chair or her bed as required.

22. In the event, unbeknown to the respondent or Miss Alway, there had been a limited number of occasions on which the hoist was used to transport PS between rooms, thus from her bed to the shower chair in the bathroom, or to the lounge chair, rather than using a wheelchair as the means of transport. That practice was not recorded in a clear way in the care records.

23. In early December 2019 the claimant was using a hoist to move another service user between rooms in the presence of an Occupational Therapist who was conducting an assessment. The therapist noticed that the claimant and her colleague were using the hoist to transport the service user between rooms and pointed out that that was inappropriate, and unsafe.

24. The claimant suggested that in consequence, she raised concerns with Miss Always that carers, including herself, had incorrectly been using the hoist to move PS between rooms, and that Miss Alway told her that it was permitted and had been risk assessed. Whilst we accept that the claimant may have reported her conversation with the therapist to Miss Alway, we reject the claimant's evidence that Miss Alway instructed her to carry on and that it was permitted, as she suggests. First, we prefer Miss Alway's evidence that she knew that such a course was inappropriate; we can see no benefit to the respondent in the practice of using a hoist as a means of transport, given that the requirement in the care plan was for two carers to undertake the task, so there would be no cost saving. Secondly, and critically, when the claimant raised concerns in relation to PS (as detailed below) she did not make reference to the use of the hoist or Miss Always's alleged instruction to continue to transport service users between rooms using it.

25. On or about 20 December 2019, the claimant provided care to PS. During the course of conducting personal care the claimant discovered that PS's pubic hair appeared to have been shaved and her genital area was red and sore, which caused PS some distress when the claimant cleaned the affected area. The claimant sent a text message to the first respondent's duty phone in which she stated,

> *"…it was easier to text and voice my concerns than it was to call. But I do think PS needs a reassessment after the New Year, I don't feel she is safe some*

mornings to get up into the shower and I sense from the family they ain't happy atm. She is put into the chair in front room shouting and not happy and she isn't safe in that chair.… I feel the family needs to be speaking to GP to see whether these episodes she is having a down to pain. I hope this comes across the right way. xxx."

26. The claimant received a reply from the respondent's duty mobile, advising her that a reassessment had been requested from Bath social services, and the claimant would be informed when the respondent heard from them.

27. On 7 January 2020, the claimant was diagnosed with psoriatic arthritis and Spondylarthritis / sacroiliitis. She informed Miss Alway. The claimant was given new medication and as a consequence of the side-effects had to take time off work. She provided a doctor's note covering the period from 17 January until 13 February 2020.

28. The claimant continued to keep the respondent informed by text message, and there was a discussion between Miss Alway and the claimant in relation to the payment of statutory sick pay for the period; Miss Alway mistakenly suggesting that statutory sick pay began on the fourth day of sickness absence. It appears that she confused the requirement to provide a Med 3 certificate on the third day of sickness absence with the entitlement to sick pay.

29. It was agreed between the respondent and the claimant that the claimant should work reduced hours upon her return in accordance with the advice from her GP, which proposed reduced hours over a three-month period. In essence, the claimant was to work two days a week rather than the four days a week that she had previously.

30. The claimant returned to work on 13 February 2020. At that stage the pandemic was rapidly escalating and threatening the vulnerable residents of care homes. The same day, a domiciliary care manual handling risk assessment for PS took place. The resulting report was included within the care plan pack for PS; it provided that she should continue to receive double care visits (i.e. two carers should continue to attend to perform her care).

31. On 27 February 2020, Miss Alway sent a text message to all of the respondent's employees advising them that if they incorrectly completed the paperwork required to record the personal care which they provided, then their wages would be deducted to reflect any underpayment received by the respondent in respect of those services. The claimant was most unhappy with that course.

<u>The referral to the South Gloucestershire Safeguarding team on 28 February 2020</u>

32. On the 28 February 2020 one of the respondent's employees anonymously made a referral to the South Gloucestershire Safeguarding team ("the Safeguarding team") complaining about the care provided by the respondent. In particular, the report alleged that the respondent had made requests for reassessments or reviews of service user's care plans (which had been requested by a carer or family members); that hoists were used to move service users from bedrooms to living rooms, and that the respondent had not completed DBS checks for its employees; and lastly that inductions or training for some employees had not taken place. Despite the report relating to service users within Bath and Northeast Somerset area, the report was made to the South Gloucestershire Safeguarding Team.

33. We pause only to note that each of those allegations are allegations which the claimant has made in these proceedings, and repeated in her evidence or questions for the respondent's witness, although she remained adamant during her evidence that it was not her who had made the report to the Safeguarding Team on 28

February.

34. On 29 February the claimant texted the respondent's duty phone to request copies of her February payslip. She was told that the payslip had been emailed to her, but still she could not find it. In consequence the respondent resent the payslip by email and included a copy of it within the text message sent to the claimant notifying her that it would be resent. The claimant acknowledged safe receipt of it.

35. On 3 March 2020 the claimant and Mrs Fudge provided personal care to PS. The claimant noted that PS's genital area again appeared to have been shaved as the area was red and sore.

36. On the same day the respondent was notified of the referral to the Safeguarding team. Consequently, on 4 March 2020 Miss Alway emailed all of the respondent's employees on behalf of the senior management team advising them of the fact of the report, and the consequent investigation. The email was in parts emotional and in some places ill-considered; analysing and rebutting each of the allegations which had been reported to the Safeguarding team, expressing the hurt and upset that Miss Alway had that the reports/concerns had not been raised with her, and ending with the comments,

    "This caller seriously jeopardised our contract with south glos and I am sad to say, the future of Star Care.

    We will do everything in our power to keep Star Care running, as we will not let a disgruntled person take away 17 years what we love doing with passion and commitment.

    If anyone has any issues they want to raise with us, then as always our office is always open or we are always at the end of the telephone."

37. On 6 March 2020 Miss Alway texted all of the first respondent's employees advising them that hoists should not be used to transport PS between rooms; reiterating the instruction to the same effect in the email of 4 March above.

38. On 7 March 2020 the claimant suffered from diarrhoea and sickness and began a further period of sickness absence to avoid transmitting a sickness bug to service users.

    <u>The protected disclosure of 10 March 2020.</u>

39. On 10 March 2020 the claimant attended an appointment with her GP, Dr Gavin Jewell. The GP was also PS's GP. During the course of the consultation the claimant disclosed that she had had to manually hoist a service user in a way which she knew was inappropriate. In addition, she raised her concerns about the PS family appearing to have shaved caused PS's genital area, which had caused soreness and pain.

40. The claimant alleges that she also reported to the GP that the respondent was fraudulently charging the local authority for two carers in respect of care when only one carer had attended a service user; and, separately, that the GP agreed to make a referral to the CQC about those matters on the claimant's behalf. We reject that evidence because it is not referred to in the letter of the GP, dated 17 September 2021, in which he details the concerns that the claimant raised with him. We accept the respondent's argument that had the concerns being raised they would have been recorded by the doctor on his practice's systems (if not reported to the local authority at the time) and would therefore have been reproduced in the letter. It is utterly inconceivable that the GP would have agreed to make a referral to the CQC but

would not refer to that in a letter detailing the circumstances of the concerns that were raised to him and the actions that he took in consequence.

The events leading to the claimant's dismissal

41. On 12 March 2020 the claimant requested leave the following Friday (20 March) so she could have a blood test.

42. On the same day, Miss Alway was contacted by an inspector from the CQC who informed her that a further anonymous complaint had been made about the respondent, its practices and the care that it provided.

43. Subsequently, on 13 March, the claimant asked whether she could take the day as annual leave. Miss Alway responded that it was not possible for the day to be taken as annual leave, and she requested that the claimant should wherever possible make appointments during the days when she was not working, because the regular and frequent changes to the claimant's shift were causing difficulties (in a time where the pandemic was beginning to bite). The claimant was unhappy with the refusal of the request for annual leave because it meant that she would not be paid full pay for the day.

44. On 18 March the claimant requested copies of her payslips from June 2019 to March 2020. She did not suggest that she had not received copies of those payslips previously.

45. On 19 March 2020 Miss Alway expressed her frustrations relating to the reports to the Safeguarding team and the CQC on her Facebook page. She referred to the individuals who had made the referrals to those organisations as "just shallow jealous individuals that are parasites;" a view large derived from her belief (which she had expressed in the email of the 4 March 2020) that the complaints and allegations were false and known by the person who made them to be false. However, the greater part of the post focussed upon the incredible efforts of the first respondent's employees to maintain care during the very difficult circumstances of the Covid 19 pandemic.

46. On 23 March 2020, the Government announced that those who were categorised as 'clinically vulnerable' should shield at home. The claimant was concerned that she was clinically vulnerable as a consequence of the medication that she was taking, and therefore informed the respondent that she would isolate and would return to work on 7 April 2020.

The claimant's dismissal

47. On 31 March 2020 Miss Alway received a video call from the claimant's mother. During the telephone call the claimant's mother advised her that the claimant, her twin sister, and the claimant's mother (Miss Alway's sister) had been responsible for the reports to the South Gloucestershire Safeguarding Team and the CQC. Miss Alway received the impression from the claimant's mother that the claimant thought the allegations and the disruptions were in some way amusing, and that they had been made by the claimant to 'get her own back' on Miss Alway, and she knew the allegations were false.

48. Miss Alway was devastated by the news; in particular she was at a loss as to why members of her family would, as she viewed it, make false allegations to those organisations in a manner which appeared to be designed to cause the maximum disruption and the maximum damage to the first respondent's business. She then sent a WhatsApp message to the claimant stating

"just so you know I know the complaints came from you, your Mum confirm that and I know her and Jenny continued it with you knowing. I'm done, please just hand in your notice so U have a half about chance with employment record to get another job."

49. The claimant denied any knowledge of the discussion or the act of whistleblowing, and refused to hand in her notice. Miss Alway replied that she would receive no work.

The Issues

50. The issues are those recorded in the Case Management Orders of Employment Judge Bax dated 23 March 2021; they will not be repeated here.

The Relevant Law

51. 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 ."

52. 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."

53. 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.

54. 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

55. 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).

56. However, neither the EAT was not referred to Babula v Waltham Forest College [2007] ICR 1045, CA in either Blackbay or in Eiger Securities, and although it was referred to the case in NASUWT v Harris (2019) UKEAT0061/19, Soole J did not address the potential inconsistency and tension between those Blackbay and Babula (see para 62 for his analysis). Blackbay was relied upon by the EAT in Harris and applied by Soole J to allegations of the commission of criminal offences.

57. The identification of the legal obligation "does not have to be detailed or precise but it must be more than 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 Tribunal 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" (see Eiger at paras 46 to 47 respecticely).

58. In Twist DX v Armes UKEAT/0030/20/JOJ (V) Linden J returned to the issue 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.

59. 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.

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

60.1. 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;

60.2. 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:

60.2.1. 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);

60.2.2. 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.

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

60.3.1. *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 at paras 46-47; Twist DX).

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

60.4. 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.)

60.5. 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.

61. "Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. …" (see Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 per Mr Justice Lewis at paragraph 49).

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 principal reason for the dismissal is "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (see Abernethy v Mott, Hay and Anderson [1974] ICR 323).

70. 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 decision-maker 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.

Instructions to hand in notice etc.

71. It has long been established that if an employee is told that he or she has no future with an employer and is expressly invited to resign, then that employee is to be regarded as having been dismissed — see, for example, East Sussex County Council v Walker [1972] 7 ITR 280, NIRC.
72. The principles to be considered in such circumstances were set out by the Court of Appeal in Martin v Glynwed Distribution Ltd [1983] ICR 511, CA. Sir John Donaldson MR said that: 'Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really terminated the contract of employment?". If the answer is the employer, there was a dismissal.

Provision of itemised pay statements

73. Section 8(1) of the Employment Rights Act 1996 (ERA) states that 'a worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.'

74. In Anakaa v Firstsource Solutions Ltd [2014] IRLR 941, NICA, the Court of Appeal in Northern Ireland considered the similarly worded Northern Irish legislation (Article 40 of the Employment Rights (Northern Ireland) Order 1996 SI 1996/1919) and, in particular, whether the employer had complied with its obligation to give a written, itemised pay statement where workers were only given online accessible payslips. It was persuaded that, in the modern context, the obligation was satisfied where words are reproduced in a visible form on a computer screen.

Discussion and Conclusions

The protected disclosure claims (s.103A and 47B ERA 1996)

Was the claimant dismissed?

75. We have no hesitation in concluding that the claimant was. Miss Alway told her unambiguously that she should hand in her notice, and, when she refused, told her that she would not be given any hours. We have no doubt that the respondent thereby terminated the claimant's employment on 31 March 2020 and that was a dismissal for the purposes of s.95(1)(a) ERA 1996.

Automatically unfair dismissal on the grounds of having made protected disclosures

76. As the claimant lacks the two years' continuous employment necessary to bring a

claim for unfair dismissal contrary to section 98(4) ERA 1996, she bears the legal and evidential burden to prove the facts from which we could conclude that the reason or principal reason for that dismissal was any of the protected disclosures that she alleges that she made.

77. In this case, given the highly unusual facts and circumstances, both in the sense of the discussion which led to the decision to dismiss and the respondent's candour as to the reason for dismissal which is recorded in Miss Alway's witness statement and which was repeated in her evidence in cross-examination, there is clear evidence before us of the reason for dismissal, which necessarily assists us to answer to the question that we have to decide "what was the reason or principal reason for the dismissal?"

78. Miss Alway, the second respondent, who made the decision to dismiss on behalf of the first respondent stated in round terms in her evidence in cross-examination, "yes, I dismissed because I was told that the claimant had whistleblown to the Safeguarding team and that she did so knowing the allegations she made were false, and that they were made to cause disruption to my business." Her evidence was therefore clear and unambiguous that the set of facts or beliefs which caused her to instruct the claimant to hand in her notice was the breakdown in the relationship caused by her the claimant's mother's disclosure that the claimant had made the report to the South Gloucestershire Safeguarding team on 28 February 2020, and that the claimant's mother or sister had raised the anonymous complaint with the CQC on or about 12 March 2020.

79. Neither of those reports is relied upon by the claimant as a protected disclosure for the purposes of these claims. Rather, she is adamant, as she was at the time of the events, that she had no involvement in either of those matters.

80. Whilst those reports echoed (largely if not entirely) the claimant's concerns, which she repeated in the messages and conversations said to form her protected disclosures (namely the use of a hoist, and the shaving of PS's genital area), the statutory wording of s.103A ERA 1996 is clear that it is only if the actual protected disclosure made by an employee is the reason or principal reason for a dismissal that a claim under section 103A will be well founded. It is not enough for the purpose of the statute that a respondent believes that a claimant has blown the whistle and dismisses because of that belief: in that sense the requirement is very different to that under section 27 of the Equality Act 2010 were a complaint of victimisation is made consequent to the doing of a protected act. The statutory language in section 27(1)(b) is clear that an individual victimises another if he subjects him to a detriment on the grounds that he believes that the individual has done or is likely to do a protected act (whether or not that belief is accurate). There is no similar statutory provision within section 103A ERA 1996 which renders a dismissal unlawful because the reason for it was a belief that a worker had or would blow the whistle.

81. The claim that the claimant was automatically unfairly dismissed because the reason or principal reason for her dismissal was a protected disclosure is therefore not well-founded and is dismissed.

82. It is not therefore necessary for us to analyse the disclosures relied upon by the claimant to determine whether they were protected disclosures or not.

Detriment on the grounds of having made a protected disclosure.

83. It was established in Timis and another v Osipov [2019] EWCA Civ 2321 that an employee may bring a claim, relying on the vicarious liability provision in s.47B(1B), against his employer in respect of a detriment done by a worker, and that there was nothing in s.47B which precluded such a claim being made in respect of the

detriment of dismissal. Here, therefore, the claimant may bring a claim against the respondent in relation to Miss Alway's decision to dismiss.

84. A dismissal is clearly a detriment within the meaning of the section and in accordance with the definition in Shamoon and Khan.

85. The test of causation under section 47B ERA 1996 is different to that under section 103A. Here, the claimant only has to establish facts from which it could be inferred that the protected disclosures were more than a trivial influence on the decision to dismiss. A respondent can defend an allegation under section 47B if it shows that the reason for the dismissal was not in any sense whatsoever the protected disclosure. Therefore, once again, the focus must be upon the protected disclosures said to be made by the claimant and not others. The focus must also be upon a protected disclosure, rather than upon the subject matter of that disclosure: put simply it is not enough that the reason that a respondent dismisses a claimant is in respect of a protected disclosure A, which was not made by the claimant but by another person (Z), but which echoes entirely or largely in its subject matter allegations which the employee made in protected disclosure B. That is precisely the scenario here.

86. We repeat our earlier finding and conclusion as to the reason for claimant's dismissal: it was the belief that the claimant had made a report to the Safeguarding team on or about the 28 February 2020 and the reasons for the report as detailed at paragraph 78 above, not that she had made disclosures on 20 December or to her GP on 10 March 2020. Those disclosures did not even have a trivial influence on Miss Always's decision to dismiss.

87. For those reasons the complaint that the claimant was subjected to the detriment of dismissal on the grounds of having made a protected disclosure is not well-founded and is dismissed.

Breach of Contract in respect of notice pay

88. We have found that the claimant was dismissed on 31 March 2020. There is no dispute between the parties that the claimant was not paid notice pay. The claimant was entitled to one week's notice in accordance with the terms of her contract.

89. The claim that the claimant was dismissed in breach of contract is well founded and succeeds; the respondent is ordered to pay the claimant £182.74 in respect of notice pay.

Unpaid annual leave

90. The respondent conceded that the if true contractual position were that the claimant remained employed in accordance with the terms of her contract whereby she worked 19 hours across four or five days a week, it underpaid her accrued but unpaid annual leave because payment was calculated on the basis of the claimant working two days a week or approximately 9 hours a week.

91. We have no hesitation in concluding that the claimant's contractual terms were unaltered at the time of her dismissal and that she was employed for 19 hours a week. Those were the express terms of her contract and the respondent neither adduced any evidence nor asked any questions to suggest that there was an agreed variation to those terms when the claimant reduced her hours in accordance with the advice of her GP. The claimant's evidence that the reduction in hours was limited to a 3 month period to enable her to manage and adapt to the effects of her medication was unchallenged. We accept that evidence.

92. It follows that the claim for unpaid annual leave is well founded and succeeds. The claimant was entitled to 28 days annual leave; the leave year began on 1 January and the claimant was dismissed on 31 March 2020. She had therefore accrued a quarter of her annual leave entitlement or 7 days. The respondent's evidence that the claimant had taken one day of annual leave on 6 January 2020 was unchallenged. The respondent is therefore ordered to pay the claimant a sum representing 6 days annual leave, being £156.53 less the payment already made.

93. The respondent should within 14 days of the date of this judgment process the figures through its payroll (ICT Bureau) to ensure the correct sums are calculated, notify the Tribunal and the claimant of the figures and calculations and pay the sums to the claimant.

Failure to provide itemised pay statements

94. The respondent's evidence as to the manner in which the payslips were produced and sent to the parties was not challenged. As was held in Anakaa v Firstsource Solutions Ltd a respondent will not breach s.8 ERA 1996 if it provides employees with access to electronic versions of their payslips.

95. In this case the only contemporaneous evidence before us in relation to the payslips were text messages from the claimant to the respondent asking for her payslips. The first of those related to the February 2020 payslip, which the claimant stated she had not received. It was resent to her on the day of the request; she received it. Critically she did not say in that exchange that she had not received other payslips. Later, in March 2020 the claimant request copies of her payslips from June 2019 to March 2020. Again, she did not say in that correspondence that she had not received them previously, only that she wanted further copies. The individual who was responsible for sending the payslips to the employees was Mrs Fudge, the claimant's grandmother, and the claimant did not suggest to her in cross-examination that she never received them.

96. We concluded on the balance of probabilities that the claimant had received the payslips and the claim is therefore not well founded and is dismissed.

Employment Judge Midgley
Date: 1 December 2021

Judgment & reasons sent to parties: 21 December 2021

FOR THE TRIBUNAL OFFICE