Case Number: 1802160/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Railton	v	(1) Vineyard Project Limited (2) Mr I Kingaru

Heard at: Hull **On**: 22, 23 and 24 August 2022

Before: Employment Judge A James
Ms S Scott
Mr G Wareing

Representation

For the Claimant: Mr P Morgan, counsel

For the Respondent: Mr B Frew, counsel

JUDGMENT

(1) The claim for whistleblowing dismissal (s.103A Employment Rights Act 1996) is upheld against the first respondent.
(2) The claims for whistle-blowing detriment (s.47B Employment Rights Act 1996) are upheld against the first respondent.
(3) The claim for pregnancy/maternity discrimination (s.13 Employment Rights Act 1996) against the first and second respondent is not upheld and is dismissed.
(4) The claim for notice pay against the first respondent (Employment Tribunals (Extension of Jurisdiction) Order 1994) is withdrawn and is dismissed.
(5) The claim for holiday pay against the first respondent (s.23 Employment Rights Act 1996/Regulation 30 Working Time Regulations 1998) is withdrawn and is dismissed.
(6) The claimant is entitled to be compensated by the first respondent in respect of the claims which the tribunal has upheld, as follows:
    a. Basic award £446.88.
    b. Compensatory award for loss of wages and pension - £2,225.94.
    c. Injury to feelings - £7,500.00.
    d. Acas uplift at 25%, £2,543.21.
(7) The total award therefore amounts to £12,716.03.

REASONS

The issues

1. The agreed issues which the tribunal had to determine are set out in Annex A.

The proceedings

2. Acas Early Conciliation was commenced on 10 March 2021 for the first respondent and was completed the same day. Acas Early Conciliation was commenced on 17 March 2021 for the second respondent (Mr Kingaru), concluding on 18 March 2021. The claim form was issued on 18 March 2021.
3. A preliminary hearing for case management purposes took place on 22 September 2021 before Employment Judge Rostant. The claimant, who by then was legally represented, was ordered to provide further particulars of her claim and the respondent was ordered to provide an amended response.
4. A further preliminary hearing took place on 15 November 2021. At that hearing, before Employment Judge Lancaster, a list of issues was identified. The claimant was allowed to amend her claim to include three further alleged detriments and to rely on S43G Employment Rights Act 1996. Further Case management orders were made.
5. A strike out warning was issued on 20 January 2022 due to the first respondent not complying with the tribunal orders dated 15 November 2021. On 9 February 2022, the late submission of the amended response was accepted and the directions were varied as requested by the respondent's representative in a letter dated 24 January 2022.
6. An application was made to strike out the respondents' defences in April 2022. That application was refused by Employment Judge Rostant on 11 April 2022.
7. At the conclusion of submissions, Mr Frew made an application to remove the second respondent as a party to the proceedings. The Tribunal did not consider it appropriate to do so at this stage in the proceedings. The second respondent was a respondent to the maternity discrimination claims only. It was only on the conclusion of the evidence that Mr Morgan decided not to make any submissions in relation to those claims, on the basis that the detrimental treatment alleged was more likely to be found to be due to the alleged disclosures, than the claimant's maternity leave. The claims have not been withdrawn. The judgment records that the claims against the second respondent have been dismissed. In light of the comments made by the second respondent in relation to the claimant's maternity leave in February 2021 (see below), it was reasonable to maintain those claims until the evidence had been concluded.

The hearing

8. The hearing took place over three days. Evidence and submissions on liability/remedy were dealt with on the first three days. On the remainder of the third day, the tribunal was able to arrive at its decision, on both liability and remedy. Judgment was reserved.

9. The tribunal heard evidence from the claimant, and for the respondents from Mr Kingaru the second respondent. There was an agreed trial bundle of 469 pages.

10. This is an appropriate case in which the Tribunal considers it proportionate to make general comments about the lack of credibility and reliability of the evidence given by the second respondent, Mr Kingaru. There were numerous examples of this during cross examination. For example:

    10.1. Mr Kingaru told the Tribunal that the claimant was the only person to have received the furlough letter at 370a of the bundle; whereas in his witness statement he stated that it was sent to all staff.

    10.2. Mr Kingaru told the Tribunal that service users were kept up to date during the pandemic by telephone but could not point to any notes in the agreed bundle of telephone calls to tenants in which they were updated by telephone.

    10.3. Mr Kingaru states in his witness statements that only Allison Smith and Sandra were working during the initial furlough period, but then told us in evidence that another support worker CN was working as well; even though her name is not mentioned in the message sent on 26 March 2020 by Ms Smith to staff (see below).

    10.4. The claimant told Mr Hogg of the SART team that the action plan provided by the first respondent's HR providers was a blank template (this forms part of one of her alleged protected disclosures). Mr Kingaru says that it was completed, but no completed action plan appears in the bundle. Mr Kingaru told the Tribunal that he did not realise it ought to be.

    10.5. Paragraph 31 of the Amended Further and Better Particulars of Claim asserts that the disclosures were made in good faith and that the Claimant had a reasonable belief that the factual information in them was correct. The Amended Grounds of Resistance admit that; nevertheless, the second respondent asserted to the Tribunal that the allegations were in fact false.

    10.6. Finally, in relation to the service user KV, Mr Kingaru's witness statement at paragraph 20 accepts that he was a tenant of the first respondent – but during cross examination he resiled from that position and argued that KV was never a tenant.

11. As a result of these and numerous other examples, the Tribunal preferred the evidence of the claimant, whose witness evidence is in general consistent with the documents.

Findings of fact

Commencement of employment

12. The claimant started work for the respondent on 1 April 2019. She was initially employed in the role of Support Worker. Her statement of main terms and conditions states:

'*this contract together with the Employee Handbook forms part of your terms and conditions of employment*'.

That contract was signed by the claimant on 14 February 2019. The claimant accepts that the Employee Handbook was received by her by email but she did not read that at the time or afterwards.

13. The Whistle-blowing Policy is set out in section 7 and states:

> *Employees may, in properly carrying out their duties, have access to, or come into contact with information of a confidential nature. Their terms and conditions provide that except in the proper performance of their duties, employees are forbidden from disclosing or making use of in any form whatsoever such confidential information. However, the law allows employees to make a 'protected disclosure' of certain information. In order to be a 'protected' a disclosure must relate to a specific subject matter (listed below) and be made in an appropriate way. The disclosure must also be made in good faith and in the public interest.…*
>
> *[A summary of the S.43B Employment Rights Act 1996 matters is then set out] …*
>
> *Information which an employee reasonably believes tends to show one or more of the above should promptly be disclosed to their managers so that any appropriate action can be taken.*

The first respondent

14. The first respondent is a non-profit making organisation that specialises in assisting homeless vulnerable people with the skills and knowledge they require to live independently. It was set up in 2012. The second respondent is the founder and Chief Executive Officer (CEO) of the first respondent. At the time of the pandemic, the respondent supported about 115 tenants. The respondent employed about eight support workers, two maintenance workers, a manager, Allison Smith and the second respondent.

15. Stringent record keeping is required in relation to work carried out for service users. Those records should include the initial referral, the support plan, notes of meetings with tenants and team meetings. Records should be kept on SharePoint, (which are backed up electronically); and paper files are also kept. A number of key documents are missing from the bundle. For example, all records of the service users KV and MG; notes of team meetings; and notes of meetings between the second respondent and Ms Smith. In a letter to the claimant's solicitors, the former representatives of the respondents confirmed that no records could be found for particular service users, and denied ever having tenants KV and MG.

The SART Team

16. In May 2019, the claimant became aware of concerns being raised by Kingston upon Hull City Council's Supported Accommodation Review Team (SART) which exercises a supervisory role over the support work provided. For example, the claimant was asked whether the first respondent had a non-engagement procedure for tenants. The first respondent did not; so the claimant created one. Concerns were also raised as to whether or not the support which the first respondent said it was providing to tenants was actually being provided. It was subsequently agreed by Mr Kingaru the second respondent, that the

claimant would be the sole point of contact between the first respondent and the SART Team.

Promotion to Team Leader

17. The claimant was promoted to the position of Team Leader on 1 August 2019, following the resignation of the previous Team Leader. The claimant's role required her to continue to have a caseload of approximately 17 service users at any one time and to support them with issues such as housing, finances, appointments, food parcels, signposting, and seeking employment. Other duties included overseeing the maintenance team and support workers, and assisting the manager, Allison Smith. Whilst the claimant was responsible for overseeing the maintenance team, any maintenance costs needed to be signed off by Ms Smith before the work was carried out.

18. During her employment, the claimant raised a number of issues with regard to service users. The factual matters set out below are potentially relevant to the claimant's argument that the information she alleges she disclosed were properly made to the SART team of Kingston upon Hull City Council, instead of to the first respondent. They can be summarised as follows:

    18.1. In July 2019 the claimant raised an issue with Ms Smith about the front door hanging off at 7 Floral Ave. Despite that being raised with Ms Smith, the front door was not replaced until 16 October 2019.

    18.2. In August 2019, the claimant was told by the second respondent and Ms Smith not to record if a tenant had been left without gas and electricity. Support workers were expected to top up tenants' gas and electricity meters when they visited. Sometimes however, due partly to petty cash shortages, service users could go overnight, or sometimes over whole weekends, without gas or electricity. To brush over this fact, the claimant and her colleagues were told to record how much was on the meters when they left or how much they had topped them up by; but not that they were on zero when the worker arrived. The Tribunal was shown examples of records made both prior to this instruction and afterwards, which corroborated the claimant's assertion.

    18.3. In early December 2019, a service user MG attended the office for a standard risk assessment. MG was assessed by the claimant as different to many of the service users. He was timid and quiet, and did not having a history of drug abuse. He had a speech impediment and was partially deaf and the claimant was concerned that he could easily be manipulated by other tenants for money and would not be able to defend himself if necessary. During a team meeting on 10 December 2019, Ms Smith informed the claimant and other support workers that MG would be moving into 149 Rosemead St. The claimant immediately raised concerns that putting MG into that property would put him in considerable danger due to another service user who resided there who had a history of violence and aggression as well as being an alcoholic and drug addict. Ms Smith's response was that they had to 'fill the voids'.

    18.4. MG subsequently called the respondent on 3 January 2020. The claimant took the call. MG told the claimant that he was scared for his welfare because the other tenant was arguing with his wife/girlfriend

and the service user was too scared to call the police in case they heard him. The service user locked himself in his bedroom for his own safety. The tribunal notes that although the notes for this service user have been requested, the respondents denied through their solicitors that MG had lived in the first respondent's accommodation, and relevant documents have not been disclosed.

18.5. Concerns regarding KV, who had a number of serious health conditions including COPD. The claimant spoke to him on 16 March 2020 and he sounded unwell. KV told the claimant he was unwell with COPD and he was worried about Covid because he lived in shared accommodation. This information was passed on to Ms Smith, who shrugged it off and said there was nothing else they could do.

18.6. The eviction of JM in November 2019 – see below.

The claimant's pregnancy

19. The claimant discovered that she was pregnant in October 2019, when she was about one month pregnant. She informed Ms Smith and the second respondent soon after. A risk assessment was carried out. The risk assessment confirmed, amongst other things, that the claimant would not be required to attend evictions.

20. Despite this, on 18 November 2019, the claimant was asked to attend the premises of a service user, JM, to serve his eviction notice. Although the claimant reported that she would be late in due to morning sickness, she was still required to attend the service user's home with another support worker Sandra and the maintenance worker Varis. Whilst they were inside the property, the service user forcefully pushed the claimant, causing her hands to hit her stomach. The claimant left the property in shock and called 999 straightaway . She suffered from stomach pains afterwards and attended the Early Pregnancy Unit. She was told that she would have to wait for two days for a scan, as that was when the first scan was booked.

Covid-19 announcement

21. Also on 16 March 2020 the second respondent sent an email to all staff which stated:

> *All in all, in general advice will be displayed throughout Vineyard project properties, staff have access to information through our intranet and updates will be provided through emails used by our Support workers. This is a fast-moving situation and COVID- 19 is new to all of us. Vineyard Project We'll continue to be guided by advice from Public Health England and make further steps with local authorities to ensure safety across all our Vineyard project Properties and tenants.*

Request to work from home

22. Yet further, on 16 March 2020 the claimant requested in an email to the second respondent that she be allowed to work from home during the pandemic due to her being pregnant. She expressed concern for both herself and her unborn child and her belief that during this period of uncertainty she needed to err on the side of caution and follow government guidelines. After the second respondent had discussed this request with Ms Smith, Ms Smith came into her office and told her the claimant could not work from home. Around this time, the

claimant also raised with Ms Smith the lack of hand sanitiser, and PPE, for use by staff.

23. In an email to the claimant dated 17 March 2020, page 367, Ms Smith told her:

> '*I feel the job we do does not require you to work from home as the job of a support worker is to work in the community or office'*.

The claimant's duties were amended slightly so she did not need to visit tenants in their properties but tenants still came into the office. If so, the claimant had to open the door to admit them even if she was on her own. The claimant felt this continued to place her at risk due to possible Covid-19 infection and because tenants could be aggressive. The risk assessment was not formally updated.

Concerns about the health and safety of service users

24. On both 16 and 23 March 2020 the claimant raised concerns with Mrs Smith about the health and safety of service users being put at risk if staff were furloughed. Her concerns were brushed off. This is relied on as the second protected disclosure.

25. On 23 March 2020 the claimant took it upon herself to draft a letter to be sent to service users, since her concerns about keeping them up-dated were not being listened to. This was sent to/given to some service users by their support workers, the content having been approved first by Ms Smith. The letter stated:

> *There are a few changes being implemented to the service we are providing due to the outbreak of the COVID-19 (Coronavirus) our priority is to assure the safety of staff and service users.*
>
> *Firstly, we would like to reassure you staff will still be attending the property to place gas and electric on your meter. Staff will contact you via mobile phone before entering the property, if you do not have a mobile phone staff will knock and shout upon entering, please ensure you are at least two meters away.*
>
> *We are temporarily postponing non-urgent home and office visits until further notice - this also includes non-urgent repairs.*

Furlough – 24 March 2020

26. On 24 March 2020 the claimant was placed on furlough, alongside other colleagues. She was told initially that furlough would last for a period of three weeks. The claimant was paid 80% of her wage whilst on furlough. At staff meetings on 23 and 24 March 2020, prior to her being placed on furlough, the claimant raised concerns that workers were still expected to carry out work. She did not consider that would be lawful.

27. On 26 March 2020, the claimant and other team members were asked to work whilst on furlough by Mr Kingaru and Allison Smith. Ms Smith's email stated:

> *As from Monday 30th March all the team apart from me and Sandra will be working from home. As everyone is paid 80% I will expect staff to call there tenants and update there notes as and when.*

28. The claimant replied to say that staff should not be working whilst on furlough; and that if they were expected to carry out any of their duties, they should be paid full pay. She also confirmed that she was happy to work from home.

29. An email was sent to the claimant by Ms Smith on 27 March 2020, which stated:

> *as a result of you not working from home myself or Sandra will collect your laptop next week.*

The claimant's laptop was subsequently collected by her colleague Sandra. The claimant was the only person who had her laptop removed.

Conversation with Mr Hogg – 31 March 2020

30. On 31 March 2020, the claimant received a telephone call from Matthew Hogg, of the SART Team at Kingston upon Hull City Council. The day before the call, Mr Hogg had emailed the respondent regarding the proposed eviction of a tenant. As noted above, it had been agreed that the claimant would be the contact person for the first respondent, in relation to any enquiries from SART.

31. During her conversation with Mr Hogg, the claimant raised a number of concerns. Those were subsequently summarised in an email sent by Mr Hogg to SART colleagues as follows:

> *• She has been furloughed by Isaac Kingaru therefore cannot respond to my email (below)*
>
> *• That all but two staff (Allison Smith and Sandra Keeping) have been furloughed for 3 weeks in the first instance with a possible extension to 3 months*
>
> *• She has raised a query about VPL still being in receipt of the Housing Benefit used to pay the workforce yet furloughing people and claiming 80% of this from Government, she is concerned that this is an abuse of the benefits system and is being used to profit from the COVID 19 outbreak*
>
> *• She is concerned about the safety of tenants due to the lack of support and no information given to tenants regarding how the organisation is going to support people re COVID 19 and changes in support procedures. Although the workforce have been given the government guidelines there has been no other information. Staff were given an action plan by a private provider of HR - this action plan was a blank template with no other information re business continuity.*
>
> *• She is 6 months pregnant so can only work from the office if required to return to work*
>
> *• She is very concerned that a specific tenant, Kevin Varty, (92 Melrose Street) is in the CV19 vulnerable group - has breathing difficulties and underlying medical issues - she is concerned that he will not be receiving the required support and as a result will be particularly vulnerable*
>
> *• She would like to speak with the SART about further concerns with VPL at a later date and understands that this cannot be done now due to CV19 issues*

32. The Tribunal is satisfied that the action plan referred to on 31 March was indeed a blank template. If it was completed, which the Tribunal doubts, the completed version was never shown to the claimant, and it has not been produced.

33. Despite the claimant being reassured that her confidentiality would be maintained, Mr Hogg's email containing the alleged disclosures was inadvertently sent to Mr Kingaru by the Council.

Forwarding of email to Mr Kingaru

34. At 15.20 the second respondent emailed Mr Bower as follows:

> *I have answered all questions so deal with Hull city council and police.*
>
> *Vineyard is still open but some staff are working from home like council and are pregnant i.e my Team leader Carmen*
>
> *Mr John Bower please don't be clever with me.*
>
> *Vineyard has been helpful. You and Mathew aren't helpful nor I still don't trust you.*
>
> *I wait for you comments in regards to group chat. My lawyer has been involved with all emails Mr John Bower.*

35. Shortly after, at 15:29 the second respondent emailed to say:

> *Just to confirm email from Mathew Hogg He had a chat with carmen this morning?*
>
> *Hope its not her personal number? Or personal email? Carmen doesn't have Vineyard Project Mobile so if you have her personal number I would like to know how you got it again like remember You Mr John Bower has My manager Allison number? Please delete my Vineyard Project staff Personal numbers.*

36. At 16:07 the second respondent emailed Mr Tompkins as follows:

> *.. my project isn't funded nor commissioned by local council hence private funded. I thank you for taking your time to google.*
>
> *Vineyard has the following: an accountant, lawyers, consultants, business development, trustees and many many more who advise Vineyard daily basis in what's happening with current news and up dates.*
>
> *I thrive once again in perfection but failure its not in my oxford nor Cambridge vocabulary. (sic)*

37. The second respondent was clearly annoyed about the claimant's conversation with Mr Hogg. He told the Tribunal and we accept that the claimant's conversation with Mr Hogg caused him to lose trust and confidence in her. Whether that was reasonable is another matter, which we discuss below.

Alleged detriment two

38. Allison Smith put a message on the Facebook Messenger work group on 1 April 2020 which said:

> *[T]hanks to a staff member and SART team in times of crisis (thinking emoji)*

This is relied on by the claimant as the second detriment. Since the group chat was accessible to all support workers, the claimant was upset and anxious and worried about her return to work because she believed there were going to be repercussions for her.

39. On 1 April 2020, Ms Smith sent a further message stating:

> *Clearly covid-19 is new to us all, if anyone has any ideas of how to handle it better like with the tenants please feel free to give your input, me, Vairis, Stas and Sandra are working hard to support all the tenants best we can*

under the circumstances, the tenants did receive a letter stating what's going on but like I said it's new to us all, take care everyone, and thanks to those helping from home xx

The claimant believed that the latter words were again a sarcastic reference to her.

Blocking of claimant from work emails - 1 April 2020 – detriment 1

40. Mr Hogg telephoned the claimant to inform her of the inadvertent forwarding of his email, setting out her alleged disclosures, to the second respondent. In an email to Mr Hogg on 1 April 2020 the claimant stated:

Thanks for your email, I didn't process properly what you was saying yesterday. I was in shock and I'm now extremely anxious as I'm unsure of what repercussions is going to happen from this.

I tried logging into my work emails this morning I have now been blocked from logging in to them. I haven't heard anything from Allison or Isaac except she sent a message in a group inbox with my colleagues on Facebook saying 'thanks to a staff member and SART team in crisis'.

The letter they sent to me regarding furlough is they would contact me via email which I'm not going to receive now as I'm blocked. I can only assume they would send a letter out to me, I am suppose to return to work on the 14th April if furlough isn't extended.

Continued furlough of the claimant

41. The claimant was not asked to return to work although all her colleagues were, save for one other. Her other colleagues were furloughed for a period of about two weeks. The claimant remained on furlough until her maternity leave commenced.

42. On 2 April 2020 the claimant emailed John Bower of the SART Team about Mr Hogg's email being inadvertently sent to Mr Kingaru. She stated:

Thank you for your email, I do appreciate that it was human error. Obviously I am concerned regarding Isaac being aware, due to his unpredictable and difficult behaviour. I don't feel at risk as such, but do feel vulnerable as in how Isaac and Allison will behave towards me, Allison has already made a sarcastic comment in a work group chat. I'm hoping that this furlough will be extended for a few more weeks, if not I might go on sick and then take my maternity leave early, as I think it will too toxic an environment to work in. I don't have any plans in returning to the Vineyard Project after my maternity anyway (not the they are aware of this) as its not what I thought it would be when I took on the role.

43. On 9 April 2020 the claimant queried with Ms Smith why she had been locked out of her emails and whether she would be returning to work after 3 weeks. Ms Smith replied:

I have decided to keep you furloughed until further notice as the government are advising lock down until May. As you are not working you have no need to access your emails.

44. The claimant commenced maternity leave on 22 June 2020.

Email about belongings following office move

45. On 23 July 2020 Ms Smith emailed the claimant (at her personal email address) to inform her that Mr Kingaru had stepped down/retired as managing director and Ms Smith was the new Managing Director. She also informed the claimant of the new office address.

46. The claimant congratulated Ms Smith on her appointment and asked whether her belongings had been transferred over to the new premises. Ms Smith confirmed on 24 July 2020 that they had removed everything '*and it was all at Anlaby Road'*.

Alleged breach of contract – detriment 3

47. On 27 July 2020, Mr Kingaru emailed Darren Tompkins as follows:

> *On the 31 March 2020 14:50 Your colleague Mr Mathew Hogg sent you and Mr John Bower an email he had an discussion with my Team Leader Carmen about her concerns*
>
> *I hereby state that she has breached her trust with Me Isaac Kingaru owner Aka CEO of Vineyard Project and my new elected Allison Smith Managing Director former Vineyard Project Manager.*
>
> *I will not wish her to come back to my Vineyard Project as I don't have any confidence nor Trust in her. She was in a position of trust as a Team Leader but thanks to Mr Mathew Hogg and Mr John Bower she will have to find alternative accommodation.*

48. The next day, 28 July 2020 Allison Smith emailed the claimant as follows (Detriment 3):

> *Can we arrange a meeting to discuss the matter of breach of contract? As you are aware we were notified by the SART team you had contacted them with concerns regarding our company. It would be in both our interest to have a discussion moving forward.*

49. Since the claimant had a 4-week old baby she declined the request to meet in person. She did however email Ms Smith on 28 July 2020 to request that the allegations be put in writing, so she could then respond in writing. Her email was never responded to. The claimant was upset that the respondent had taken so long to put this alleged breach of contract to her. She was at the time on maternity leave, and her baby was only four weeks old.

Request for return to work date

50. In January 2021 Ms Smith resigned her position. The claimant was not aware of that and hence on 12 February 2021, she emailed Allison Smith regarding her return to work date.

51. The claimant understood she had accrued 30 days holiday. Her previous return to work date had been provisionally agreed as 3 May 2021, taking into account leave that would be accrued during her maternity leave period. She therefore emailed Ms Smith to agree her return to work date. The claimant was asked by Mr Frew whether she really intended to return to work, given the contents of her email of 2 April 2020 to Mr Bower. The claimant told the Tribunal, and we accept, that having been on furlough, and then on maternity leave for a year, during the pandemic; and given that she had a young baby to support and provide for and no other job to go to; the claimant did indeed want to return to her previous job.

52. On 12 February 2021, Mr Kingaru informed the claimant by email:

> *Allison has left Vineyard and your vacancy isn't available am afraid due to lockdown and Covid -19.*
>
> *I will get my HR to draft something as from next week.*
>
> *I will wish you all the best in the future.*

53. The second respondent told the Tribunal, and we accept, that the real reason for not allowing the claimant to return to work was the alleged breach of trust, not Covid-19.

Email about belongings – detriments 4, 5 and 6

54. The claimant also emailed the second respondent on 12 February 2021 to say she still had some personal belongings to collect. Mr Kingaru replied:

> *You don't have any belongings in my new office nor old office. Well I recall Allison stating that to you in an email.*

55. The claimant replied:

> *I have an email from Allison stating my belongings was moved to the new office, also I have contacted Allison yesterday to double check my belongings are at the new office and she said they are.*
>
> *I would like to arrange a time and date suitable so I can collect these.*

56. Mr Kingaru subsequently emailed the claimant on 13 February 2021:–

> *Thanks for understanding the email doesn't state your belonging it states we moved every thing which was Vineyard.*
>
> *You took your thing plus Vineyard belonging i.e Laptop.*
>
> *Once again, I wish you all the best in your future.*
>
> *Our communication is over.*

57. The claimant's alleged detriment 4 is that in this email the second respondent accused the claimant of taking the first respondent's laptop. The claimant was upset by that accusation. In his witness statement at para 40, Mr Kingaru says that he was unaware at the time that the company laptop had been returned to or collected by the first respondent. In contrast, during cross examination, Mr Kingaru told the Tribunal that he meant, by the above email, that the claimant had taken the laptop when she went on maternity leave but later handed it back. The tribunal rejects both of those accounts, and finds that Mr Kingaru was accusing the claimant of taking and keeping the first respondent's laptop.

58. The denial that her belongings remained with the first respondent, is relied on as detriment 5. The claimant has never been able to collect her personal effects. These included a designer make up bag in which she kept pens and pencils in, the stationary, and other personal effects of sentimental value, such as mugs.

59. The comment: '*our communication is over';* is relied on as alleged detriment 6. All of these comments upset the claimant.

Email about pay, 26 February 2021

60. On 26 February 2021, the claimant emailed Mr Kingaru about her pay, since it was the end of the working month and she had not received any. Friday 26

February was the last working day of the month. The claimant was informed in an emailed reply from the second respondent that she would receive her pay on the Sunday, the last working day of the month. The reply also stated:

> *Yes, for sure you're not coming to Vineyard project ltd. Head office. Please see your email to Mr Hogg last year? I don't have one your words it my head, nor HR simple lockdown no vacancy. (sic)*

61. On 1 March 2021 the claimant asked for her pay slip to be sent. Mr Kingaru took a photograph of her pay slip and sent that to her by email instead. He also informed her that she had one more pay slip due at the end of the month and that the decision had been made not to allow her to return due to lockdown.

Threat to sue the claimant for defamation – detriment 7

62. The claimant told Mr Kingaru in an email dated 5 March 2021 that she had spoken to Acas and intended to submit a claim:

> *After speaking to Acas I intend to take claims of pregnancy and maternity discrimination and automatically unfair dismissal against you to an employment tribunal. This is in respect of refusing to allow me to return to work after maternity leave and making a public interest disclosure.*

63. Mr Kingaru replied on 5 March 2021:

> *Why would want to come to Vineyard back?*
>
> *Honestly after what I have heard You already are in maternity leave and no job offer as I said lock down, but Allison can and will offer you a job plus I have a good reference for you when you go to SART team Hull city council?*
>
> *Sue you for defamation, aka slander. Email to Mr Hogg march 2019?*

The claimant relies on the threat to sue her for defamation as detriment 7. She was upset by the threat.

P45 and final pay slip

64. The claimant asked Mr Kingaru for her pay slip and P45 on 29 March 2021 and was told by him in reply:

> *Pay sip has your address. I don't take pictures Carmen. Smile. IK*

65. When the claimant received the P45, it noted the date of her dismissal as being 21 March 2021. The Tribunal finds that was the effective date of termination. She was not told before then she was being dismissed, just that she was not coming back. The claimant was still on maternity leave and maternity pay continued to be paid. Although the first respondent had the right to make a payment in lieu of notice, the first respondent did not at any time formally write to the claimant to inform her that it was exercising this right.

Injury to feelings

66. As well as the effect of the individual matters set out above, the Tribunal accepts that the claimant's mental well-being declined during her maternity leave. She felt anxious. She felt threatened by the second respondent. Every time it came up to her furlough being reviewed, she had panic attacks, and worried about going back to work. She had considered bringing her maternity leave forward or calling in sick if she was asked to come back to work but decided not to do

since she needed to work as much as possible before her maternity leave started for financial reasons.

67. The claimant's enjoyment of the last few months of her pregnancy was seriously affected because she was constantly worried. The claimant was upset by the emails received and sarcastic messages, received both before and after her request to return from maternity leave. She would often not open them for a few days but then they would play on her mind constantly. The claimant would suffer from physical sensations of butterflies in her stomach and chest, including since the submission of her Employment Tribunal claim. When writing her witness statement, those same sensations arose.

68. The claimant has asked for counselling, and started therapy in September 2021. The claimant feels guilty because she has not been able to spend the time with her daughter and concentrate on her family as much as she would have liked.

Mitigation

69. The claimant's present employer is the Goodwin Trust, which provides support and advice to breast-feeding mothers. The claimant attended training in January 2021 with the Trust. After completing the training, the claimant was included in a breast feeding group chat. Vacancies at the Trust are advertised on that group chat. An advert appeared in April 2021. The claimant submitted an application on 26 April 2021. She was interviewed on 30 April. She was successful and commenced work 11 May 2021. That was the only job the claimant applied for. The claimant is happy in her role and still works there. The claimant is only claiming losses up to the date she was appointed. There is no claim for ongoing financial loss after that date.

70. In the application form the claimant stated:

I had my first baby in June 2020, this was during the COVID-19 pandemic. In this time, I felt quite isolated and disheartened as I wasn't able to attend any antenatal classes or baby events in preparation of birth and motherhood. Although this was understandable under the circumstances, I felt I had little professional support and I didn't know who to ask for help or support, other than family and friends which was really helpful, but sometimes their information was outdated.

Whilst I was in hospital my baby struggled to latch on to my breast, I had no knowledge in breast feeding I just knew I wanted to do it. Out of all the midwives on shift, I only had support from one midwife and a student nurse whilst in the hospital. They really took their time with me to support me, but once they finished their shift, I was once again unable to latch my baby and feed her. Once I was discharged from the hospital I was still struggling to breastfeed, I wasn't able to get any physical support due to the pandemic and I wasn't getting the knowledge and support I needed to help me, until I contacted the Goodwin.

After my experience, I want to make sure women are supported whether its face to face or via the telephone. That they have someone who can guide them through their journey. I would like to help other women gain knowledge and confidence in being able to breastfeed and know they have someone they can

rely on to champion them and support them through the difficult times. I would also like to gain more knowledge and better myself, as I am keen to help other mothers' have the most positive breast feeding journey possible.

Relevant law

Protected disclosure detriment/dismissal

71. Workers have the right under s.47B ERA 1996 not to be subjected to a detriment on the grounds that they have made a protected disclosure. Although this section (in common with ERA 1996 ss 43M to 49A**49A** generally) relates to detriment *in* employment, it can apply to detriment occurring *after* termination as well (in the light of the similar position in discrimination law as held in *Rhys-Harper v Relaxion Group plc* ***[2003] IRLR 484****, HL*): *Woodward v Abbey National plc* ***[2006] EWCA Civ 822***, ***[2006] IRLR 677*** (not following on this point *Fadipe v Reed Nursing Personnel* ***[2001] EWCA Civ 1885***, ***[2005] ICR 1760****n*). The contrary submission by Mr Frew, relying on the case of ***Melia and Magna Kansei Ltd [2005] EWCA Civ 1547*** is rejected. That case is not authority for the proposition that post-termination detriments are not actionable. It is authority for the proposition that where the detriment can be compensated under the unfair dismissal provisions, those provisions must be applied. If the detriment cannot be compensated for under the unfair dismissal provisions, it is covered by section 47B.

72. Pursuant to s.103A ERA 1996, a dismissal will be regarded as an automatically unfair dismissal if the reason or, if more than one, the principal reason for the dismissal is that the employee made a protected disclosure.

73. 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 types of wrongdoing or failure listed in s.43B(1)(a) to (f) of the ERA 1996. The Claimant relies in respect of each disclosure on s.43B(1)(d). That is, he asserts that he disclosed information that he reasonably believed was in the public interest and tended to show that the health and safety of any individual has been, is being or is likely to be damaged.

74. In ***Williams v Michelle Brown AM***, UKEAT/0044/19/00 at paragraphs 9 and 10, 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.*
>
> *Unless all five conditions are satisfied there will not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if*

any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn its reasoning and conclusions in relation to those which are in dispute."

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

30. The concept of 'information' as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Longstaff J made the same point in the Judgment below [2016] IRLR 422, para 30, set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between 'information' on the one hand and 'allegations' on the other […]

31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute 'information' and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision. …

35. …In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in the ***Cavendish Munro*** *case did not meet that standard.*

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by the Tribunal in the light of all facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in s43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in ***Chesterton Global Ltd v Nurmohamed*** *[2018] ICR 731, para 8, this has both a subjective element and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief." …*

41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in the ***Cavendish Munro*** *case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says 'You are not complying with health and safety requirements', the statement would derive force from the context in which it was made and taking in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of the whistleblowing claim under the*

protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.

76. The issues arising in relation to a Claimant's beliefs about the information disclosed were reviewed by Linden J in ***Twist DX v Abbott (UK) Holdings Ltd*** (UKEAT/0030/30/JOJ), from which the following principles emerge:

    76.1. Whether at the time of the alleged disclosure the Claimant held the belief that the 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 [para.64].

    76.2. It is important for the ET to identify which of the specified matters are relevant, as this will affect the reasonableness question [para.65].

    76.3. The belief must be as to what the information 'tends to show', which is a lower hurdle than having to believe that it 'does show' one or more of the specified matters. The fact that the whistle-blower may be wrong is not relevant, provided his belief is reasonable [para.66].

    76.4. There is no rule that there must be a reference to a specific legal obligation and/or a statement of the relevant obligations or, alternatively, that the implied reference to legal obligations must be obvious, if the disclosure is to be capable of falling within s.43(B)(1)(b). 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 [para.95].

77. The Court of Appeal considered the 'public interest' test in ***Chesterton Global Ltd v Nurmohamed*** [2018] ICR 731. The following principles emerge.

    77.1. The Tribunal must ask: did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest? [Para.27]. That is the subjective element.

    77.2. There is then an objective element: was the 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 [para.28].

    77.3. The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. According to Underhill LJ (at para. 29):

    That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify after the event by reference to specific matters which the Tribunal finds were not in his head at the time, he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential and not substantive. Likewise, in principle a tribunal might find that the particular reasons

why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable."

77.4. 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 [para. 30].

77.5. '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 [para. 31].

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

78. When considering the question of the Claimant's reasonable belief, it is to be remembered that motive is not the same as belief: ***Ibrahim v HCA International Ltd*** [2020] IRLR 224.

79. In *Kong v Golf International Bank (UK) Ltd [2022] EWCA Civ 941*, the Court of Appeal upheld the Employment Appeal Tribunals decision that a Tribunal directed itself properly on the issue of the separability of the reason for a workers dismissal and the protected disclosures she had made. The Employment Tribunal accepted that a complaint about the Claimant's behaviour was motivated by the protected disclosures and that that complaint was a material part of the reason why the Claimant was dismissed. However, it found that the decision-makers had decided to dismiss on the basis of conduct in the manner in which the Claimant raised a matter and questioning professional awareness or competence and not because of the protected disclosures.

80. The claim for automatic unfair dismissal did not succeed. The Claimant appealed to the Employment Appeal Tribunal who dismissed the appeal. The Tribunal was clear that what motivated the decision-makers was not the content or fact of the Claimant's disclosures but the way in which she conveyed her criticisms. The former was properly separable from the latter. The Tribunal had directed itself properly on the issue of the separability of the reason for dismissal and the protected disclosures. The Court of Appeal dismissed the Claimant's appeal.

81. Section 47B(1) ERA 1996 provides that 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. 'Detriment' is not defined in the ERA 1996, but applying discrimination case law, the concept is a broad one and there will be a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment: ***Jesudason v Alder Hay Children's NHS Foundation Trust*** [2020] IRLR 374.

82. The initial burden of proof is on the Claimant to establish that a protected disclosure was made and that the ground or reason (that is more than trivial) for detrimental treatment is the protected disclosure. Thereafter, by virtue of s.48(2) ERA 1996, the Respondent must be prepared to show why the

detrimental treatment was done and inferences may be drawn in the event that the Respondent's explanations are unsatisfactory.

83. While the threshold of establishing a qualifying disclosure may be relatively low, it is essential that causation is properly considered. In a detriment case, determining whether a detriment is on the grounds that the worker has made a protected disclosure, requires an analysis of the mental processes (conscious or unconscious) of the employer acting as it did: ***Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust*** [2019] 9 WLUK 556. It is not sufficient to demonstrate that 'but for' the disclosure, the employer's act or omission would not have taken place. The protected disclosure must have materially influenced the employer's treatment of the worker: ***NHS Manchester v Fecitt & Ors*** [2012] IRLR 164. It is not enough to consider whether the act was 'related to' the disclosure in some looser sense.

84. In a dismissal case under s.103A of the ERA 1996, there are two questions to be answered: Did the employee make a protected disclosure? If so, was the making of that protected disclosure the reason or principal reason for the dismissal?

85. The relevant provisions of s.43G Employment Rights Act 1996 provide:

(1) A qualifying disclosure is made in accordance with this section if—

(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or …

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer … has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.]

Time limits

86. Subject to the rules on early conciliation, a claim for detriment under Section 47B of the Employment Rights Act 1996 must be presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them (Section 48(3)(a), Employment Rights Act 1996).

87. For alleged acts of detriment to form part of a series of similar acts, there must be some relevant connection between the acts pursuant to *Arthur v London Eastern Railway [2006] EWCA Civ 1358*. It is also essential that each of the acts forming part of the alleged series is, in itself, unlawful, *Oxfordshire County Council v Meade UKEAT/0410/14*. In *Meade*, detriments inflicted after a particular date were held not to be by reason of whistleblowing, but rather another disagreement between the parties, and so they could not be used to continue the series for the purposes of calculating the time limit to bring a whistleblowing claim.

Maternity discrimination

88. Since the maternity discrimination claims are no longer actively pursued, there is no need to refer to the relevant law.

Conclusions

89. In arriving at its conclusions on the issues before the Tribunal, the law has ben applied to the facts found above. We shall not repeat every single fact, in order to keep these reasons to a manageable length.

Protected Disclosures

Issue 1 - Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996 when she spoke to Mr Hogg at Hull City Council on about 31 March 2020? The Tribunal will decide:

(Issue 1.1) What did the Claimant say? The Claimant says she made four disclosures:

Issue 1.1.1 That the First Respondent was claiming money in full from Hull City Council for staff who were on furlough;

90. This disclosure was made - see our findings of fact and page 373.

Issue 1.1.2 That she had concerns about the health and safety of service users due to the lack of support they would receive while the First Respondent's staff were on furlough;

91. This disclosure was made - see our findings of fact and page 373.

Issue 1.1.3 That she had concerns about one specific individual who was extremely clinically vulnerable and would not be receiving the support he needed

92. Again, this disclosure was made - see our findings of fact and page 373.

Issue 1.1.4 Concerns about the health and safety of service users and employees of the First Respondent (paragraph 11 of the further particulars).

93. Those are not the words reflected in Mr Hogg's email. Whilst the Tribunal accepts that Mr Hogg's email was a summary of what had been said, the Tribunal finds that those words were not used. Mr Hogg's email states '*she would like to speak with the SART about further concerns with VPL at a later date and understand that this cannot be done now due to CV19 issues'*. In any event, had we found that the word set out in issue 1.1.4 had been said, we would have found that those amounted to an allegation, not a disclosure of information.

Issue 1.2 Did she disclose information?

94. The tribunal concludes that the claimant did disclose information in relation to disclosures 1 to 3 above. These amounts to more than mere allegations. They set out factual information, albeit briefly, in relation to alleged fraud, and as to why the claimant was concerned for the health and safety of service users.

Issue 1.3 Did she believe the disclosure of information was made in the public interest?

95. The Tribunal concludes that the claimant did believe that, in relation to disclosures 1 to 3 above.

Issue 1.4 Was that belief reasonable?

96. The Tribunal concludes that this belief was reasonable. The allegation in relation to the claiming of housing benefit whilst paying workers on furlough and claiming that money from the government, would amount to fraudulent use of public money. The belief that it was in the public interest to raise that is a reasonable one. As for the concerns for service users' health and safety, the respondent was responsible for over a hundred service users, including KV, and the claimant reasonably believed that it was in the public interest to raise the concerns that she did, in order to safeguard their health and safety.

Issue 1.5 Did she believe it tended to show that a criminal offence had been committed, was being committed or was likely to be committed; that a person had failed, was failing or was likely to fail to comply with a legal obligation; or

that the health or safety of an individual had been, was being or was likely to be endangered?

97. The Tribunal concludes that the claimant did believe those matters. In relation to 1 above, that a criminal offence was being committed (i.e. fraud) and or a legal obligation was not being complied with (the obligation not to misuse public monies); and in relation to 2 and 3 above, failure to comply with a legal obligation (a duty of care towards service users), or that the health and safety of service users was at risk.

Issue 1.6 Was that belief reasonable?

98. The Tribunal concludes that it was, on the basis of our findings of fact above. The claimant had raised a number of concerns which appeared to be falling on deaf ears. She was genuinely concerned for the health and safety of residents and about a potential fraud. She had already raised with Ms Smith the fact that workers should not be asked to work whilst on furlough (since that would be potential fraud). The response was to tell the claimant that her laptop would be collected from her.

Issue 1.7 If the Claimant made a qualifying disclosure:

Issue 1.7.1 Did she reasonably believe that the information disclosed and any allegations in it were substantially true?

99. The Tribunal concludes that the claimant reasonably believed that the information disclosed and any allegations in it were substantially true. It was suggested by the second respondent that the claimant was just trying to undermine Ms Smith because she wanted her job. The tribunal firmly rejects that suggestion, for which there is no credible evidential basis.

Issue 1.7.2 Did she make the disclosure for personal gain?

100. The Tribunal concludes that the allegations were not made for personal gain, but due to the claimant's genuine and reasonable concerns about the matters raised.

Issue 1.7.3 Did she reasonably believe that she would be subjected to detriment by the First Respondent if she made the disclosure to it?

101. The Tribunal concludes that the claimant reasonably believed that she would be subjected to detriment by the first respondent and the second respondent if she made the disclosures. Her email of 2 April 2020 confirms that she considered the second respondent's behaviour to be unpredictable and difficult. That was based on her experience over the preceding year. When she raised the issue about working whilst on furlough with Ms Smith, she was told her laptop would be removed.

Issue 1.7.4 Or, if there was no relevant prescribed person, did she reasonably believe evidence relating to the failure would be concealed or destroyed if she made the disclosure to the First Respondent?

102. The Tribunal concludes that the claimant did reasonably believe that, on the basis of her experience up to that point. Whilst the Tribunal has not reached this conclusion on the basis of the non-disclosure of documents for this tribunal, this subsequent behaviour confirms that her concerns in that regard were well-founded. The Tribunal does rely on the facts found above regarding the change in the way that meter readings were recorded.

Issue 1.7.5 - or, had she previously made substantially the same disclosure to the First Respondent?

103. The Tribunal concludes that the claimant had done so. In relation to furlough fraud, the issue raised with Ms Smith was about being asked to work whilst on furlough; that is slightly different to the disclosure of information to Mr Hogg, but is nevertheless substantially the same. In that both involved potential fraud of the furlough scheme. The claimant had also raised concerns about the health and safety of service users and in particular, KV and MG, and those concerns had been shrugged off. The claimant had also been raising her concerns about how the needs of service users would be met if workers were furloughed, but workers were furloughed nevertheless.

Issue 1.7.6 Was it reasonable for her to make the disclosure in all the circumstances?

104. The Tribunal concludes that it was. The SART team had supervisory responsibilities for the work being done. Their role involved overseeing the support being provided.

Detriment

Issue 2.1 Was there a series of similar acts or failures?

105. The Tribunal concludes that the detriments below amount to a series of similar acts or failures. The actions of the first respondent arose from the same protected disclosures. There was a hiatus, after the end of July 2020, because the claimant was on maternity leave. That does not however, in these circumstances and on the facts of this case, break the chain of causation.

Issue 2.2. Was the claim presented within three months (plus early conciliation extension) of the last of them?

106. Yes it was.

Issue 2.3 If not, for any claim not presented within the time limit, was it reasonably practicable to do so?

107. As a result of our conclusions above it is not necessary to reach any conclusions on this or the following issue.

Issue 2.4 Was that claim presented within a reasonable period?

108. See 2.3 above.

Issue 3 - Did the Respondents do the following – and in each case, was that a detriment?

Issue 3.1 Preventing access to the Claimant's work emails on or about 1 April 2020;

109. This clearly did happen as a matter of fact, and it was a detriment. The claimant was aware that the disclosures she had made to Mr Hogg had been inadvertently forwarded to the second respondent-and reasonably concluded that there was a link between her emails being blocked, and that fact. The fact that she could be contacted via personal email and group chat does not prevent this being a detriment. The claimant raised it as an issue in her email of 1 April 2020 to Mr Hogg and was upset by it. It was reasonable for her to be upset. No other employee had their access to work emails blocked.

Issue 3.2 Allison Smith commenting in a group chat on 1 April 2020 "Thanks to a staff member the SART is in crisis"; [ET Note: the actual words used were *'Thanks to a staff member and SART team in times of crisis']*

110. This occurred as a matter of fact in relation to the amended words set out above. The claimant was upset by that remark which she reasonably concluded was directed towards her as a result of her conversation with Mr Hogg. She was the sole link person with the SART team, and that was known by the rest of her colleagues. The words used are a sarcastic comment, directed at the claimant.

Issue 3.3. Allison Smith asking the Claimant to a meeting to discuss her "breach of contract" on 28 July 2020

111. This occurred as a matter of fact. The context is important. The invitation was sent one day after Mr Kingaru told the Council in an email that the claimant had breached his trust, that he did not have any trust or confidence in her, and he did not want her to return to work. Had the invitation to the meeting occurred shortly after the claimant's conversation with Mr Hogg, the Tribunal may have concluded differently. But the invitation was in fact sent out four months after the conversation with Mr Hogg, after the claimant had commenced maternity leave, and given birth to her child. The fact that the invitation was sent on the day after the second respondent had made it clear that he die not want the claimant to return to work for the first respondent, leads the Tribunal to conclude that the proposed investigation was a sham. The second respondent's intention was to dismiss the claimant regardless of what she said. Indeed, that is precisely what happened at a later date. Further, the claimant made a perfectly reasonable suggestion that the allegations should be sent to her in writing and she would then respond in writing. The claimant did not receive a response to her reasonable suggestion and the Tribunal was not given any satisfactory explanation why that was the case. We conclude that there was no satisfactory explanation.

Issue 3.4 - wrongly accusing her on 12 February 2021 of retaining the First Respondent's property;

112. The Tribunal concludes that the words used did wrongly accuse the claimant of retaining the first respondent's property, namely the laptop. The claimant was genuinely and reasonably upset by that accusation, which was baseless.

Issue 3.5 Denying on 12 February 2021 that the First Respondent still had some of the Claimant's property;

113. This detriment clearly succeeds on the facts. The Tribunal also concludes that it was a detriment. It would have been a simple matter for the second respondent to arrange for the claimant to attend the office so that she could collect her personal belongings. Instead, he denied that they had any such belongings; and this despite Ms Smith having confirmed that the claimant's personal effects had been transferred to the new office.

Issue 3.6 Telling the Claimant on 13 February 2021 that her communication with the First Respondent was over;

114. This did occur as a matter of fact, at a time when the claimant was trying to gain access to her personal belongings. This was, understandably, upsetting to the claimant. It was a detriment.

Issue 3.7 Threatening to sue the Claimant for defamation?

115. This did occur as a matter of fact. The tribunal concludes that it was a detriment. The time limit for a defamation claim was about to run out, and the second respondent had given no previous indication to the claimant that he was considering such a claim. The claimant was genuinely and reasonably upset by the threat.

Issue 4 If so, was it done on the ground that the Claimant made a protected disclosure?

116. The Tribunal concludes that the reason for those detriments was the protected disclosures the tribunal has found were made. The second respondent's emails to the Council of 31 March and 28 July 2020, clearly demonstrate that he was annoyed by the disclosures that the claimant had made. The tribunal therefore concludes that there is a clear link between that annoyance and the detrimental treatment that the claimant was subjected to. That conclusion is only reinforced by the fact that the second respondent accepted before the Tribunal that his reason for dismissing the claimant was her conversation with Mr Hogg.

Dismissal

Issue 5 Was the reason or principal reason for dismissal by the First Respondent that the Claimant made a protected disclosure? If so, the Claimant will be regarded as unfairly dismissed.

117. Unsurprisingly, given the above, the Tribunal concludes that the reason for the claimant's dismissal was that she made a protected disclosure. The second respondent accepts that the reason he dismissed the claimant was the alleged breach of trust, which he claims arose from the disclosures made. The Tribunal has concluded that those disclosures were reasonably made to Mr Hogg, rather than to the first respondent, in measured terms.

118. It is not possible in those circumstances to separate out the manner in which the disclosures were made from the content of the disclosures themselves. Further, it would be illogical in such circumstances to conclude that even though it was reasonable for those disclosures to be made to Mr Hogg, it was nevertheless reasonable for the first respondent to dismiss the claimant because she made those disclosures to Mr Hogg, instead of to the first respondent. The facts of the claimant's case are clearly distinguishable from the factual situation in *Kong*.

Maternity Discrimination

Issue 6.1 Were the acts complained of part of a course of conduct over a period and was the claim presented within three months (plus early conciliation extension) of the end of the period?

119. This claim is no longer pursued and no conclusion needs to be reached on this or issues 6.2 to 6.4 below.

Issue 6.2 If not, is it just and equitable to extend time for bringing the first complaint?

120. See above.

Issue 6.3 Did the Respondents treat the Claimant unfavourably by:

Issue 6.3.1 In about July 2020, refusing or ignoring her request to deal with the alleged breach of contract in writing;

121. See above.

Issue 6.3.2 Dismissing her?

122. See above

Issue 6.4 If so, was it because she was exercising or had exercised the right to maternity leave?

123. See above.

Remedy

Issue 7.1 - If there is a compensatory award for unfair dismissal or compensation for discriminatory dismissal, how much should it be? The Tribunal will decide:

Issue 7.1.1 What financial losses has the dismissal caused the Claimant?

124. Since the claimant had less than the two years service required for an unfair dismissal claim and for a redundancy payment, she cannot claim compensation for loss of statutory rights. She claims loss of wages, and pension, of £2,225.94. That figure is not disputed.

Issue 7.1. 2 Has she taken reasonable steps to replace her lost earnings, for example by looking for another job?

125. The tribunal concludes that the claimant did take reasonable steps, and Mr Frew did not seek to argue differently.

Issue 7.1.3 If not, for what period of loss should she be compensated?

126. Not applicable. The Tribunal concludes that the claimant should be compensated in full for the loss of wages and pension claimed of £2,225.94.

Issue 7.2 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

127. The Tribunal concludes there was not. The second respondent argues that there was a breakdown of trust and confidence caused by the claimant's email of 31 March 2020. In his witness statement at paragraph 47 however he stated that the first respondent was investigating the issue but when the claimant said she was beast-feeding, decided not to pursue the matter further. On that case, any repudiatory breach of contract had been waived.

128. In any event, the claimant did not breach trust and confidence by her actions and could not have been fairly dismissed for them. Yet further, the first respondent had already made clear to the Council on 27 July 2020, that he did not want the claimant to return. The decision to dismiss her had therefore already been made at that stage and that decision was not a reasonable one, no investigation having been carried out by then.

Issue 7.3 If so, should the Claimant's compensation be reduced? By how much?

129. This is not applicable in light of our above conclusion.

Issue 7.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

130. The Acas Code applied to the claimant's dismissal.

Issue 7.5 Did the Respondent unreasonably fail to comply with it?

131. The decision to dismiss the claimant was made without any formal process being followed. The claimant had tried to agree a return to work date from her maternity leave. It was only at that stage that the first respondent told the claimant there was no job for her. He initially told her that this was because of Covid and lockdown but that was patently untrue and not the real reason.

Issue 7.6 If so is it just and equitable to increase any award payable to the Claimant? By what proportion, up to 25%?

132. Given the wholesale failure to follow the ACAS code at all, the Tribunal concludes that this is an entirely appropriate case in which to award the maximum uplift of 25%.

Issue 7.7 Does the statutory cap of fifty-two weeks' pay apply (unfair dismissal only)?

133. On the basis of the compensation awarded for the dismissal, this is not applicable.

Issue 7.8 What basic award for unfair dismissal is payable to the Claimant, if any?

134. The claimant is entitled to 1 week, in the sum of £446.88

Issue 7.9 What injury to feelings has any detrimental treatment or discrimination caused the Claimant and how much compensation should be awarded for that?

135. The Tribunal notes that injury to feelings can only be claimed in relation to the detriments. Injury to feelings is not payable for the dismissal. Bearing in mind the facts found above, as to the effect of the detrimental treatment on the claimant, the tribunal concludes that the appropriate award is at the top end of the lower Vento band, £7,500.

136. Whilst each of the detriments taken individually are at the lower end of the scale, they nevertheless caused the claimant serious upset, particularly in the context in which they occurred. They had a cumulative impact on the claimant, given the number of them. We refer to the finding of fact above. The claimant had raised legitimate concerns with Mr Hogg of the SART team, during the pandemic, a stressful time for everyone. As a result of the first respondent and Mr Kingaru's reaction, the stress that the claimant was already under was considerably increased.

137. When the claimant commenced her maternity leave not knowing whether she had a job to return to. She was subsequently invited to a meeting to discuss a 'breach of contract', four months after the alleged breach had occurred. This was after an email from Mr Kingaru to the Council, demonstrating that the proposed 'investigation' was in fact a sham. Whilst, due to her ongoing maternity leave, there is then a gap of over six months before the next detriments, those detriments occurred after the claimant had in effect been told that she was not going to be allowed to return to work for the respondent.

138. The claimant was then unreasonably accused of retaining property belonging to the first respondent; unreasonably refused permission to collect her personal belongings; Mr Kingaru then unreasonably cut off all communication;

and unreasonably threatened to sue the claimant for defamation, when he had no real intention of doing so. Taken as a whole, those detriments were egregious and the effect of them was cumulative. The Tribunal has considered Mr Frew's argument that the contents of her application form to the Goodwin Trust, quoted in the facts section above, show that other matters were preying on her mind. The Tribunal concludes that the matters set out there were perfectly understandable matters to set out in an application for the role that she applied for and currently occupies. It does not detract from her clear and largely unchallenged evidence about the effect on her of the detrimental treatment. Hence the award of £7,500

Issue 7.10 Should interest be awarded on discrimination compensation? How much?

139. The claimant has not succeeded in her discrimination claims and therefore interest is not payable.

Employment Judge James

Employment Judge A James
North East Region

Dated 5 September 2022

Sent to the parties on:
Date: 6 October 2022

Annex A – List of Issues

1. Claims

   The Claimant brings the following complaints, as set out in her further particulars dated 11 October 2021:
   1.1. Being subjected to detriment for making protected disclosures;
   1.2. Automatically unfair dismissal for making protected disclosures;
   1.3. Maternity discrimination;
   1.4. Wrongful dismissal (notice pay) and
   1.5. Pay for accrued but untaken annual leave.

2. The Claimant's representative confirmed that she does not bring any claim under the Maternity and Parental Leave Regulations 1999.

3. The issues for the Tribunal to decide at the final hearing are:

4. <u>Protected Disclosures</u>

   4.1. Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996 when she spoke to Mr Hogg at Hull City Council on about 31 March 2020? The Tribunal will decide:
      4.1.1. What did the Claimant say? The Claimant says she made four disclosures:
         4.1.1.1. That the First Respondent was claiming money in full from Hull City Council for staff who were on furlough;
         4.1.1.2. That she had concerns about the health and safety of service users due to the lack of support they would receive while the First Respondent's staff were on furlough;
         4.1.1.3. That she had concerns about one specific individual who was extremely clinically vulnerable and would not be receiving the support he needed; and
         4.1.1.4. Concerns about the health and safety of service users and employees of the First Respondent (paragraph 11 of the further particulars).
      4.1.2. Did she disclose information?
      4.1.3. Did she believe the disclosure of information was made in the public interest?
      4.1.4. Was that belief reasonable?
      4.1.5. Did she believe it tended to show that a criminal offence had been committed, was being committed or was likely to be committed; that a person had failed, was failing or was likely to fail to comply with a legal obligation; or that the health or safety of an individual had been, was being or was likely to be endangered?
      4.1.6. Was that belief reasonable?

4.2. If the Claimant made a qualifying disclosure:
  4.2.1. Did she reasonably believe that the information disclosed and any allegations in it were substantially true?
  4.2.2. Did she not make the disclosure for personal gain?
  4.2.3. Did she reasonably believe that she would be subjected to detriment by the First Respondent if she made the disclosure to it?
  4.2.4. Or, if there was no relevant prescribed person, did she reasonably believe evidence relating to the failure would be concealed or destroyed if she made the disclosure to the First Respondent?
  4.2.5. Or, had she previously made substantially the same disclosure to the First Respondent?
  4.2.6. Was it reasonable for her to make the disclosure in all the circumstances?

Detriment

4.3. Was there a series of similar acts or failures?
4.4. Was the claim presented within three months (plus early conciliation extension) of the last of them?
4.5. If not, for any claim not presented within the time limit, was it reasonably practicable to do so?
4.6. Was that claim presented within a reasonable period?
4.7. Did the Respondents do the following:
  4.7.1. 7.7.1 Preventing access to the Claimant's work emails on about 1 April 2020;
  4.7.2. 7.7.2 Allison Smith commenting in a group chat on 1 April 2020 "Thanks to a staff member the SART is in crisis";
  4.7.3. 7.7.3 Allison Smith asking the Claimant to a meeting to discuss her "breach of contract" on 28 July 2020;
  4.7.4. 7.7.4 Wrongly accusing her on 12 February 2021 of retaining the First Respondent's property;
  4.7.5. 7.7.5 Denying on 12 February 2021 that the First Respondent still had some of the Claimant's property;
  4.7.6. 7.7.6 Telling the Claimant on 13 February 2021 that her communication with the First Respondent was over;
  4.7.7. 7.7.7 Threatening to sue the Claimant for defamation?
4.8. If so, was it done on the ground that the Claimant made a protected disclosure?

Dismissal

4.9. Was the reason or principal reason for dismissal by the First Respondent that the Claimant made a protected disclosure? If so, the Claimant will be regarded as unfairly dismissed.

Maternity Discrimination

4.10. Were the acts complained of part of a course of conduct over a period and was the claim presented within three months (plus early conciliation extension) of the end of the period?
4.11. If not, is it just and equitable to extend time for bringing the first complaint?
4.12. Did the Respondents treat the Claimant unfavourably by:
  4.12.1. In about July 2020, refusing or ignoring her request to deal with the alleged breach of contract in writing;
  4.12.2. Dismissing her?
4.13. If so, was it because she was exercising or had exercised the right to maternity leave?

Notice

4.14. Did the First Respondent act in breach of contract by dismissing the Claimant without notice and, if so, what damages should be awarded?

Annual leave

4.15. 7.15 Did the First Respondent fail to pay the Claimant for annual leave that she had accrued but not taken when her employment ended? If so, what should she have been paid?

Remedy

4.16. If there is a compensatory award for unfair dismissal or compensation for discriminatory dismissal, how much should it be? The Tribunal will decide:
  4.16.1. What financial losses has the dismissal caused the Claimant?
  4.16.2. Has she taken reasonable steps to replace her lost earnings, for example by looking for another job?
  4.16.3. If not, for what period of loss should she be compensated?
  4.16.4. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  4.16.5. If so, should the Claimant's compensation be reduced? By how much?
  4.16.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
  4.16.7. Did the Respondent unreasonably fail to comply with it?
  4.16.8. If so is it just and equitable to increase any award payable to the Claimant? By what proportion, up to 25%?
  4.16.9. Does the statutory cap of fifty-two weeks' pay apply (unfair dismissal only)?

4.17. What basic award for unfair dismissal is payable to the Claimant, if any?

4.18. What injury to feelings has any detrimental treatment or discrimination caused the Claimant and how much compensation should be awarded for that?

4.19. Should interest be awarded on discrimination compensation? How much?