EMPLOYMENT TRIBUNALS

Claimant:	**Ms P. Thomas**
Respondent:	**(1) Legacy Care Ltd (in Creditors' Voluntary Liquidation)** **(2) Angelic Care Resources Ltd**
Heard at:	**East London Hearing Centre (by CVP)**
On:	**2-4 and 8 June, and 27 September 2021** **28 September 2021 (in chambers)**
Before:	**Employment Judge Massarella**
Members:	**Mrs S. Jeary** **Ms J. Clark**

Representation

Claimant:	In person
Respondent:	Mr Brotherton (Litigation Executive)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant's employment terminated with immediate effect by reason of her resignation on 11 June 2019;**

2. **the Claimant's employment did not transfer by operation of the TUPE Regs 2006 to the Second Respondent; all claims against it are dismissed;**

3. **the Claimant made qualifying, protected public interest disclosures, as identified at Issues 3(C)(a) and (b), but not in respect of the other alleged disclosures;**

4. **the First Respondent subjected the Claimant to a single detriment, as identified at Issue 8(B), but only in respect of the meeting of 7 May 2019; all other allegations of PIDA detriment are not well-founded and are dismissed;**

5. the Claimant's claim of automatically unfair constructive dismissal under s.103A ERA 1996 is not well-founded, and is dismissed;

6. the First Respondent made unauthorised deductions from the Claimant's wages in respect of salary in the amount of £6,912;

7. the First Respondent made unauthorised deductions from the Claimant's wages in respect of holiday pay in the amount of £2,400;

8. the Claimant is entitled to an award for injury to feelings in respect of the single act of PIDA detriment which we have upheld; the amount of that award will be determined at a remedy hearing, unless the parties invite us to determine it by way of written submissions.

REASONS

This has been a remote hearing, by video (CVP) which has not been objected to by the parties. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Procedural history

1. The claim was presented on 26 July 2019, after an ACAS early conciliation period between 20 June 2019 and 8 July 2019. The Claimant named four Respondents: Legacy Care Plus Ltd, Legacy Care (Developments and Acquisitions) Ltd, Angelic Care Resources Ltd and Legacy Care Ltd.

2. At a preliminary hearing on 18 November 2019 before EJ Elgot, a claim of age discrimination was dismissed on withdrawal by the Claimant, and she was permitted to amend her claim against Legacy Care Ltd and against Angelic Care Resources Ltd to include a claim of automatically unfair dismissal. Legacy Care (Developments and Acquisitions) Ltd and Legacy Care Plus Ltd were removed from the proceedings because they had been wrongly included.

3. The Judge recorded the following information about the remaining two companies:

> 'The First Respondent, Legacy Care Ltd, is in voluntary liquidation since 18 November 2019 and a firm of liquidators have been appointed. The Claimant is permitted to continue with her claim against the First Respondent but was advised to contact the liquidators and advise them of the amount and calculation of the monies she alleges are owed to her consisting of her wages for April and May 2019, holiday pay and bonus. She has been given contact details.'

4. At that hearing the Claimant clarified her case in relation to the termination of her employment as follows:

> 'She states that she resigned from this employment by letter of resignation dated 19 May 2019, a copy of which she showed to the Employment Judge. She resigned on one month's notice but the period of notice was foreshortened by her when she attended a disciplinary hearing on 11 June

2019 and made it clear that she was terminating her employment with immediate effect on 11 June 2019 and would not work out her notice. She received no disciplinary sanction.'

5. Also at that hearing the Claimant raised the question of whether there had been a TUPE transfer of her contract of employment from Legacy Care Ltd (referred to hereafter as 'R1') to Angelic Care Resources Ltd ('R2'). The Claimant was ordered to provide further information about the transfer.

6. A further telephone preliminary hearing took place on 22 July 2020 before EJ Jones, although the hearing was curtailed because of the unavailability of Mr Athur Qureshi. The Judge clarified the steps the parties needed to take and ordered that the case be listed for a three-day final hearing.

7. The case was then listed for a three-day hearing in October 2021. At a TPHC on 27 November 2020 before EJ Gardiner it was relisted for June 2021. It was brought forward because of the stress that the litigation was causing the Claimant. The Judge made directions for the preparation for that hearing, including a list of issues. He clarified that the claim was about whether the Claimant had suffered detriment and constructive dismissal for making protected disclosures, as well as whether she was paid the full salary to which she was entitled, and whether she was entitled to receive additional sums by way of holiday pay and notice pay.

8. A further preliminary hearing took place before EJ Moor on 16 April 2021, at which a final list of issues was produced with the assistance of the Judge. The only areas which required further information were the matters relied on by the Respondent in relation to its contribution argument, and the number of days' holiday which the Respondent contended the Claimant had taken.

The hearing

9. According to Companies House, R1 is still active. Mr Brotherton, R2's representative, confirmed that R1 is in creditors' voluntary liquidation. He agreed that there was no bar on the proceedings continuing against it. However, he was clear that he was not instructed to represent R1 in these proceedings. Strictly speaking, all the evidence and submissions we heard were from R2. We heard no separate submissions from R1. Of course, the reality of the situation was that the witnesses from whom we did hear were all directors or employees of R1 at the material time. Consequently, we had regard to their evidence when determining the claims against R1.

10. Mr Brotherton focused primarily on the question of whether any liability could attach to the R2, on the basis that there had been a TUPE transfer from R1 to R2 and the Claimant was not employed by R1 immediately before the transfer, although he also dealt with the protected disclosures and detriments in his questions to the Claimant. Mr Brotherton provided a schedule of matters relied on by the Respondent at the beginning of the second day relating to the issue of contribution, although this was essentially a cut-and-paste version of the disciplinary allegations raised against the Claimant during her employment, but not determined.

11. Mr Brotherton told the Tribunal that he had no evidence or instructions from the R2 as to the holiday taken by the Claimant, or the extent to which salary had not been paid to the her. He accepted that there were some unpaid arrears of pay but could not provide further clarification. There were payslips in the bundle covering the period up to 7 April 2019, but none for the period thereafter. In relation to the holiday issue, the Tribunal ordered the Claimant to set out in writing how much holiday pay she maintained that she was entitled to, and by reference to which documents in the bundle.

12. The parties' preparation for the hearing was marked by a lack of cooperation on both sides. Suffice it to say that, by the morning of the final hearing, there were witness statements and a single bundle, running to some 350 pages.

13. At the start of the hearing the Claimant told the Tribunal that she had not read R2's witness statements, even though they had been sent to her before the hearing. They were not particularly long; she had the advantage of the time the Tribunal took to read into the case to familiarise herself with them; the witnesses were not called until the second day; she confirmed that she felt able to prepare questions for them.

14. We heard evidence from the Claimant. Although she had provided statements for a number of other witnesses, they did not attend to give evidence. The Tribunal explained that this would affect the weight given to their evidence. For R2 we heard evidence from its former HR manager, Mrs Brenda Clifford and its two directors, Mr Athur Qureshi and Mr Azur Qureshi, who are brothers.

15. An adjustment had already been made for the hearing: EJ Gardiner had extended the hearing by one day, in order to allow for a slower pace. At his suggestion, the Claimant had also observed other cases, to familiarise herself with the process. I explained to the parties that we proposed to take regular breaks, around one an hour, and that we would not be sitting beyond 4 p.m. I explored with the Claimant at the beginning of the hearing whether she was seeking any other adjustments; she confirmed that she was not. Mr Brotherton confirmed that R2 did not require any adjustments.

16. In the event, the hearing had to be adjourned at the end of the third day. Mr Azar Qureshi told the Tribunal that he would not be available to give evidence on the fourth day, as he was attending a Crown Court trial on that day, which was scheduled to last five days. He described the nature of that trial. At this point we will not record how he described it and his involvement in it. Suffice it to say, he characterised it as a criminal matter of the utmost seriousness and sensitivity, and of great personal significance to him (although he was not the defendant). In the circumstances, we concluded that we had no choice but to adjourn our hearing and relist it to a date in September. We were assured by Mr Brotherton that Mr Qureshi had told him that he would provide confirmation from his solicitor of the nature the trial and the need for his attendance. When the Tribunal received those documents, it emerged that the Qureshi brothers were indeed involved in a five-day hearing the following week, but it was an insolvency hearing in the Chancery Division of the High Court. It had nothing whatsoever to do with the matters which Mr Azar Qureshi had described. We concluded that he had deliberately misled us, in order to secure an adjournment. We further record that Mr Azar Qureshi and Mr Athur Qureshi were both exceptionally evasive witnesses throughout the hearing.

17. Both the Claimant and Mr Brotherton produced written submissions, which they supplemented with brief oral submissions.

Findings of fact

18. R1 and R2 are companies which provide/provided residential care for the elderly and disabled. The Claimant commenced employment at the St Peter's Court care home in Maldon, Essex on 6 August 2018. She was originally employed as a Registered Nurse. The holiday year was the calendar year; her annual entitlement was 28 days.

19. There were sixteen rooms and twenty-four residents in St Peter's Court at the time. Mr Athur Qureshi and Mr Azar Qureshi were the directors and had ultimate responsibility for, and were closely involved in, the activities of both companies. Mr Athur Qureshi had particular responsibility for finance. Ms Kelly Corrie was clinical lead but was then promoted in January 2019 to home manager. She left in around June 2019. Ms Lorraine Dowsett was compliance and audit officer; she also dealt with rotas. Both Ms Dowsett and Ms Corrie reported to the Qureshis. There was also an administrator, Ms Marion Livermore. The HR function was carried out by Mrs Brenda Clifford, supported by Croner consultants. There were six to eight nurses, supplemented by bank nurses, and thirty to thirty-five healthcare assistants. Ms Deb Fenton was the senior team leader for HCAs. Nurse Sabrina Rayner was one of the carers. There was a high turnover of staff.

20. On 31 January 2019 Mrs Clifford wrote to the Claimant, informing her that her probation period would be extended 'in view of concerns raised surrounding recent situations'. The letter suggested that there were performance concerns about the Claimant. Mrs Clifford told the Tribunal that in fact there were none at that stage. She had only just joined the Respondent and wanted to carry out a review to gain a better understanding of how the Claimant worked before confirming her in post. We accept that evidence.

21. On 7 February 2019, the Claimant wrote a resignation email to Mr Azar Qureshi (she had found another job). She retracted her resignation when Mr Azar Qureshi offered her the role of Acting Clinical Lead on a rate of £20 an hour. This undermines Mr Qureshi's oral evidence that he had no involvement in staffing matters.

22. On 25 February 2019, the Claimant took up the Acting Clinical Lead role, even though, strictly speaking, she was still in the extended probationary period set by Mrs Clifford. The promotion involved a very small increase in pay (50p per hour). As a result of the promotion the Claimant was the most senior nurse at the home. Under the new terms and conditions, she worked 48 hours per week. There was a trial period of six months.

<u>The Claimant's concerns about a colleague (protected disclosures ('PD') 3A and 3B)</u>

23. On 28 March 2019, Claimant spoke to Ms Corrie and raised concerns about a bank nurse. We will refer to her as Nurse S because we will refer to allegations about her, none of which were fully investigated, let alone upheld, and her identity is not essential to our determinations. The Claimant alleged that Nurse S was using a pressure-sensitive mat to prevent a resident getting out of bed, despite objections from the resident, and that this 'deprived her of her liberty'.

On the limited evidence available to us, we find that the resident was not deprived of her liberty: she could still get up, but the pressure pad alerted nurses to the fact she done so. We are not satisfied that the resident was 'pleading and in distress', as the Claimant alleged; there was no reference to this in the her subsequent contemporaneous complaint.

24. On 29 March 2019, the Claimant wrote to Mrs Clifford, raising the same concerns about Nurse S. In this document, she also complained that Nurse S had spoken to her (the Claimant) rudely and disrespectfully.

25. At short notice the Claimant asked to take leave between 1 April 2019 and 14 April 2019, in order to take care of her elderly parents. Ms Dowsett refused the request.

Concerns raised about the Claimant

26. On 9 April 2019, Nurse Sabrina Rayner wrote to Mrs Clifford, raising concerns about the Claimant, some of them quite serious. Most of them were general criticisms, very few by reference to specific dates or residents. The Claimant accepted in cross-examination that she had a good relationship with Ms Rayner. On 16 April 2019 Ms Deb Fenton raised a concern about the Claimant.

27. Mrs Clifford explained in cross examination how these documents had come about: she had observed a handover, after which members of staff had approached her with concerns about the Claimant; she asked them to put those concerns in writing.

28. The Claimant accepted that one of the incidents that Ms Rayner raised had occurred. She also, very sensibly, accepted that it was appropriate for these concerns to be investigated. For the avoidance of doubt, she did not accept that she was at fault in any respect. For reasons we will go on to explain, none of these allegations were finally determined by the Respondent, and the evidence in relation to them before asked was limited. Further, because we have concluded that there was no dismissal, issues of contribution and wrongful dismissal do not arise. In the circumstances, we do not consider it appropriate to make further findings of fact in a public judgement about otherwise unproven allegations against the Claimant, given that it is not necessary to do so.

29. On 23 April 2019, Mrs Clifford wrote to the Claimant to arrange a meeting with her the same day. The letter suggested that the discussion was a serious one because it held out the possibility of demotion. The evidence before us was confused as to what was discussed at that meeting, of which there are no notes. The notes of the later meeting on 7 May 2019 record Mrs Clifford saying that some of the concerns raised by colleagues were discussed with the Claimant. In her oral evidence to us, Mrs Clifford stated that neither Ms Rayner's nor Ms Fenton's concerns were raised with the Claimant at that meeting. Doing the best we can, we think that some of those concerns were raised, but in a loose, informal way. No formal action was taken at that stage. The Claimant was not demoted.

The incident concerning Patient C.

30. On 6 May 2019, an agency nurse raised a concern with the Respondent that the Claimant gave her an inappropriate instruction in relation to an elderly

patient, whom we will refer to as Patient C., nearing the end of his life, who was in pain. The Claimant denied doing this. It was also alleged that the Claimant had called the patient's family and told them to come to the home, as he might not survive the night. The Claimant accepted that she had called the family but said that she had merely informed them that he was very poorly. The family came to the home; the resident did survive the night.

The alleged protected disclosures on 7 May 2019 (PD 3(C)(a))

31. The Claimant met Ms Dowsett at 10.30 a.m. on 7 May 2019 and disclosed the following concerns about Nurse S:

> 'raising concerns regarding the treatment of residents by the nurse [Nurse S]. In that [Nurse S] called residents 'c***s', saying she hoped residents died, deprived them of their liberty by making them to go to bed early, sleeping on duty, ignoring residents pleas to not be restrained in their bed and holding residents noses so that they could not breathe so that they had to open their mouths to take medication'.

32. Mr Azar Qureshi was also present when she disclosed this information.

33. The Claimant sent an email to the Respondent the same evening. It repeated the allegations and confirmed that she had raised them with Ms Dowsett at 10.30 that morning. She also disclosed that some staff members were considering leaving because they were worried about Nurse S.

The initiation of disciplinary proceedings against the Claimant

34. After that meeting, the Claimant was informed that there would be a formal disciplinary investigation into her own conduct, including in relation to the concerns raised by Ms Rayner the previous month. Ms Clifford hand-delivered an invitation to a disciplinary investigation meeting to her around lunchtime the same day. Mrs Clifford wrote that an investigation would be conducted in relation to alleged multiple issues, but gave no further information about them. At that stage, we are satisfied that there was no obligation on her to do so.

35. Mrs Clifford struggled to explain why she actioned these concerns so quickly after the Claimant raised concerns about Nurse S, when some of them had first been raised several weeks earlier.

36. There is also an issue about the involvement of the Qureshi brothers. Both tried to distance themselves from any involvement in these decisions in their statements. In oral evidence, Mr Athur Qureshi gave extremely evasive evidence about who took the decision to move forward formal disciplinary investigation into the Claimant, giving a number of different answers in the course of several questions, and eventually stating that it had been taken 'perhaps by me and Azar'. On the balance of probabilities, we find that both brothers were involved in the decision. Mrs Clifford was a relatively new employee; we think it implausible that she would have taken the decision without consulting them.

The Claimant's contact with the RCN (PD 3(C)(c) and (d)) on 7 May 2019)

37. The Claimant also contacted the RCN on 7 May 2019 by telephone. That much is confirmed by an email from the RCN, briefly acknowledging the contact. However, it contains no information about what the Claimant said. On the evidence before us, we were not satisfied that the Claimant made protected disclosures to the RCN in her telephone call.

The meeting on 7 May 2019 (Detriment 8(B) and PD 3(C)(b))

38. The Claimant accepted in cross examination that it was appropriate for the concerns which had been raised about her, including the allegations relating to Patient C to be investigated. We agree: the Respondent was obliged to investigate the allegations.

39. A meeting took place on 7 May 2019 at 1 p.m. Mrs Clifford's evidence about the purpose of the meeting was confused: she appeared to be suggesting in her oral evidence that it was intended to address both the concerns which had been raised about the Claimant (including her conduct in relation to Patient C) and those which had been raised by the Claimant (about Nurse S). Mrs Clifford was unable to explain why she had not actioned the Claimant's concerns about Nurse S, which the Claimant had raised in writing at the end of March 2019, before this point.

40. The meeting was unstructured and poorly conducted. It is evident from the notes that the Claimant became agitated and upset. Mrs Clifford raised concerns about the Claimant's welfare, including whether the Claimant was working too many hours. The Claimant said that she was struggling with being clinical lead. Mrs Clifford asked the Claimant if she wanted to step down from that role.

41. In the course of the meeting, the Claimant raised the same issues about Nurse S which she had raised earlier that day to Ms Dowsett and Mr Qureshi. She said that she did not want to leave the building where Nurse S was on shift, because she was concerned for the residents. She again raised the concern that Nurse S made a resident go to bed when they do not wish to do so and that this was 'depriving her of her liberty'. She reiterated that she had raised safeguarding concerns earlier that day and repeated her allegation that Nurse S was holding patients noses to get them to open their mouths. She also raised a concern that the medication count did not tally, and that Nurse S was not conducting it properly.

42. Towards the end of the meeting the Claimant said that she no longer wanted to be clinical lead, and no longer wanted to be on call; she wanted to step down to her original role. She said that she wanted to take the rest of the week (Friday 10 May to Sunday 12 May) as annual leave. Mrs Clifford reminded her that she was booked to work four days the following week (Tuesday 14 May to Friday 17 May). The Claimant also asked to take that as annual leave, as well as 20 to 22 May. She said that she would the work night shifts on 18 and 19 May, and on 1 and 2 June.

43. In the event, the Claimant did not attend work at all after 7 May 2019. There is no evidence that her absence was approved as annual leave.

The Claimant's call to Essex County Council's Adult Social Care department on 8 May 2019 (PD 3(D))

44. The Claimant contacted Essex County Council's Adult Social Care department on 8 May 2019. It was her evidence that she made protected disclosures on that occasion. Apart from an email from the department dated 17 December 2019 confirming that she had 'made a request for the details of the safeguarding concern raised by you on 8 May 2019', the Tribunal concluded that there was insufficient evidence for us to make reliable findings as to what information she had disclosed.

Mrs Clifford's meeting with Nurse S

45. On 9 May 2019, Ms Clifford held a meeting with Nurse S to discuss the concerns raised by the Claimant. Nurse S decided to resign and walked out of the home the same day. Consequently, none of the Claimant's allegations were investigated/determined.

The letter from Dr Lim (Detriment 8(D))

46. On 15 May 2019 Dr Lim, a partner at the Blackwater Medical Centre, wrote to Mrs Clifford complaining that the Claimant had spoken to her in an inappropriate and 'uncompromising' manner.

47. Mrs Clifford explained how the letter came to be written. Dr Lim had spoken to another member of staff and expressed her dissatisfaction. Mrs Clifford then spoke to Dr Lim and asked her to put her concerns in writing, which she did. We accept that evidence.

The exchange of letters on 16 May 2019 (Detriment 8(F))

48. On 16 May 2019 Mrs Clifford wrote to the Claimant, informing her that she considered it necessary to conduct a further investigation into Dr Lim's concerns. She invited her to a meeting on 20 May 2019. Towards the end of the letter, Mrs Clifford wrote:

> 'To ensure that the investigation can be conducted as fairly as possible we request that you keep the matter confidential. Any breach of confidentiality may be considered to be a disciplinary matter'

The handling of the Claimant's alleged grievance and subject access request (Detriment 8(A))

49. On 16 May 2019 the Claimant wrote to the management team as follows:

> 'I know that you are trying to damage my reputation, since I have reported my concerns about the events that have been happening at St Peter's Court nursing home. The other 'Healthcare Professional' was a member of Fran's family and I am not playing your stupid and dangerous little games any more. I know this – because of Fran's text to me. My holiday was authorised by Artur Qureshi and yourself. I even have a witness! Except the shifts that you have given away to other Bank nurses. You took these away from me. You have all the information that you need from the. I have already cooperated with your ridiculous silly nonsense. I am formally requesting a copy of all the information that you have on me. I am entitled to this immediately – under GDPR regulations. Please send this ASAP. This is proof of my cooperation already in your so-called

> investigation. Or rather STAR CHAMBER meetings. I am formally putting in a grievance for group bullying from you all. I shall be reporting this behaviour to CQC and the RCN. The dates of your meeting did not give me sufficient time to arrange union representation. And, I am on holiday (as you very well know).'

50. The Claimant described this as a grievance. It was not: it was an intemperate outpouring of feeling; it was not capable of being dealt with as a formal grievance, in part because it was unparticularised.

51. Mrs Clifford wrote to the Claimant on 17 May 2019, ending as follows:

> 'As you have indicated you wish to raise a grievance, please find enclosed a copy of the Company's grievance procedure as detailed in the staff handbook, which I have attached the relevant section'.

52. Mrs Clifford attached a copy of the grievance procedure. The Claimant described this letter as the 'outcome' of her grievance. It was not: it was simply the provision of the relevant grievance policy, which would enable her to raise a grievance. In the event, she did not do so.

53. The Claimant also described the letter of 16 May 2019 as a subject access request, which it probably was. That email was sent on a Thursday at 8.55 p.m. On Sunday, 19 May 2019 at 6.10 a.m., the Claimant wrote to Mrs Clifford:

> 'Unfortunately I have sprained my ankle and I shall be unable, therefore to attend this meeting in person – as unable to drive. I have already attended an investigatory meeting of the type that you mention and I am waiting for the written response the promised (in front of our neutral colleagues Tonya Forde and Marion). Lorraine and everyone else was aware that I requested leave in that meeting and I was asked to work some nights at St Peter's Court, which I was willing to work – but St Peter's Court have taken it off the rota, against my wishes and given those shifts to someone else). I look forward to receiving the information that you agreed to send me the post, or by email […]
>
> SUBJECT ACCESS REQUEST
>
> Under the GDPR rules, I have requested a copy of all the information that you have on me. This includes any video auditory information that you have as well as written information.

54. Mrs Clifford replied on 28 May 2019:

> 'With regard to your GDPR request please could you clarify what information you would like copies of, or what they relate to and we shall forward them to you within one month of your request accordingly. Please note that if the information requested is vast, we may instead make arrangements for you to come and view it at the Company's premises and then take copies of those documents you wish to have.'

55. The Claimant did not reply.

<u>The night shifts on 18 and 19 May 2019 (Detriment 8(C))</u>

56. As we have already recorded, the Claimant asked to work night shifts on 18 and 19 May 2019. The Respondent did not allocate those shifts to her. This issue was discussed at the meeting of 31 May 2019. Mrs Clifford explained that the Respondent was not confident that she would attend the shift if she was put on the rota, and so it assigned the shifts to others. As set out above, in the event the Claimant did not attend a meeting, also scheduled for 19 May 2019 because she had sprained her ankle and was unable to drive. According to the notes of the meeting, when this was explained to the Claimant she replied: 'I get what you are saying I hear what you are saying'. We understand from this that the Claimant accepted the Respondent's explanation.

The Claimant's resignation

57. In the same email of 19 May 2019 the Claimant resigned from her post:

> 'I am formally resigning from my job as Clinical Lead at St Peter's Court nursing home and I am giving one calendar month's notice as of today. Please advise me of the shifts that you wish me to work during my one month's notice. Please inform me of my last day (probably one calendar month from today). I think my last day will be 19 June 2019. Please pay me all my annual leave accrued from January until my last day – which represents just over six months (from January until 19th June). I look forward to working my notice (if you wish me to do this). Some companies prefer the employee not work during their notice and I am not bothered either way.'

58. Mrs Clifford replied by letter dated 28 May 2019, informing the Claimant that her resignation has been accepted by the company and that her employment would terminate on 19 June 2019. She also informed her that it was the Respondent's intention to continue with the disciplinary investigation notwithstanding the Claimant's resignation.

The suspension on 28 May 2019 (Detriment 8(G)

59. In the same email Mrs Clifford suspended the Claimant on full pay. We accept the Respondent's explanation that it reached this decision, in part because of the nature of the concerns which had been raised about the Claimant, in part because of the Claimant's unpredictable approach to attendance at work since the meeting of 7 May 2019. They needed the certainty of knowing that they could deal with the allegations while the Claimant was not present in the workplace. That is consistent with the earlier decision asking her not to contact colleagues.

60. The Respondent received a request for a reference about the Claimant, in relation to new employment, dated 30 May 2019.

The meeting on 31 May 2019 (Detriment 8(B) and 8(E))

61. The Claimant attended a disciplinary investigation meeting on 31 May 2019. Mrs Clifford told the Claimant that they had received further evidence from a GP, although she declined to give his name. She described the letter as 'a bit damning'. She read the letter out. The Claimant said that she did not think she had behaved inappropriately, she thought she was passing on concerns from a

colleague. Mrs Clifford also raised the issue of the Claimant's contact with the family of Patient C.

62. The Claimant alleges that the meeting was 'oppressive' and 'a sham'; she also alleges that the conduct of the meeting amounted to a breach of the ACAS code. Because this was an investigatory meeting only, there was no obligation to permit the Claimant to be accompanied. The meeting was somewhat chaotic and uncontrolled, but it was neither oppressive nor a sham. There were genuine reasons for holding the meeting and Mrs Clifford attempted to focus on those reasons, to go through the issues with the Claimant, and to ask her for her response. To that extent, she complied with the ACAS code. It was difficult for her to do so, in part because she was herself not well-organised, in part because the Claimant had a tendency (which she also manifested in the Tribunal hearing) to challenge the way she was questioned, rather than focusing on giving a clear answer. At some points she became quite agitated, at others she sought to raise her own grievances. At certain points the meeting deteriorated into an argument.

63. It is also apparent from the notes that the Claimant had other things on her mind. At one point she said: 'how long will it be before anything happens? I'm in a difficult position now where I am looking for a job', and later she said: 'I need to be putting things on my application form because at the moment I'm not putting anything about disciplinary down. What about references?'

The invitation to the disciplinary meeting

64. On 3 June 2019, Mrs Clifford wrote to the Claimant inviting her to a disciplinary meeting on 5 June 2019 and setting out the disciplinary allegations. The Claimant accepted in her oral evidence that that the allegations required investigation.

The meeting on 11 June 2019 (Detriment 8(H))

65. The Respondent's case was that the Claimant resigned at the meeting of 11 June 2019. The Claimant denied this. On the contrary, she made an allegation that the Respondent subjected her to a disciplinary hearing 'during which Mr Azar Qureshi did not hear the Claimant at all.'

66. We have already (para 4) recorded EJ Elgot's summary of a preliminary hearing on 18 November 2019, which states that the Claimant told the Judge that the notice period was foreshortened by her when she attended a disciplinary hearing on 11 June 2019 and made it clear that she was terminating her employment with immediate effect. The Claimant denied that this is what she told the Judge. We find that she did. We think it extremely unlikely that such an experienced Judge would have mis-understood information of this sort. The Claimant was not represented at the hearing, and so there can be no question of information being incorrectly communicated on her behalf by someone else.

67. We find that the events of the meeting of 11 June 2019 were as follows. The Claimant was accompanied by her trade union representative, Mr Paul Schroder who, with the full consent of the Claimant, negotiated an agreement with Mr Azar Qureshi, whereby the Claimant would agree to the termination of her employment with immediate effect and, in exchange, the Respondent would agree to drop the disciplinary charges against her. In response to questions from the Tribunal, the Claimant confirmed that the disciplinary hearing did not

go ahead, and that she was not asked any questions about the disciplinary allegations.

68. That is consistent with the Claimant's transcript of her own recording of the meeting contains the following exchange, at the end of the meeting, which is consistent with the Respondent's case:

> 'Thomas: So the conclusion of this meeting. It's a disciplinary hearing. In what way are you [unintelligible] to discipline me?
>
> Schroder: They haven't. They have accepted your resignation.
>
> Qureshi: Exactly.
>
> Thomas: OK. I needed that to be made clear.
>
> Schroder: Sure I understand.
>
> Thomas: I don't understand these processes and that needed to be made clear to me. So thank you for doing that.
>
> […]
>
> Thomas: So I've got no disciplinary action…
>
> Schroder: Exactly. That's OK.
>
> Thomas: I truly thank you.'

<u>The post-termination letter (Detriment 8(I))</u>

69. It is also consistent with a letter in the bundle, dated 12 June 2019, from the Respondent to the Claimant, which included the following passage:

> 'At the beginning of [the] disciplinary hearing your Trade Union representative requested an 'off the record' conversation and asked on your behalf if we would consider at that point your resignation with immediate effect. We adjourned the meeting to consider this request and on reconvening, I advised that we would be prepared to accept the resignation with immediate effect. As a result, the disciplinary process was stopped at that point'.

70. Mrs Clifford told the Tribunal that she drafted it, but she then left the Respondent's employment, and it was never sent. We accept that evidence. It is consistent with a text which Mrs Clifford sent to her former colleague, Ms Livermore, which was also in the bundle:

> 'I had Pippa contact me. She still not been paid? Nor her final outcome letter I was doing on my leaving day she has not recv'd either confirming details as discussed etc.'

<u>TUPE transfer</u>

71. It was agreed between the parties at a PH that there was a TUPE transfer from R1 to R2 on 17 June 2019. Following the TUPE transfer R1 ceased trading and is currently in voluntary creditors' liquidation.

Unpaid salary

72. There was a lack of clarity about what the periods to which the payslips we were taken to related. Doing the best we can on the evidence available to us, we have concluded that the most reliable indication was contained in the payslip dated the end of April, which states that it covers the pay period for March to 7 April. That that was the last payment made to the Claimant.

Accrued but untaken holiday

73. We have already found that the holiday year was the calendar year. The Claimant's annual entitlement was 28 days. Her employment lasted until 11 June 2019. She told us that she took no holiday in the relevant leave year. R1 led no evidence to rebut that contention, and we accept it. R2 characterised the Claimant's absences, referred to above, in different ways, including as unauthorised absence from work.

74. Although there was a figure in one of the pre-termination payslips characterised as 'holiday pay', none of the Respondent's witnesses could explain why the Claimant would have been paid a lump sum at that point. Given that her employment had not terminated, there was no requirement to pay her in lieu. In the circumstances, we do not accept that it represented holiday pay for the 2019 year.

The law to be applied: TUPE

75. The Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE Regs') provides as relevant:

> **Effect of relevant transfer on contracts of employment**
>
> **4.—(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.**
>
> **(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—**
>
> **(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and**
>
> **(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.**
>
> **(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.**

Public interest disclosure claims

Protected disclosures

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

> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—**
>
> **[…]**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **[…]**
>
> **(d) that the health and safety of any individual has been, is being or is likely to be endangered.**

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

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

What was the disclosure of information?

78. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 the Court of Appeal, *per* Sales LJ, held as follows:

> **'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other**
>
> **[…]**
>
> **35. In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).**

Did the worker believe that the disclosure tended to show one or more of the matters listed in sub-paragraphs (a) to (f)? If he did hold that belief, it must be reasonably held.

79. The issues arising in relation to the Claimant's beliefs about the information disclosed were comprehensively reviewed by Linden J. in *Twist DX Ltd*. Whether the Claimant held the belief that the disclosed information tended to show one or more of the matters specified in s.43B(1)(a)-(f) ('the specified

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

Disclosure in the public interest

80. The Court of Appeal considered the 'public interest' test in *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731. The Tribunal must ask: did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest (at [27])? That is the subjective element. There is then an objective element: was that belief reasonable? That exercise requires that the Tribunal recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest (at [28]). While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it (at [30]). 'Public interest' involves a distinction between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest (at [31]).

PIDA detriment claims

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

> **A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.**

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

Automatically unfair dismissal

83. Where the dismissal relied on is a constructive dismissal, the employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that he was entitled to regard himself as discharged from his obligations under the contract.

84. An employee may rely on a breach of the implied term of trust and confidence. The applicable principles were reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 (at [14] onwards):

> **'The following basic propositions of law can be derived from the authorities:**

> **1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.**
>
> **2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".**
>
> **3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v* WM *Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).**
>
> **4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).**
>
> **[...]**

85. The Court of Appeal gave further guidance in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 (at [55]):

> **'(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **(2) Has he or she affirmed the contract since that act?**
>
> **(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**
>
> **(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)**
>
> **(5) Did the employee resign in response (or partly in response) to that breach?'**

86. In determining whether there has been a breach of the implied term, the question is not whether the employee has subjectively lost confidence in the employer but whether, viewed objectively, the employer's conduct was likely to destroy, or seriously damage, the trust and confidence which an employee is entitled to have in his employer: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 (at [29]).

87. It is important to apply both limbs of the test. Conduct which is likely to destroy/seriously damage trust and confidence is not in breach of contract if there is 'reasonable and proper cause' for it: *Hilton v Shiner Ltd Builders Merchants* [2001] IRLR 727 (at [22- 23]).

88. S.103A ERA provides:

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

89. There is an important distinction between detriment cases, where it is sufficient that the disclosure is a material factor in the treatment, and dismissal cases, where it must be the sole or principal reason.

90. In a constructive dismissal claim, the reason for the dismissal is the reason for the breach in response to which the employee resigned.

Unauthorised deduction from wages

91. Part 2, ss.13 to 27B of the Employment Rights Act 1996 Act ('ERA') set out the statutory basis for a claim of unauthorised deduction from wages.

92. An employer shall not make a deduction from wages of a worker employed by him, which are properly payable to the worker, unless the deduction is required or authorised to be made: by virtue of a statutory provision; a relevant provision of the worker's contract; or the worker has previously signified in writing his agreement or consent to the making of the deduction. Any agreement or consent authorising the deduction from wages to be made must be entered into before the event giving rise to the deduction.

Holiday pay

93. Reg 14 provides that a worker is entitled to be compensated for accrued but untaken leave upon termination of his employment:

> **14.—(1) This regulation applies where—**
>
> **(a) a worker's employment is terminated during the course of his leave year, and**
>
> **(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.**
>
> **(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).**
>
> **(3) The payment due under paragraph (2) shall be—**
>
> **(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or**
>
> **(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—**
>
> **(A x B) - C**
>
> **where—**
>
> **A is the period of leave to which the worker is entitled under regulation 13(1);**
>
> **B is the proportion of the worker's leave year which expired before the termination date, and**

C is the period of leave taken by the worker between the start of the leave year and the termination date.

[...]

Conclusions: the claims against R2

94. The Claimant resigned with immediate effect on 11 June 2019; the transfer occurred on 17 June 2019. The Claimant was not employed by R1 immediately before the TUPE transfer. Accordingly, the claims against R2 must fail because neither the Claimant's employment, nor any liability in respect of her claims, transferred to it.

95. The conclusions below relate exclusively to R1.

Conclusions: public interest disclosures

PD 3A: 'On 28 March 2019, the Claimant verbally raising concerns to the First Respondent's manager, Kelly Corrie, regarding the treatment of residents by a nurse '[Nurse S]', in that this nurse was using a pressure relieving mat for a resident, in a way it was not intended, i.e. to prevent the resident getting out of bed, despite the Resident's pleadings and distress'

96. The Claimant did raise these concerns with Ms Corrie. We are satisfied that they amounted to a disclosure of information. Subjectively, the Claimant believed it tended to show a breach of a legal obligation, which she described as 'depriving the resident of her liberty'. However, we find that that belief was not reasonable. Although it might be said the patient was deprived of the ability to choose what time she went to bed, she was not deprived of her liberty. We have already found that there was no evidence that the resident was 'pleading and in distress' as the Claimant alleged. Although we accept that the Claimant was genuinely concerned, there was no protected disclosure at this stage.

PD 3B: 'On 29 March 2019, the Claimant writing to the First Respondent setting out her concerns regarding [Nurse S]'s treatment of residents'

97. There were two aspects to this alleged disclosure. We have already concluded that the first of these, relating to the pressure pad, did not amount to a protected disclosure. The second aspect was the Claimant's complaint that Nurse S had spoken rudely and disrespectfully to her. We are not satisfied that the Claimant subjectively believed that the disclosure tended to show a breach of a legal obligation, nor that it was objectively reasonable to believe that it did. It was nothing more than a complaint of disrespectful behaviour by a junior colleague. There was no protected disclosure in this email.

*PD 3(C): raising concerns regarding the treatment of residents by [Nurse S]. In that [Nurse S] called residents "c**ts", saying she hoped residents died, deprived them of their liberty by making them go to bed early, sleeping on duty, ignoring residents pleas to not be restrained in their bed and holding residents' noses so they could not breathe so that they had to open their mouths to take medication;*

PD 3(C)(a): 'The Claimant verbally to Lorraine Dowsett and Azar Qureshi the First Respondent's regional operations director'

98. We have already found that the Claimant disclosed the information (para 31). This disclosure went further than her previous disclosure. We accept that the Claimant subjectively believed that it tended to show that elderly residents were not safe in the care of Nurse S, and that the safety of residents might further be compromised if staff left because of Nurse S's conduct. We find that belief was objectively reasonable. We have no doubt that the Claimant believed it was in the public interest to make the disclosure, and no hesitation in concluding that that belief was reasonable. The Claimant made protected disclosures.

PD 3(C)(b): 'and then at a meeting with Brenda Clifford, of HR [on 7 May 2019]'

99. The Claimant repeated the same disclosures at the meeting with Mrs Clifford at the meeting on 7 May 2019. For the reasons already given, they were protected disclosures.

PD 3(C)(c): 'verbally to the Royal College of Nursing [on 7 May 2019]; and PD 3(C)(d): 'by email to the Royal College of Nursing [on 7 May 2019) copied into Ms Dowsett, Mr Azar Queshi and Athuruddin Queshi and Ms Clifford'

100. We have already found (para 37) that the Claimant did not make separate protected disclosures to the RCN on 7 May 2019.

PD 3(D): 'On 8 May 2019 the Claimant telephoned the Essex County Council's Adult Social Care department to report a safeguarding issue regarding ES's treatment of residents.'

101. We have already found (para 44) that there was insufficient evidence to support a finding that the Claimant made protected disclosures to Essex County Council's Adult Social Care department.

Conclusions: PIDA detriments

Detriment 8(B): 'on 7 May [and 31 May] subjecting the Claimant to oppressive investigatory meetings which were a sham, causing the Claimant distress and upset'

102. We reject the allegation that the meeting of 7 May 2021 was a 'sham': there were genuine concerns which had been allowed to lay dormant, but which the Claimant herself accepted in cross-examination ought properly to be investigated. Crucially, there was also a new concern which had arisen the day before, on 6 May 2019, which we conclude was one of the triggers for the decision to move to a formal investigation. Nor was the meeting 'oppressive' in terms of the manner in which it was conducted. It was somewhat chaotic, but we are satisfied that Mrs Clifford was genuinely seeking to address the issues which needed to be addressed.

103. However, we are not satisfied that the timing of the decision to move to a disciplinary investigation, which could be described as oppressive given its haste, was unconnected with the fact that the Claimant made protected disclosures at 10.30 in the morning. An invitation to a disciplinary investigation meeting was on her desk by lunchtime. We have concluded that the fact that she had made protected disclosures irritated the Qureshis and materially influenced the timing of the meeting, i.e. their decision to instruct Mrs Clifford to move so quickly to a disciplinary procedure. We have concluded that it was a subsidiary reason, not the sole or main reason for the decision. The principal

reason was the new matter which had arisen on 6 May 2019; it was decided that this matter required formal investigation, and that it would be appropriate tolook at the other matters formally at the same time, as there may be underlying concerns about the Claimant's conduct. Nonetheless, the fact that the disclosures played a subsidiary, but not immaterial, part in the decision, is sufficient for this claim to succeed.

Detriment 8(D) 'in mid-May 2019 the first Respondent, via their HR manager Mrs Clifford, requesting from a GP letter regarding the Claimant'

104. There was nothing sinister in the letter. A concern had been raised about the Claimant's manner of interacting with another practitioner. Given that there were other pending concerns, we are satisfied that Mrs Clifford acted properly in asking the GP to document her concern. We have concluded that the fact that the Claimant had made protected disclosures played no part whatsoever in this decision. The claim is not well-founded.

Detriment 8(F) 'on 16 May 2019, the first Respondent instructing the Claimant not to discuss anything with any of her colleagues or she would be faced with the disciplinary hearing regarding breaching confidentiality'

105. Mrs Clifford did instruct the Claimant not to contact her colleagues, in the context of an investigation into Dr Lim's concerns (para 48). This was a reasonable request, in circumstances where there was the potential for staff to take different views as to the events in question, and a risk that the Claimant might seek to influence others in discussion. We are satisfied that that was the sole reason why Mrs Clifford included this paragraph in her letter. There was no detriment to the Claimant: all she was being asked to do was maintain confidentiality. The reference to possible disciplinary action, if she did not do so was also not a detriment. Provided she maintained confidentiality, which she did, she was not at risk. The claim is not well-founded.

Detriment 8(A): 'before 19 May 2019 the first Respondent ignoring the Claimant's grievance (raised on 16 May 2019) and subject access request'

106. We have already found (para 50) that the Claimant did not raise a grievance and, insofar as she indicated that she intended to do so, the Respondent did not ignore it, but provided her with the relevant policy. Nor was the Claimant's subject access request ignored. Mrs Clifford asked for clarification of what information was sought; the Claimant did not reply. The conduct did not occur as alleged and the claim is not well-founded.

Detriment 8(C): 'On 18 and 19 May 2019, the first Respondent refusing to allow the Claimant work night shifts for them'

107. There was a detriment, in that the shifts were not assigned to the Claimant. We have concluded that the sole reason why the Respondent did not do so was because, given the Claimant's unpredictable attendance at work, it was not confident that she would cover them, if she they were assigned to her. The decision had nothing whatsoever to do with her having made protected disclosures. The claim is not well-founded.

Detriment 8(G): 'on 28 May 2019, the first Respondent suspending the Claimant from her employment'

108. We have accepted the Respondent's explanation for the suspension. We find it had nothing whatosever to do with the fact that the Claimant had made protected disclosures. The suspension occurred after the Claimant's resignation, and so cannot have had any influence on it.

Detriment 8(B): 'on [7 and] 31 May 2019, the first Respondent subjected the Claimant to oppressive investigatory meetings which were a sham, causing the Claimant distress and upset'

Detriment 8(E): 'In May 2019, the First Respondent failing to follow the ACAS code of practice in relation to the investigatory meetings outlined above and regarding the Claimant's alleged performance issues in her role as Clinical Lead.'

109. As far as the investigation meeting on 31 May 2019 is concerned, we have concluded that the fact that the Claimant had made protected disclosures played no part whatsoever in Mrs Clifford approach to the meeting. The purpose of the meeting was legitimate: to explore with the Claimant the concerns which had been raised about her. Again, the meeting was disorganised and ill-focused. The reason for this was, in our judgement, twofold: firstly, Mrs Clifford was not a particularly skilled HR adviser; and, secondly, it was difficult for her to keep the Claimant focused on the issues at hand. It was not a sham, nor was it oppressive. We are not satisfied that there was any breach of the ACAS code. If we are wrong about that, we are satisfied that the fact that the Claimant had made protected disclosures played no part whatsoever in the timing or conduct of the meeting of 31 May 2019. The claim is not well-founded.

Detriment 8(H): 'on 11 June 2019, the First Respondent subjecting the Claimant to a disciplinary hearing during which Azar Qureshi did not hear the Claimant at all'

110. There was no disciplinary meeting on 11 June 2019, because an agreement was reached whereby the Claimant would resign with immediate effect and the disciplinary charges would be dropped. The claim fails on its facts.

Detriment 8(I): 'after [the] disciplinary hearing on 11 June 2019 the First Respondent failing to write to the Claimant at all (the Claimant will say that the letter produced by the first Respondent on that date is not genuine)'

111. It is right that the letter was not sent. We have concluded that the sole reason for this was that it was overlooked when Mrs Clifford left the Respondent's employment, having drafted the letter. It had nothing whatsoever to do with the the Claimant having made protected disclosures. Given that it post-dated her resignation, it cannot have been a cause of it.

Detriment (para 17): unpaid salary and not being informed of the TUPE transfer

112. We are not satisfied that the fact that the Claimant had made protected disclosures played any part whatsoever in the failure to pay the Claimant her outstanding salary or the failure to inform her about the TUPE transfer.

113. We have concluded that the sole reason why she was not informed about the transfer was because she had resigned. Had she not resigned, she would have been informed. It is unclear whether there was any meaningful consultation with any of the employees about the transfer until the very last moment. Like many

aspects of the Respondents' business, it appears to have been a rushed and somewhat chaotic process.

114. As to the pay, we have concluded that the sole reason why the Claimant was not paid her outstanding pay was because it was overlooked when Mrs Clifford left the business. By the time Mrs Clifford reminded payroll, the responsibility for payroll had passed to R2. R2 considered that it was not liable for any outstanding pay (that was the responsibility of R1, because the Claimant had not transferred); and, insofar as R1 still existed, it was plainly in financial difficulties and the resolution of the pay issues of this former employee was not a priority.

115. We have concluded that there is no evidence from which we could reasonably conclude that the fact that the Claimant had made protected disclosures played any part whatsoever in these failures.

Conclusions: constructive dismissal by reason of having made protected disclosures

116. We have found that only one of the PIDA detriment claims succeeds. Because the timing of the 7 May 2019 meeting was materially influenced by an improper consideration, it cannot be said that the Respondent had 'reasonable and proper cause' for holding the meeting when it did.

117. We went on to ask ourselves whether this, in itself, amounted to conduct which was so serious that, viewed objectively, it was likely to destroy or seriously to damage the relationship of trust and confidence. This is a difficult issue. We have concluded that it was not: it was only the haste with which the meeting was arranged which was improper; we are satisfied that the meeting would have taken place in any event, because (as the Claimant agreed in oral evidence) the Respondent was obliged to investigate the concerns. Consequently, we have concluded that there was no breach of the implied term of trust and confidence, entitling the Claimant to resign and claim constructive dismissal.

118. If we are wrong about that, the claim of constructive dismissal must fail in any event, because we have concluded that the Claimant did not resign (even in part) in response to the detriment which we have found to occur. The sole reason for her resignation was that she wished to avoid potential disciplinary action, which might affect her ability to find new work. Although arising out of the same factual matrix, in our judgment it is a quite separate reason for resigning from the fact that she had been subjected to the detriment in question.

119. If we are wrong about that, the fact that the Claimant had made take disclosures was (we have already found) only a subsidiary reason for the detriment. It was not the sole or principal reason for it. The principal reason for the convening of the meeting was that there were concerns about the Claimant's conduct and practice which the Respondent considered had to be investigated formally, in particular an additional matter which had been raised the day before. Consequently, even if there were a constructive dismissal by reference to the detriment we have found, it follows that the sole or principal reason for the dismissal was not the making of the disclosure by the Claimant and the claim of automatically unfair constructive dismissal under s.103A ERA would also fail for that reason.

120. For all these reasons, the claim of constructive dismissal is not well-founded.

Conclusions: wrongful dismissal

121. The Claimant resigned without notice on 11 June 2019. In the circumstances, she was not entitled to notice pay. The claim of wrongful dismissal is not well-founded.

Conclusions: unpaid salary

122. We have already found (para 72) that the Claimant was not paid in respect of the period after 7 April 2019, although she remained employed. None of the exceptions apply. We are satisfied that R1 made unauthorised deductions from the Claimant's wages.

Conclusions: holiday pay

123. The Claimant worked 5.33 months out of 12. She accrued 12.5 days' holiday entitlement (28÷12 times x 5.33), for which the Respondent did not pay her on termination of her employment. Her claim succeeds.

Remedy in respect of the pay claims

Loss of salary

124. We have calculated the loss on the basis of a 48-hour week, at £20 an hour, which was the rate for the clinical lead role.

125. After 7 April 2019, the Claimant worked for four weeks at 48 hours per week, plus shifts on 6 and 7 May 2019, which is 19.2 hours (based on a five-day week).

126. The only two days on which she made herself available to work after that was 18 and 19 May 2019. Although we have found that the Respondent's reasons for not allocating shifts to her on those days did not amount to detriments by reason of the Claimant's protected disclosures, nonetheless she was available for work, and should have been paid. That represents a further 19.2 hours.

127. The Claimant was suspended on full pay on 28 May 2019. She was not paid between that date and 11 June 2019, when her employment terminated by reason of her resignation with immediate effect. That is two weeks (2 x 48 hours) and two days (19.2 hours).

128. The total number of hours for which the Claimant was not paid is 345.6 hours, which (at £20 an hour) equates to £6,912.

Holiday pay

129. The Claimant is entitled to pay in respect of 120 hours (12.5 days x 9.6 hours), which at £20 an hour equates to £2,400.

Injury to feelings

130. The Claimant is also entitled to an award for injury to feelings in respect of the single PIDA detriment which we have upheld. For the avoidance of doubt, we have concluded that no loss of earnings can flow from that single detriment because we are satisfied that, had it not occurred, the Respondent would have

instigated a disciplinary investigation in any event, and the Claimant would have resigned at precisely the same point.

131. The parties may invite us to deal with the question of how much the award for injury to feelings should be on the papers, if they wish to avoid a further hearing. However, if a hearing is requested, it will be listed for three hours. The parties must notify the Tribunal of their preference within 14 days of the date on which this judgment is sent out.

Employment Judge Massarella
Date: 21 December 2021

APPENDIX: AGREED LIST OF ISSUES

1. What was the effective date of termination of employment?

    a. the Claimant will say her employment terminated on 19 June 2019, having given a month's notice on 19 May 2019;

    b. the 2nd Respondent will say that she resigned with immediate effect on 11 June 2019.

2. If the Claimant was employed on 17 June 2019, then her employment will have transferred from the First to the Second Respondent.

Protected disclosures (Part IVA ERA)

3. Did the Claimant make protected disclosures to the Respondent, pursuant to section 43B of the Employment Rights Act 1996? The Claimant relies on the following alleged disclosures:

    a. on 28 March 2019, the Claimant verbally raising concerns to the First Respondent's manager, Kelly Corrie, regarding the treatment of residents by a nurse '[Nurse S]', in that this nurse was using a pressure relieving mat for a resident, in a way it was not intended, i.e. to prevent the resident getting out of bed, despite the Resident's pleadings and distress;

    b. on 29 March 2019, the Claimant writing to the First Respondent setting out her concerns regarding [Nurse S]'s treatment of residents;

    c. on 7 May 2019:

a. the Claimant verbally to Lorraine Dowsett and Azar Queshi the First Respondent's regional operations director;

b. and then at a meeting with Brenda Clifford, of HR;

c. and by verbally to the Royal College of Nursing; and

d. by email to the Royal College of Nursing copied into Ms Dowsett, Mr Azar Queshi and Athuruddin Queshi and Ms Clifford;

e. raising concerns regarding the treatment of residents by the nurse ES. In that ES called residents "c**ts", saying she hoped residents died, deprived them of their liberty by making them go to bed early, sleeping on duty, ignoring residents pleas to not be restrained in their bed and holding residents' noses so they could not breathe so that they had to open their mouths to take medication;

d. On 8 May 2019, the Claimant telephoning the Essex County Council's Adult Social Care department to report a safeguarding issue regarding ES's treatment of residents.

4. Did the alleged disclosure at sub paragraph b above, disclose information?

5. If so, did the Claimant have a subjective belief which was reasonably held that she disclosed information which showed or tended to show that the First Respondent was failing or was likely to fail to comply with:

   a. any legal obligation to which it was subject (Section 43B(1)(b) ERA 96), as referred to in the Claimant's 'Burden of Proof' document, and/or;

   b. the health and safety of any individual had been, was being or was likely to be endangered (section 43B(1)(d) ERA 96).

6. If so, did the Claimant have a reasonable belief that these disclosures were made in the public interest? (The Claimant has stated why she believed these disclosures were in the public interest in her Burden of Proof document.)

Section 103A of the ERA 96 unfair dismissal for the [sole] or principal reason the Claimant made protected disclosures

7. If the Claimant made a protected disclosure, then was she constructively dismissed?

8. The Claimant relies on the following alleged conduct of the First Respondent:

   a. before 19 May 2019 the First Respondent ignoring the Claimant's grievance (raised of 16 May 2019) and subject access request.

   b. on 7 and 31 May 2019, the First Respondent, subjecting the Claimant to oppressive investigatory meetings which were a sham, causing the Claimant distress and upset;

c. on 18 and 19 May 2019, the First Respondent refusing to allow the Claimant to work night shifts for them;

d. in mid-May 2019, the First Respondent, via their HR Manager, BC, requesting from a GP a letter regarding the Claimant;

e. in May 2019, the First Respondent failing to follow the ACAS code of practice in relation to the investigatory meetings outlined above and regarding the Claimant's alleged performance issues in her role as Clinical Lead;

f. on 16 May 2019, the First Respondent instructing the Claimant not to discuss anything with any of her colleagues or she would be faced with a disciplinary hearing regarding breaching confidentially;

g. on 28 May 2019, the First Respondent suspending the Claimant from her employment;

h. on 11 June 2019, the First Respondent subjecting the Claimant to a disciplinary hearing during which, Azar Queshi, did not hear the Claimant at all;

i. after the disciplinary hearing on 11th June 2019, the First Respondent failing to write to the Claimant at all (the Claimant will say that the letter produced by the First Respondent on that date is not genuine).

9. Did that conduct breach the implied term of trust and confidence? The Tribunal will need to decide whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the parties; and whether it did not have a reasonable and proper cause for doing so.

10. Did the Claimant resign in response to that breach?

11. Did the Claimant affirm the contract before resigning?

12. If the Claimant was constructively dismissed, was the [sole] or principal reason for dismissal the fact that she made protected disclosures? If so then the Claimant was unfairly dismissed.

13. Has the Claimant discharged her duty to mitigate her losses i.e. has she made reasonable efforts to find alternative work?

14. If there has been an unfair dismissal, would the Claimant have still been dismissed? If so, what adjustment, if any, should be made to the compensatory award? (the *Polkey* question).

15. Did the Claimant cause or contribute to her dismissal by blameworthy conduct? If so, pursuant to sections 122(2) and 123(6) of the ERA 1996, should the basic and compensatory wards be reduced to reflect this?

16. Did either party breach the ACAS Code of Conduct in relation to the Claimant's dismissal? If so, does such breach(es) entitle the Claimant to an uplift or reduction in compensation, pursuant to Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

Section 47B of the ERA 96; detriments on the grounds of making protected disclosures

17. Did the First Respondent subject the Claimant to any detriments on the grounds she made protected disclosures? The Claimant relies on the allegations contained in paragraph 8(a-i) above and the unpaid salary (as set out below) and that she was not informed of the TUPE transfer.

Section 13 of the Employment Rights Act 1996 – Unauthorised deductions from wages

Unpaid salary

18. Did the First Respondent fail to pay the Claimant her salary for the period of April-June 2019?

19. If so, is the Claimant entitled to claim the sum of £11,544 (gross)? Calculated on the basis of a 48 hour week @£18.50 per hour.

Holiday pay

20. What was the Respondent's holiday year? The Claimant will say it was the calendar year.

21. How much holiday had the Claimant accrued and did not take in that holiday year upon her termination of employment? The Claimant will say she had not taken any paid holiday that year. [The Respondents to insert the dates upon which they contend the Claimant took paid holiday.]

22. Did the Respondent fail to pay the Claimant this accrued and untaken holiday pay?

Wrongful dismissal

23. Is the Claimant entitled to notice pay? If so, how much?