



EMPLOYMENT TRIBUNALS

Claimant: Ms V. Viegas

Respondent: The Disabilities Trust

HELD BY: CVP **on:** 4th – 6th July 2022

BEFORE: Employment Judge T. Vincent Ryan
Ms M. Farley
Mr P. Charles

REPRESENTATION:

Claimant: Ms. Viegas represented herself (a Litigant in Person)

Respondent: Ms I. Baylis, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant made protected disclosures to the respondent on 28th August 2020 and 14th May 2021, being disclosures of information which in her reasonable belief tended to show that the health and safety of an individual had been or was being or was likely to be endangered.
2. The claimant was not subjected to any detriment by any act, or any deliberate failure to act, by the respondent done on the ground that the claimant had made a protected disclosure, or protected disclosures.
3. The claimant's claim that she was subjected to a detriment on 14th May 2021 by Jennifer Carpenter was presented out of time, and in circumstances when it would have been reasonably practicable for her to have presented that claim in time. If the Tribunal had jurisdiction in respect of this claim it would have found that it failed in any event.
4. The respondent did not make an unauthorised deduction from the claimant's wages for the period 28th May – 4th June 2021.
5. The claimant's claims all fail and are dismissed.

REASONS

The Issues:

1. The parties agreed a List of issues during the course of the hearing and a copy is set out in the appendix to this judgment along with an agreed chronology and cast list.

The Facts:

2. The Respondent (R):

2.1 R is a large employer with a professional HR function. It is “a national charity in receipt of public funds providing support to individuals with a number of complex needs, including acquired brain injury, autism and physical disabilities” (R’s Grounds of Resistance paragraph 1). Amongst other residential establishments owned and managed by R is Ty Aberdafen, Llanelli where C worked.

2.2 R Employed permanent staff in management, administration, HR, housekeeping, clinical and caring roles and some other roles. It also engaged bank workers.

2.3 R would arrange training for staff, giving priority to its permanent staff. It had no formal commitment to training bank workers on a regular basis although on occasions, such as where a training course or place was booked but a permanent member of staff was unavailable for it, the paid-for training would be opened up to available bank workers. A bank worker booked for a shift that coincided with the training would not be considered as being available to take up any spare place.

2.4 Permanent staff could step up to more senior roles, such as a carer becoming a shift leader, and a shift leader becoming a team leader. Bank workers did not step up in this way. As happened in this case, this policy could mean that a more recently appointed, less experienced, and younger, permanent care worker could step up and become more senior or in a position of authority over longer-serving, more experienced, and older bank workers. I make reference to age because it is evident that this was a consideration in the mind of the claimant when she compared her situation to that of Amy Jones, a permanent worker who stepped up and therefore “out ranked” (my expression) the claimant.

3. Cast list:

Name	Job Title	Relevance to case
Vanessa Viegas (C)	Bank support worker	Claimant - <u>witness</u>
Rina Ugali	Support worker	Claimant witness for incident 9 th June – <u>witness for C.</u>
Amy Jones (AJ)	Support worker	AJ and C involved in dispute about task

		assignment on 9 th and 10 th June. AJ subject of alleged protected disclosure 14/05/21. Witness for Respondent. <u>Witness for R</u>
Cameron Kosac (CK)	Support worker	Sees AJ crying on the 9 th June. Makes complaint about C's treatment of AJ and provides statement for investigation.
Christine Groves (CG)	Regional Project Manager at relevant time	Decision maker both to cancel C bank shifts whilst there was an investigation and to partially uphold outcome. <u>Witness for R</u>
Dean Jenkins (DJ)	Assistant Manager	Initial phone call re cutting shifts
Kirsty Atkins (KA)	Head of Care	Initial phone call re cutting shifts
Alyssa Burgess Russell (ABR)	Assistant People Manager	Called the claimant to explain the process of investigation. <u>Witness for R.</u>
Jennifer Carpenter (JC)	Team Leader/Assistant Manager	Alleged PD disclosed to JC about medication being left out. <u>Witness for R.</u>
Daniel Thomas (DT)	Then Assistant Manager at Sussex Community House.	Investigator.

4. **Witness evidence:** The Tribunal heard evidence from C and Rina Ugali as well as R's witnesses Amy Jones, Jennifer Carpenter, Alyssa Burgess-Russell and Christine Groves.

5. **The Claimant (C):**

5.1 C was employed by R as a Housekeeper, working 10 hours each week, between 8th October 2018 – 30th July 2020; she was engaged as a Bank Support Worker from 30th January 2019 and last worked a shift as such on 10th June 2021. During the latter period she also accepted placements (or offered to) as a housekeeper when there was a need. Her claims relate to her role as a Bank Rehabilitation Support Worker. As stated, C worked in both roles at Ty Aberdafen, Llanelli.

5.2 On 4th February 2019 C signed her acceptance of R's offer letter for the role of Bank Rehabilitation Support Worker dated 30th January 2019. C accepted her role on the basis that it did not establish any form of contractual relationship and that she was not guaranteed regular work. In fact, she made herself available as often as she could; there was usually work available on a rota system and the claimant completed many shifts over the period between January 2019 and June 2021. She was not obliged to accept any shifts that were offered, and R was not obliged to offer shifts.

5.3 The rate of pay at commencement was £8.61 per hour or £9.61 at weekends and on bank holidays, with holiday entitlement accruing over a reference period of 13 weeks.

5.4 C was not entitled to contractual sick pay. C was entitled to SSP, subject to satisfying qualifying conditions.

5.5 C was a committed carer and housekeeper, and whilst R had some reservations and grounds for concern (including those based on complaints) there was never any issue so serious as to merit formal investigation or termination of engagement prior to the matters that arose in June 2021 (see below). C enjoyed her work although, as will become evident, there were some issues with interpersonal relationships. C struck up a good rapport with residents at the care home, whom all parties referred to as “service users”; her relationship with service users was good, and her care of them was not criticised. Having ceased her employment as a housekeeper she would nevertheless put her name forward to assist in housekeeping when there was a need and R made an appeal for extra hands.

5.6 C wanted the opportunity to step up to a more senior role and would have welcomed that; she also would have appreciated the same training opportunities as permanent staff. C knew that she could apply for training places and that if one became available it could be offered to her.

5.7 When Amy Jones (AJ) commenced her permanent employment with R, aged approximately 20, C enjoyed a good working relationship with her. If they had any interpersonal difficulties, they were able to resolve them amicably following a friendly conversation. That situation changed when AJ became a shift leader and in a position of authority over C, which included her allocating tasks to C, amongst others. C resented taking instructions from AJ because she thought that AJ, being younger and less experienced, was less able than she was. At the material time C was aged 47 years, and she started to work at Ty Aberdafen before AJ. The Tribunal makes these findings based on all available evidence including the evidence of AJ, which was clear, plausible and consistent (both internally and with the documents in the hearing bundle) and despite the denials of C, whose evidence on this point was unclear, implausible and inconsistent; the Tribunal notes the complaints made by CK detailed at page 98 about C’s conduct towards AJ, and an undated text or WhatsApp message sent by C to a colleague (page 120). C was prepared to, and did, speak in disparaging, disrespectful and insulting terms about AJ to her colleagues. The Tribunal was also taken to a message between C and a colleague during the time C was not being allocated shifts pending investigation (which we will refer to as a “suspension” although technically it was not one), and C’s statement to the internal investigation in which she refers to a text message conversation with a colleague (HA) in both of which she advised her respective colleagues to report AJ to shift leader/management. As referred to below, C was prepared to, and did, challenge and undermine AJ with and in front of colleagues. R was informed that C shouted abuse about AJ and whilst we did not have first-hand evidence of that, we find it reasonable for R to have believed these reports as they were, on balance, most likely true. C admitted in evidence that she sent the disparaging message at p120 and that she said words to the effect that she would not be told what to do by a 20-year-old (although there is some dispute as to whether she used the words “fucking” and “kid”).

5.8 AJ was told about C’s comments and messages after the events. She was hurt, offended and felt undermined. She took matters to management. The

relationship had “soured” in the words of AJ and has yet to recover. The Tribunal finds that the reason for this was that AJ had become Shift Lead having stepped up.

6. 28th August 2020 emails from C to KA/DJ (“the food emails”) (p55):

6.1 C would send emails to R’s management if she had concerns about any matters at work. She raised issues fairly often, as described by CG - “grumbles” and “concerns”.

6.2 On 28th August 2020 C sent an email to KA and DJ referring to an email of the previous day (also p.55). Those emails concerned food hygiene, potential use of out-of-date ingredients, the standards and practice of a particular chef, and the risk of food safety procedures in place compromising the well-being of Service Users.

6.3 C conscientiously believed that Service Users were being put at risk, not least because of potential breaches of a policy in place for residents with difficulty swallowing (which policy she did not expressly reference). C believed that by raising these concerns management would take steps to minimise risks and improve standards for Service Users, and that her raising them was therefore in the public interest.

6.4 C was reporting what she had observed when she went to the kitchen to prepare a sandwich, her conversation with a chef, and her awareness that some staff members were not eating food prepared by him. This was her first-hand knowledge which she therefore reasonably believed to be true; she also had reason to believe, from her knowledge of best practice, the applicable policies, and the needs of Service Users, that their health and safety had been, was being or would likely be endangered.

6.5 AJ was unaware of this, or these, email(s) until two days before this hearing commenced when she read them in preparation in the hearing bundle. They were not addressed to her, may even have pre-dated her employment, and they were never drawn to her attention before her said preparation.

6.6 The email trail was dealt with KA/DJ. CG was informed of them some weeks later and her recollection is that DJ dealt with the matter; she then put them out of mind. The Tribunal accepts CG’s evidence, being clear, credible and consistent, that she did not think again about the emails until they were brought up as part of C’s claim to the Tribunal. She was not referred to them, nor did she refer to or think of them, when investigating C’s conduct of 9th-10th June 2021. CG categorised these emails as “concerns”, and not “grumbles”, raised by email to management in the appropriate way. They had no bearing on CG’s later dealings in the said investigation.

7. 14th May 2021 email C to JC (“the keys email”) (p64-65):

7.1 On 14th May 2021 C saw a set of keys to the medicine cabinet, which had been in AJ’s safe custody, on a table at which was seated a Service User. She sat at or near the table and took a photograph of the Service User, table, and keys on her ‘phone. AJ had stepped away from the table to put a tray on

a trolley and she had her back to the table when C took the picture. AJ's evidence, and it was not contradicted, was that the Service User in question was immobile and could not have reached for the keys. That said, AJ, having ensured that the medicine cabinet was securely closed and locked, should have kept possession of the keys, should not have left them unattended even momentarily, and should not have left the keys near a Service Users; that constituted best practice in accordance with applicable policies and procedures for the safe keeping of drugs and ensuring the safety of residents.

7.2 Having taken at least the two pictures that are in the bundle, C sent two pictures of the scene to JC with a brief message about the keys being unattended for 5 minutes. She did this without telling AJ. AJ denies the alleged timeframe or that she left the room. The Tribunal finds that AJ's version of events (para 30.1) is more likely true on balance and in any event, technically, if C was in attendance and watching the keys for the said 5 minutes then they were not "unattended". The Tribunal considers that if C was concerned then she would have taken the precaution of removing the keys from the table and securing them.

7.3 C understood, correctly, from what she had observed that AJ had breached health and safety policies and procedures by at very least putting the keys on the table in front of a Service User, turning her back and walking away. The breach could have led to the endangerment to the health and safety of the Service User in the picture or another in the vicinity, save that this was unlikely in fact on this occasion as C was present and observing the scene. Such a breach on another occasion would more likely lead to such endangerment.

7.4 C believed that breaches of policies and procedures designed to ensure security of medication could endanger vulnerable residents; safeguarding Service Users was paramount, and the rules were designed to ensure that. C believed therefore that it was in the public interest to raise this issue with JC. C was also at least in part motivated by her resentment at AJ stepping up to Shift Lead; she had previously reminded AJ of the need to lock the medicine cabinet but on this occasion, she did not remove the keys, take them to AJ or counsel AJ on procedures.

7.5 Upon receiving the email with the pictures JC counselled AJ on maintaining medicine security by keeping the keys on her person, as it had been drawn to her attention that she had left keys unattended on a table. JC did not tell AJ the source of her information; she did not show AJ the email and photographs; JC just told AJ to be "mindful" of safe practices concerning the keys and the risks otherwise. AJ accepted the immediate, oral, counselling given to her and that was how the matter was concluded. AJ did not know at that time that it was C who brought the matter to JC's attention.

7.6 Prior to this event the relationship between AJ and C had already soured. AJ already believed that C had taken against her because she had stepped up, and she already felt that C was giving her "a hard time over the shift lead – she felt unappreciated by new people taking over". On 9th-10th June matters came to a head between C and AJ for reasons related specifically to events and words spoken on those days.

7.7 The email and photographs referred to above were not in AJ's mind in her subsequent dealings with C. The Tribunal finds that AJ allocated appropriate tasks, and made comments or gave instructions, that were appropriate and specific to situations affecting Service Users; she rose above inter-personal difficulties arising from the soured relationship; on balance this is likely as AJ wanted to succeed as Shift Lead and wanted to show that, despite what C may feel about her experience and relative youth, she was capable of putting the needs of Service Users first; we heard no evidence of any concerns or complaints raised about AJ by R, but only those raised by C. AJ candidly volunteered that she was not able to administer medicines in May/June 2021 because of an error that she had made at work. AJ said in evidence, and we believed her, that she did not seek or even want promotion to Lead but was asked by management to step up and she accepted it.

7.8 CG was unaware of the keys email at the time and, on her account which we believed, probably until she was preparing for this hearing and read the hearing bundle. The keys email played no part in the investigation into C's conduct and the events of 9th – 10th June 2021 and the outcome.

8. C's absence from work 28th May – 4th June 2021:

8.1 In May 2021 C suffered an injury out of work. On or around 28th May that injury was exacerbated when a Service User (M) kicked out and that kick struck C; M had a propensity to kick out, but he enjoyed a good relationship with C generally; they co-operated well together and had a commendable rapport. M could do a lot for himself and was considered by AJ to be one of the Service Users requiring less hands-on attention and care than most others. It is accepted that by following correct procedures on which staff were trained, carers could minimise the risk of injury from M when he kicked out. C was suitably trained, and we accept her evidence that she generally followed her training and safe practices.

8.2 As a result of the exacerbation of her injury C was unavailable to accept shifts, including ones booked, in the period 28th May – 4th June. As they had been booked R paid her SSP. She did not receive company sick pay albeit KA/DJ indicated to her that in the circumstances it may be, or was likely to be, paid; it was not within their authority to authorise payment. The question of sick pay was referred to CG. CG confirmed that C did not have a contractual right to company sick pay, and she authorised payment of SSP. C received the payment of money to which she was entitled. She was available and worked shifts after 4th June 2021 and was paid in accordance with her contract for hours worked.

9. 9th June 2021:

9.1 At this time C was on shift with AJ and RU. Because of earlier errors and corrective action by R, AJ and RU were not permitted to perform medication rounds for Service Users. AJ allocated C to carry out the two required medicine rounds on that shift.

9.2 The practice at the end of a medicine round is for another member of staff, not the one who did the round, to check the medicines to ensure the round had

been safely and properly carried out. The person doing the round cannot check their own work. AJ had not allocated the checking role in advance. When C completed the second round as allocated, AJ asked RU to do the check; AJ had received confirmation from management, upon her enquiring, that RU was able to perform that task. AJ was then required to manage the shift hand-over, that is from the finishing shift she was on with C and RU to the newly arrived carers for the next shift. In these circumstances AJ instructed RU to perform the medicines check.

9.3 RU complained to AJ that she wanted to get ready to go, and to go, home; that she, AJ, ought to have told her sooner; RU refused to do the check. C supported RU's refusal in the circumstances and undermined AJ's authority. AJ asked another colleague to do the check.

9.4 AJ was upset and tearful.

10. 10th June 2021:

10.1 AJ and C were working together again on shift. AJ allocated C to care for M. She asked C to shower him. There was nothing intrinsically unusual or wrong with that allocation or request.

10.2 C felt it was unfair that she should have to be M's carer that day; she had already worked with M earlier in the week and did not want to be allocated to M that day; she did not want to shower M. She said all of this to AJ. She objected to all of AJ's instructions and requests in this regard. AJ checked with her management whether C was fit to work (to ascertain whether there might be good reason for C refusing to care for M that day or to shower him); she was duly informed that C had signed herself fit to work. AJ considered that as M ought to be showered, she had properly allocated C to M, because of their good relationship and as M was easier to handle than the other service users, and C was officially fit to work then she ought to do as instructed. She said to C that as she was fit, she should shower M.

11. Following the events of 9th - 10th June CK made an informal complaint to management about C's conduct. AJ also asked to speak to management. The Tribunal finds that the notes at p 99-100 under the heading "Background Situation" is an accurate reflection of what was reported to R by both CK and AJ. AJ said that on occasions C refused to accept her direction and instruction. The Tribunal finds that C was on occasions obstructive to such instruction and direction either by challenging or objecting and in any event complaining about AJ's management and that she did so at times rudely and loudly. She also spoke in disparaging terms to RU and within earshot of others about AJ and her management and she actively undermined her to others. AJ stated, in reference to the events of 9th - 10th June 2021 that C refused her instructions and in evidence AJ clarified that she was in part mistaken; on 9th June C had performed the two medication rounds allocated to her and she was not allocated the medicine check; AJ was upset at the attitude and comments of RU and C when the check was allocated to RU. The Tribunal finds that AJ merely made a mistake, and probably out of upset, confusion and exasperation when she referred to C not completing a task on 9th June; AJ did

not false accuse C for any reason related to, let alone influenced by, the food or keys email.

12. Investigation of complaint about C 10th June – 1st October 2021:

- 12.1 DJ and KA met with C on 10th June 2021. The notes of the meeting, commencing at p99 are accurate. C was informed that R had received feedback from staff about her, including that some of her colleagues had left work in tears because of what was described as her “general demeanour and negative impact on others”. C confirmed that she expected that she would be spoken to. She was not told the details set out under the heading “Background Situation”, but she knew that she was under suspicion of bullying AJ. She knew enough to provide a very detailed defensive written statement subsequently. C sent a text message to a colleague saying that she had been suspended for “bullying Amy”, and in that text message she used crude and derogatory language about C in making serious allegations of misconduct by AJ; her colleague was concerned at the tone and content of the message and brought it to R’s attention, apparently out of concern for AJ.
- 12.2 R confirmed that shifts would be withheld from C pending investigation (which we have referred to as “suspension” in a non-technical but practical sense). C was upset and tearful.
- 12.3 DT was appointed as Investigating Officer. He had not handled an investigation before and required assistance. We did not hear evidence from DT and so cannot make exact findings as to the dates he took certain action or his rationale. It is more likely than not that DT requested that witnesses provide witness statements after receiving C’s statement, provided on 23rd June 2021.
- 12.4 DT completed his investigation and report on 13th August 2021. C said in evidence that she did not criticise DT for delay and that she does not assert that any delay on his part was detrimental or was on the ground that she had made protected disclosures (the food email and the key email). C confirmed her claim relates to the handling of the matter by CG after she received DT’s report.
- 12.5 CG received the investigation report on 13th August 2021 and her timeline thereafter was as follows:
- 12.5.1 17th August she was made aware that C was in hospital having had a suspected heart attack; that diagnosis, and of heart-failure, was subsequently confirmed. CG required clarification of some matters by C and wanted to establish when C would be well enough to discuss matters with her;
- 12.5.2 19th – 30th August 2021 – CG was on annual leave;
- 12.5.3 31st August 2021 CG returned to work facing a holiday backlog and matters that she conscientiously prioritised over chasing C for the clarifications required;

12.5.4 6th September 2021 CG contacted C to arrange to meet remotely, and a Zoom call was arranged;

12.5.5 9th September 2021 - Zoom meeting between CG and C;

12.5.6 CG had and expressed the hope to provide an outcome to C by 24th September 2021. Owing to work commitments and further annual leave she was unable to meet this aim;

12.5.7 9th – 19th September 2021 CG was absent on annual leave. C was unaware of this and said to the Tribunal that she could have better understood the delay had she known it before this hearing, when CG gave that information in cross-examination;

12.5.8 CG had and expressed the hope to provide an outcome to C by the revised date of 1st October 2021.

12.5.9 1st October 2021 CG provided an outcome letter. She recommended mediation between C and AJ before C undertook (or was offered) any further shifts and did not uphold other specific allegations. The outcome letter is at pages 146 – 149. The Tribunal finds that it is a true reflection of CG's conscientious consideration of the evidence before her, unaffected and not influenced in any way by the food email, or the keys email (of which she was then unaware). As regards the food email she did not have it in mind at the time of the outcome and, in any event, it related to what she had considered to be a genuine concern, appropriately raised by C, that had been dealt with properly by DJ at the time and was a long since closed matter.

12.6 CG partly upheld one of the complaints and did not uphold two. She conscientiously concluded that the best way to advance matters was by way of mediation between C and AJ, face to face. C suggested it be done via Teams but that was considered to be sub-optimal in the circumstances. AJ was not aware of the outcome but said in evidence that she would not by then have been ready to participate in mediation as she felt so hurt by C; she would not have been ready for it if it had been suggested to her. It was not suggested to her because C had declined the opportunity to meet on site for the purposes of mediation. C has not been offered any further shifts pending mediation.

13. Time limits:

13.1 The keys incident email was sent on 14th May 2021 and that is the date C alleges JC told AJ about it. The primary time limit for presentation of a claim was three months from the date complained about subject to ECC extension. The latest date by which C ought to have commenced ACAS conciliation was therefore 13th August 2021.

13.2 C pursued ACAS early conciliation in the period 25th August 2021 – 6th June 2021, when the ECC was issued. A claim in relation to events occurring

before 26th May 2021 would potentially be out of time, and the parties have agreed that the relevant date is 3rd June 2021.

13.3 C presented her claim to the Tribunal on 14th October 2021.

The Law:

14. Public Interest Disclosure:

14.1 S.43A Employment Rights Act 1996 (ERA) defines protected disclosures, in the context of public interest disclosures generally referred to as “whistle blowing”. S. 43B ERA lists the types of disclosures that qualify for protection at 43B (1) (a) – (f) ERA including disclosures that a person failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and that the health and safety of any individual has been, is being or is likely to be endangered. Any such disclosure must be made appropriately as required by sections 43C – s. 43H ERA.

14.2 A worker has the right not to be subjected to any detriment by the employer done on the ground that the worker has made a protected disclosure (S. 47B ERA). S.103A provides that an employee who is dismissed shall be regarded 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, an automatically unfair dismissal (s. 103A).

14.3 There is a five-stage test to determine if there has been a protected disclosure

there must be a disclosure of information;

the worker must believe the disclosure is made in the public interest;

that belief must be reasonably held;

the worker must believe that the disclosure tends to show one of the matters in s.43B(1) (a) – (f) ERA, for example breach of legal obligation et cetera ;

that belief must be reasonably held.

14.4 It is good practice to decide why an employer acted as it did before becoming involved in lengthy esoteric debate about whether there has been a protected disclosure, so as to ensure the relevance of any such finding; if the tribunal were to find that the employer’s actions were not influenced by any potential disclosure but have a clear and obvious innocent explanation for action or inaction then there is no need to over-deliberate to establish whether in fact the comment or observation made by the employee amounted to a qualifying or protected disclosure. The tribunal should establish the employer’s motivation and rationale for action or deliberate inaction.

14.5 An “allegation” and “information” are not mutually exclusive; to qualify for protection a disclosure must have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in section 43B (1) ERA; if there is sufficient factual content and specificity, and the worker subjectively believes that

the information tends to show one of those listed matters, then it is likely that the belief would be a reasonable belief, assessed in the light of the particular context in which it is made (*Kilraine v Wandsworth LBC* [2018] ICR 1850).

14.6 The tribunal ought to investigate the claimant's state of mind at the time of the disclosure to consider the reasonableness of the claimant's belief and whether this subjective belief was objectively reasonable.

14.7 What matters then is whether a protected disclosure materially influenced (more than trivially) the employer's treatment of the person who made the disclosure (*Fecitt & others v NHS Manchester* [2012] ICR 372).

14.8 As stated above, in both discrimination and whistleblowing cases treatment will amount to detriment if a reasonable worker would, or might, take the view that the treatment accorded to them had in all the circumstances been to their detriment (*Jesudason v Alder Hay Children's NHS Foundation Trust* [2020] EWCA Civ 73).

14.9 It is irrelevant that the respondent to a claim involving detriment would have or may have acted in the same way for any other number of reasons if the reason for action in the particular case is because of the protected action. If the treatment was because of a protected action, it is no defence to say that the same treatment could have followed other circumstances too (*Balfour Kilpatrick Ltd v Mr S. Acheson & Others* EAT/1412/01/TC).

14.10 The respondent provided detailed legal, and factual, submissions. They were relevant and appropriate. The Tribunal took due account of them and adopted the approach indicated by the cited authorities. A copy of the written submissions was given to C with time for her to consider them and to prepare her response, albeit we appreciate that she is a litigant in person and unused to such a procedure. The Tribunal commended Counsel on the written submissions and does not, in its judgment demur. In these circumstances the submissions are not re-iterated.

15. Wages:

15.1 A contract of employment exists when there is offer, acceptance, and valuable consideration establishing an employment relationship on the basis of agreed terms, where there is sufficient mutuality of obligation, namely that an employer will provide certain work and/or pay the employee in respect of certain work and the employee will perform that work. It is for the parties to agree terms and conditions with regard to matters such as pay, hours, work location, notice provisions, conditions regarding holidays and sick pay. It is for a court or tribunal to imply terms in a contract unless to do so is necessary in order to give effect to agreed terms. Words used in a contract of employment or written statement of employment particulars ought to be given their usual meaning.

15.2 s. 13 ERA gives an employee or worker the right not to suffer unauthorised deductions from their wages.

16. **Application of law to facts** – by reference to the agreed List of Issues and using the numbering employed in that List:

Protected disclosures

1. *Did the Claimant make a qualifying protected disclosure as defined by sections 43A and 43B of the ERA1996? In particular, C relies upon*

1.1 *On 14 May 2021 did C send the email at p64/65 to Jenny Carpenter “med keys left unattended on table for 5 mins” (the keys email). C informed JC that AJ had left the keys to the locked medicine cabinet on a table in proximity of a service user. The photograph showed that AJ was not in possession and control of the keys that were in closer proximity to the service user than to AJ (who was not in the picture).*

1.2 *On 28th August 2020 did C raise concerns about health and safety in the kitchen and the quality of food not consistent with the care plan relating to strict dysphasia guidelines (the food email). The Respondent accepts it received emails at p55 and 56. It accepts the content of these emails solely. C raised issues of food safety and hygiene, issues with a particular chef.*

2. *It is accepted the disclosures contained information*

3. *Did C reasonably believe that the disclosures were in the public interest? It is accepted that in terms of disclosure 1.2, the food email, C reasonably believed this to be in the public interest.* The only issue here is in respect of the keys email. There are well known and strict rules and guidelines on the safe storage of controlled drugs and other medication in the environment of a Care Home. Those rules and guidelines are for the good health, and safety, of residents, and indirectly of staff. A care provider is expected to adhere to drug control requirements and both residents, staff and other interested parties (such as the next of kin of service users) can expect and should have confidence in adherence to safe and best practice in this regard. Drugs could go missing or be misused if security is breached; safe record keeping and therefore safe medication distribution would be compromised. C considered that AJ relinquishing control of the keys jeopardised the situation and that AJ should be taught a lesson for the future safety of those concerned and that this would be in the public interest. That said, she also believed that she would score a point over AJ and benefit by drawing a fault to the attention of management because she was resentful of AJ's promotion. In fairness to C, she had already discreetly locked the cabinet and told AJ of this without alerting management. The keys incident was, however, a further failing and C took that opportunity to raise a fault rather than dealing with it directly and supportively.

4. *Did C reasonably believe that her disclosure(s) tended to show that a relevant breach had occurred? It is accepted that in terms of disclosure 1.2 only (the food email), C believed that her disclosures tended to show a relevant breach had occurred.* C knew that the keys email showed a relevant breach because the keeper of the keys should maintain possession and control of them, should not put them down and walk away, and should not leave them in the proximity of service users; those were the known rules and best practice. The keys email was evidence that these rules were broken. C knew what ought to have been done with the keys and knew that the situation she photographed ran contrary to that. She knew the rules and guidance were a matter of health & safety.

5. *What was the relevant breach? The Claimant relies on s43B (d) that the health or safety of any individual has been, is being or is likely to be endangered.* The relevant breach was as alleged by C; the Tribunal considers this to be self-evident. In a care home setting safe food standards and security of the medication cabinet are of the utmost importance in maintaining the health and safety of service users.

6. *It is accepted the disclosures were made to her employer as per s43C of the Employment Rights Act.*

Detriments

7. *Was the Claimant subjected to a detriment (including whether the Respondent's treatment of the Claimant could amount to a detriment)? The Claimant relies on the following alleged detriments*

7.1 *That on the 14th May 2021 Jennifer Carpenter told Amy Jones about the 'key email'. As found above JC counselled AJ to be mindful of security and that she was aware that the keys had been left on the table. That was the least JC could have done and was the obvious, and we say intended, minimum but essential consequence of C's disclosure. C wanted JC to draw the matter to AJ's attention. She may have wanted more than that, but we do not know and neither did JC. JC's actions could not be reasonably considered to be a detriment to C. C thought JC told AJ that she was the source of the information. JC did not so inform AJ. If C's unfounded suspicions were born out then the manner of JC's disclosure to AJ would have been relevant and the words used could have amounted to a detriment, but she did not disclose her informant; there was no need; JC only had to tip AJ off that she ought never leave the keys unattended as she had done even for moments. JC's words and actions did not amount to a detriment to C.*

7.2 *That on the 9th June 2021 Amy Jones accused the Claimant of not completing duties. C performed the task that AJ allocated to her. RU refused to check the medication and C undermined AJ's authority by supporting RU against AJ. AJ complained about C's conduct. She aggregated the behaviour of C and RU, reporting that they did not comply with her instructions. This comment however must be taken in context with events of 10th June and in the general context of C's churlish response to AJ's management as her Shift Lead. As regards the medication check AJ was strictly speaking inaccurate in saying C had refused instructions; she made a genuine mistake by overstatement. Management did not treat AJ's comment in isolation. R received a complaint from CK about disparaging remarks C and RU made about AJ. It received AJ's complaint about 9th and 10th June. R response, investigating, not upholding all of the complaint, recommending mediation but no sanction, was not to C's detriment. "Suspension" pending investigation was detrimental in that C lost shifts and pay.*

7.3 *That on the 10th June 2021 Amy Jones assigned the Claimant service user M and said, 'you're fit for work you can do it'. Being allocated service users and showering them as and when instructed by the Shift Lead was part and parcel of a carer's role. ON 10th June C had indicated that she was fit to work. No required adjustments to duties were indicated. AJ's comment was a statement of fact and a consequential instruction. It might have been a detriment to allocate and instruct regardless of fitness or contrary to an indication of either unfitness or the need for adjustments to duties. It cannot reasonably be considered a detriment to ascertain that a carer was fit to work, therefore removing the only real obstruction to the allocation of a service user and instruction to perform required sanitary duties, and then to so instruct. This does not amount to a detriment.*

7.4 *That the investigation process from 10th June – 1st October 2021 was unfairly delayed. The Tribunal finds that there was no deliberate or sinister delay. The timeline as accepted shows that the investigation was not "unfairly delayed". C conceded that she had no complaint about delays when the investigation was in the hands of DT. She was, understandably, anxious and frustrated about unfulfilled indications of the date for*

the outcome. When C realised that GC had two periods of annual leave during the course of her management of the matter C seemed to accept and understand that the “delay” was not as she had feared. There was an inevitable delay caused by time constraints resulting from C’s illness, the need for clarification, two periods of leave, GC’s other urgent work priorities and the need for GC to deal with the matter properly and professionally. That said, C’s health suffered during the delay; uncertainty and anxiety contributed to that. She had hoped, and been led to believe, that the outcome would be sent to her sooner and in the meantime, she was missing work and pay. The delay was a detriment.

8. If so, was this/were these on the grounds that she had made a protected disclosure for the purposes of section 47B of ERA?

The “suspension”, prolonged by delays in the procedure, and therefore the delay, were both detriments. The “suspension” was not because AJ said C had not completed her duties on 9th June, when she had. The suspension was due to the poor state of the relationship between C and AJ and C’s conduct, especially on 9th and 10th June but in a wider sense than whether she had or had not performed duties on 9th. Her attitude to and undermining of AJ, including on 9th, was key to the suspension. R received complaints from CK. AJ had gone home in tears on 9th June because of the conduct of RU and C. On 10th June C was again insubordinate. The relationship between C and AJ was at rock bottom and something had to be done about it, hence “suspension” pending investigation of the whole situation. The “suspension” was not on the ground that C had made either of her two disclosures (food email and keys email). Those emails were irrelevant and for all the reasons found above they did not influence R in “suspending” C.

The delay in the process, in particular with GC’s handling of matters, was due to the events that occurred including DT’s inexperienced attempt at investigation and his gathering in of witness statements, C’s illness, GC’s holidays and her other priorities on return to work. The said disclosures were irrelevant. The regrettable delay was inevitable. It was not something done on the grounds of the disclosures.

Jurisdiction

11. Was there a series of similar acts or failures to act The Tribunal has found that even where there were detriments to C, “suspension” and delay, they were not things done on the ground of C having made protected disclosures. The reasons for each were separate and diverse. There was no series as posed. JC did not subject C to a detriment as alleged anyway.

12. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one of them and/or in relation to any deliberate failure to do something when did the person in question decide on it (and/or In the absence of evidence to the contrary that person is to be taken to decide on any failure to do something when they do an act inconsistent with doing it, or, if there is no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it? The claim in relation to JC and the keys email is potentially out of time as those events occurred on 14th May 2021.

13. In this regard, anything before 3rd June 2021 is prima facie out of time;

14. *With regard to any complaint presented out of time, would it have been reasonably practicable be present it in time?* C has not provided any evidence or submission to explain her failure to act in respect of the 24th May 2021 allegation in good time. C worked and was fit to work after this date and performed good service for the benefit of service users. She was active in respect of undermining of AJ. The Tribunal concludes that it would have been reasonably practicable for her to have commenced early conciliation and to have presented a claim in respect of this incident in time.

15. *If not, did the Claimant present the claim within a reasonable period of time thereafter?* This issue falls away in view of our findings above.

20. *Did the respondent make a deduction or deductions from the Claimant's wages in the following manner:*

a. *Not paying the Claimant for her shifts whilst she was off work as a result of an injury week 28th May - 4th June 2021 for the sum of £322.70 gross.* C was only entitled to be paid in respect of shifts she accepted and worked, or SSP subject to qualifying for it. She did not work 28th May – 4th June 2021 as she was unfit to work. She qualified for SSP. She was paid SSP. C was not entitled to receive £322.70. She was paid the monies to which she was entitled without deduction.

21. *Was/were the deductions authorised to be made by virtue of a relevant provision of the Claimant's contract?* C's contract provided as set out in the paragraph above as regards her entitlement.

23. *Had the Claimant previously signified in writing her agreement or consent to the making of the deduction(s)?* C agreed the said terms and signed an Acceptance Statement on 4th February 2019.

24. *The Respondent will say that there was no deduction in wages. The Claimant was not a salaried employee she was a bank worker who was only paid for the shifts she did. She did not have a contract entitling her to be paid company sick pay and so was not.* The Tribunal agrees with R.

Employment Judge T.V. Ryan

Date: 13.07.22

JUDGMENT SENT TO THE PARTIES ON 19 July 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

APPENDIX

AGREED LOI, & CAST LIST

Cast list

Name	Job Title	Relevance to case
Vanessa Viegas	Bank support worker	Claimant
Rina Ugali	Support worker	Claimant witness for incident 9 th June
Amy Jones	Support worker	AJ and C involved in dispute about task assignment on 9 th and 10 th June. AJ subject of alleged protected disclosure 14/05/21. Witness for Respondent.
Cameron Kosac	Support worker	Sees AJ crying on the 9 th June. Makes complaint about C's treatment of AJ and provides statement for investigation.
Christine Groves	Regional Project Manager at relevant time	Decision maker both to cancel C bank shifts whilst there was an investigation and to partially uphold outcome. Witness for R
Dean Jenkins	Assistant Manager	Initial phone call re cutting shifts
Kirsty Atkins	Head of Care	Initial phone call re cutting shifts
Alyssa Burgess Russell	Assistant People Manager	Called the claimant to explain the process of investigation. Witness for R,
Jennifer Carpenter	Team Leader/Assistant Manager	Alleged PD disclosed to JC about medication being left out. Witness for R.
Daniel Thomas	Then Assistant Manager at Sussex Community House.	Investigator.

List of issues

Protected disclosures

1. Did the Claimant make a qualifying protected disclosure as defined by sections 43A and 43B of the ERA1996? In particular, C relies upon

1.1 On 14 May 2021 did C send the email at p64/65 to Jenny Carpenter "med keys left unattended on table for 5 mins".

- 1.2 On 28th August 2020 did C raise concerns about health and safety in the kitchen and the quality of food not consistent with the care plan relating to strict dysphasia guidelines. The Respondent accepts it received emails at p55 and 56. It accepts the content of these emails solely.
2. It is accepted the disclosures contained information
3. Did C reasonably believe that the disclosures were in the public interest? It is accepted that in terms of disclosure 1.2, C reasonably believed this to be in the public interest.
4. Did C reasonably believe that her disclosure(s) tended to show that a relevant breach had occurred? It is accepted that in terms of disclosure 1.2 only, C believed that her disclosures tended to show a relevant breach had occurred.
5. What was the relevant breach? The Claimant relies on s43B (d) that the health or safety of any individual has been, is being or is likely to be endangered
6. It is accepted the disclosures were made to her employer as per s43C of the Employment Rights Act.

Detriments

7. Was the Claimant subjected to a detriment (including whether the Respondent's treatment of the Claimant could amount to a detriment)? The Claimant relies on the following alleged detriments
- 7.1 That on the 14th May 2021 Jennifer Carpenter told Amy Jones about the 'key email'
- 7.2 That on the 9th June 2021 Amy Jones accused the Claimant of not completing duties
- 7.3 That on the 10th June 2021 Amy Jones assigned the Claimant service user X and said 'you're fit for work you can do it'
- 7.4 That the investigation process from 10th June – 1st October 2021 was unfairly delayed
8. If so, was this/were these on the grounds that she had made a protected disclosure for the purposes of section 47B of ERA?

Jurisdiction

11. Was there a series of similar acts or failures to act

12. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one of them and/or in relation to any deliberate failure to do something when did the person in question decide on it (and/or In the absence of evidence to the contrary that person is to be taken to decide on any failure to do something when they do an act inconsistent with doing it, or, if there is no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it?

13. In this regard, anything before 3rd June 2021 is prima facie out of time;

14. With regard to any complaint presented out of time, would it have been reasonably practicable be present it in time?

15. If not, did the Claimant present the claim within a reasonable period of time thereafter?

Remedy if successful

16. Did the Claimant suffer injury to feelings, in which case which VENTO band does the behaviour fall?

17. Did the Claimant suffer loss of earnings as a result of the detriment? The Respondent will say that C would have been unable to work for the period of the investigation in any event as she was unwell. Further, as she was not an employee and was free to work elsewhere, she could have done so. She also moved location. Subsequent to the investigation she has been cleared to work for the Respondent, but she has chosen not to/ is too unwell to do so.

18. Was any sustained detriment caused or contributed to by action of the complainant and, if so, in what proportion should the tribunal reduce compensation (s49(5)) of ERA?

19. Were the disclosures made in good faith? If not, would it be just and equitable to reduce any award by up to 25% (s49(6A)) of ERA?

Unlawful deduction of wages

20. Did the respondent make a deduction or deductions from the Claimant's wages in the following manner

a. Not paying the Claimant for her shifts whilst she was off work as a result of an injury week 28-May- 41 June 2021 for the sum of £322.70 gross.

21. Was/were the deductions authorised to be made by virtue of a relevant provision of the Claimant's contract?

23. Had the Claimant previously signified in writing her agreement or consent to the making of the deduction(s)?

24. The Respondent will say that there was no deduction in wages. The Claimant was not a salaried employee she was a bank worker who was only paid for the shifts she did. She did not have a contract entitling her to be paid company sick pay and so was not.