EMPLOYMENT TRIBUNALS

Claimant:	**Ms Ewelina Butkiewicz**	
Respondent:	**CAD Services Ltd t/a Facilities by ADF**	
Heard at:	**Cardiff (by CVP)**	**On: 21, 24, 25, 26, 27 and 28 October 2022**
Before:	**Employment Judge R Brace** **Members: Ms A Burge and Mr P Pendle**	

Representation:

Claimant:	In person accompanied by her husband in support (with interpreter (Ms A Piwonska))
Respondent:	Mr A George (Solicitor)

JUDGMENT having been sent to the parties on 1 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preliminary Matters

1. The Claimant is a litigant in person and a Polish interpreter, Ms Alexandra Powinska, was provided to enable the Claimant to participate throughout the hearing. Ms Powinska also provided interpretation for the Claimant's husband and witness, Mr Krystian Butkiewicz, when he was giving evidence. The Tribunal thanks Ms Powinska for her invaluable assistance throughout this hearing.

2. The Claimant represented herself with the support of her husband until the morning of the third day when, due to an inability to speak due to a sore throat, the Claimant's husband, at the Claimant's request, represented her and continued cross-examination of the Respondent's witnesses.

3. On the morning of the first day, by consent it was agreed that the name of the Respondent would be amended to CAD Services Ltd t/a Facilities by ADF. Further case management also took place when the timetable and list of issues was agreed. The list of issues, as set out in the case management order of Judge Powell of 10 February 2022, was adopted as the list of issues in the case [36] ("List of Issues") save that:

a. The wrongful dismissal claim has since been dismissed on withdrawal by the Claimant; and
b. The Respondent has conceded that at all relevant times the Claimant was a disabled person as defined by s.6 Equality Act 2010 ("EqA 2010"). Knowledge is disputed.

4. The Claimant also confirmed that she was not relying on s.100 (1)(a),(b) or (ba) Employment Rights Act 1996 ("ERA 1996) for the purposes of her health and safety automatic unfair dismissal claim, but was relying on s.100(1)(c), (d) and/or (e) ERA 1996. Likewise, she was not relying on s.44(1)(a) and/or (b) ERA 1996 for the purposes of her health and safety detriment claims.

5. This List of Issues was found to be incomplete as it did not contain the Claimant's disability discrimination claim in relation to her dismissal and, after discussion and agreement with the parties, the following issue was also included:

<u>Discrimination arising from disability (Equality Act 2010 section 15)</u>

1. *Did the Respondent treat the Claimant unfavourably by dismissing her?*

2. *Did the following things arise in consequence of the Claimant's disability:*

    a. *Attendance and slow performance and/or inability to move equipment such as washing machines?*

3. *Was the unfavourable treatment because of any of those things?*

4. *Was the treatment a proportionate means of achieving a legitimate aim?*

    The Respondent will indicate that the dismissal was a proportionate means of achieving a legitimate aim in relation to the following factors

    a. *Continued Performance issues of the Claimant after implementation of adjustments;*

b. *Attendance levels above normal threshold even taking any underlying cause into account – Bradford factor 144 when threshold is 45 within Respondent business;*
c. *Cleaning standard required within the respondent business which is of a high level due to the customer base and the risk of customer complaints or loss of contract in a competitive industry.*

5. *Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?*

Evidence

6. The Tribunal heard evidence from the Claimant and from her witness, her husband Mr Krystian Butkiewicz. For the Respondent, the following gave evidence:
   a. Tony Cosh, the Claimant's Supervisor from May 2021;
   b. Chris Huxton, Workshop Manager;
   c. Andrea Browning, HR Manager; and
   d. Linzi Chellow, Administrator and Respondent H&S Representative.

7. All witnesses relied upon witness statements which were taken as read and they were then subject to cross examination, Tribunal questions and re-examination. The Tribunal was referred selectively to documents contained in a bundle of documents that had been agreed (the "Bundle") and amounted to 313 pages. References to pages in that Bundle in these written reasons are denoted by [ ]. Those documents included an additional document [313] which was permitted on the second day of the hearing and oral reasons were provided to the parties on the day.

8. The Tribunal was satisfied that all witnesses gave their evidence honestly and to the best of their information and belief and we did not consider it necessary to reject a witness's evidence by regarding any witness as unreliable or not telling the truth in this case.

9. The Claimant was reminded, before and during her cross-examination of the witnesses, of the law in relation to protected disclosures and the burden of proof as well as the requirement for the Tribunal to consider the employer's conscious and unconscious reasons for acting as it did and that in doing so we needed to consider: why did the dismissing officers act as they did? What, consciously or unconsciously, was their reason?

10. The Claimant was also encouraged on a number of occasions to keep the List of Issues before her to ensure that she covered all of the claims that she was seeking to bring.

Schedule of Loss

11. The Claimant has provided a Schedule of Loss [32] in which she claimed £31,650.89.

Findings of fact

12. The Respondent is a limited company that provides support to the film and entertainment industry**.** It employed around 180 staff.

13. From 25 November 2019, the Claimant was employed by the Respondent as a Cleaner based in Bridgend and on terms set out in writing in a contract of employment signed on 19 November 2019 [58]. In that role the Claimant was responsible for:

    a. cleaning and restocking trailers supplied to film productions which contained household items including microwaves, washing machines and fridges and, dependent on their use, could also contain boxes of make-up and clothing racks dependent on the trailer's function; and
    b. cleaning the Respondent's main office (including toilets)

14. The contract of employment provided for a probationary period and clause 16 of the contract directed the employee to a staff handbook ("Staff Handbook") which contained non-contractual policies and procedures.

15. A copy of the Staff Handbook [68] could be located by staff on the Respondent's internal system known as IRIS; a system which also enabled staff to book annual leave.

16. The Staff Handbook contained reference to Performance Review Procedures at §6.4 [95], which put in place a five stage procedure of warnings to deal with poor job performance [95], equal opportunities and harassment [108] and whistleblowing [113].

17. §1.5 of the Staff Handbook provided that the Respondent reserved the right to use truncated versions of the policies and procedures during an employee's initial 24 months of employment and, in exceptional circumstances, to refrain in totality from following them.

18. Whilst we found that the Claimant was provided by the Respondent with a link to the Staff Handbook [313], where she could have located and read the Staff Handbook, we found that she did not.

19. The Staff Handbook also contained health and safety provisions (§2.5) which indicated that if there were any questions or concerns about health and safety, the employee should talk to their manager or health and safety representative [76].

20. The Respondent employed Linzi Chellew as one of its H&S representatives. The Claimant knew Miss Chellow who was also based in Bridgend. Her duties included health and safety responsibility for the cleaning employees, including the Claimant. We accepted Linzi Chellow's evidence that her name and mobile number were included on a Health and Safety poster, that was posted up next to the canteen in what was considered a central area, and that if employees were unable to speak to their line manager or her regarding health and safety issues, they could raise concerns with any member of the management team.

21. At no time during her employment did the Claimant raise any issue of a health and safety issue with Linzi Chellew in Miss Chellew's capacity as a health and safety representative, or at all.

22. The Claimant's husband, Krystian Butkiewicz, was also employed by the Respondent. He was considered by the Respondent to be a good employee having initially been employed as a cleaner from July 2019, and was promoted to Maintenance Technician.

23. From the commencement of her employment in November 2019 until May 2021, the Claimant reported to Chris Huxton, Workshop Manager, whose duties included management of cleaning staff.

24. Due to an increase in the Respondent's business, and in turn the workload of Chris Huxton, a decision was made that from May 2021, the Claimant would report, not to Chris Huxton but to a new Supervisor, Tony Cosh. Tony Cosh himself had for many years been employed as a driver for the Respondent and would regularly assist with the cleaning of trailers, working alongside the Claimant.

Period of furlough

25. The Claimant was not in work continuously from November 2019 however. Covid-19 significantly impacted on the entertainment industry and in turn the Respondent's business and from 17 March 2020 to 21 September 2020, the Claimant agreed to be placed on furlough under the government's Coronavirus Job Retention Scheme. She was again furloughed on 6 January 2021 and remained furloughed until 22 February 2021 [145].

Performance and attendance concerns

26. The were no performance issues with the Claimant in the period November 2019 to March 2020, prior to the Covid-19 pandemic and she successfully completed her probationary period on 11 March 2020 [137].

27. Likewise, in the period September 2020, when the Claimant returned to work form her first period of furlough, to January 2021, there were no concerns regarding her performance, or certainly none in evidence before us.

28. Issues regarding the Claimant's performance started to arise on her return to work in late February 2021, following the second period of furlough.

29. Chris Huxton gave evidence, which we accepted, that he started to receive reports from managers on production (Heads of Department) and other supervisors and trades staff from the workshop, that the cleaning standards on trailers used on productions, and trailers newly built and kitted out by the workshop, were below acceptable standard; that supervisors in the yard were noting that the Claimant was slow in cleaning the trailers.

30. He too had noted that standards had fallen and had noted that on a number of occasions the Claimant had asked her husband to assist her in cleaning, a task that was outside the scope of Mr Butkiewicz's own role as Maintenance Technician.

31. Whilst Christ Huxton was unable to provide specific dates, due to the informal nature of the conversations, he also gave evidence that from April/May 2021 he spoke to the Claimant on a number of occasions to inform her that she was not meeting the Respondent's cleaning standards. He also spoke to her husband to instruct him not to assist the Claimant to complete her tasks as that was not his role.

32. Concerns regarding both the standards of cleaning and assistance received from the Claimant's husband appears to have continued however up to and following Tony Cosh's appointment as the Claimant's new Supervisor in May 2021. He too engaged in a number of informal discussions with the Claimant regarding both her standard of cleaning and how her husband should not clean behind her to improve the standard of her cleaning.

33. He too reported his concerns to Chris Huxton.

34. In addition, the Claimant's attendance was of increasing concern, with the Claimant's attendance being logged into the IRIS system providing the Respondent with a Bradford score on attendance of 144. Sickness absence related to conditions including bad stomach and flu-like symptoms in March 2020, and again in March, April and May 2021.

First Protected Disclosure – May 2021

35. Whilst the Claimant had complained in her ET1 that had informed the Respondent in May 2021 of '*issues of moving heavy kitchen appliances unaided and working dangerously on a ladder*'[1], the Claimant had made no reference to this in her witness statement. On cross examination, she explained that this was not included evidence in relation to this in her witness statement as, as an litigant in person, she believed that she only had to prepare a short statement.

36. However it is important that the Tribunal understood the disclosures relied on and in answers to questions on cross-examination, she told us that before the first formal performance management she had told Tony Cosh that she was '*afraid of heights and concerned about working on a ladder and moving heavy objects'* when she had been asked to clean behind the fridges and washing machines. She said that she had told Tony Cosh that she would probably kill herself if she fell falling off a ladder.

37. In his witness statement and in cross-examination, Tony Cosh denied that the Claimant had been required to use a ladder whilst holding a vacuum cleaner to undertake her cleaning role or that she was required to stand on a ladder cleaning whilst not holding on as had been claimed. He told us that if she had worked on a ladder at height, she had done so on her own behest.

38. He denied discussing working on a ladder with the Claimant or that the Claimant had told him that working at height was dangerous.

39. Whilst he accepted that the Claimant was required to clean behind washing machines and fridges, his evidence was that he removed the heavy washing machines for her, and that the fridges with the trailers had been small and had not been heavy to move.

40. Whilst we did find that from time to time the Claimant may have used a stepladder or 'hop up' to clean particularly the tops of clothing rails or shelving in trailers, and accepted that it was more than possible that the Claimant was afraid of working at height, we did not find that the Claimant had proven on balance of probabilities that she had any discussions with Tony Cosh in May 2021 regarding working on a ladder or made any disclosure of information to Tony Cosh in May 2021 that there issues of her working dangerously on a ladder.

41. Whilst we accepted it probable that at some point the Claimant was likely to have told Tony Cosh that she was unable to move a heavy washing machine on her own, as she had been required to clean behind them, we did not find that the Claimant made any other disclosure beyond that.

[1] §10.2 and 12 ET1 Rider

42. We also found it likely that Tony Cosh would not have required the Claimant to move heavy machinery, such as washing machines on her own; that he would always move them for her or ask the male cleaner to move them for her.

43. Despite the informal discussions regarding the Claimant's performance, issues continued to arise with the Claimant's standard of cleaning resulting in trailers having to be recleaned and with the Claimant continuing to involve her husband in her cleaning duties, despite having been instructed not to involve him.

44. As a result Chris Huxton asked Andrea Browning, the Respondent's HR Manager to accompany him to a formal meeting with the Claimant to discuss his concerns regarding her performance.

3 June 2021 Meeting

45. On 3 June 2021, Chris Huxton approached the Claimant's husband to ask if he knew of the Claimant's whereabouts. Having located the Claimant, Chris Huxton asked her to join him in a meeting.

46. Andrea Browning was also in attendance. At the meeting the Claimant was told that the meeting had been arranged to discuss her performance.

47. No notes have been provided of that meeting. Whilst Chris Huxton's recall was that the Claimant did not confirm at that meeting that she had a definite diagnosis of diabetes at that meeting, we found that this recall was not accurate as:

.

a. Andrea Browning's evidence was that the Claimant had informed them at that meeting that she had been diagnosed with diabetes; and
b. In addition, the letter dated 4 June 2021 (subsequently sent to the Claimant by email of 7 June 2021 [148],) prepared and signed by Andrea Browning on behalf of Chris Huxton, also stated that the Claimant had informed them that she had been diagnosed with diabetes.

48. As a result, we found that at the meeting of 3 June 2021, the Claimant had informed Chris Huxton and Andrea Browning that she had been diagnosed with diabetes but that she did also confirm that she was awaiting blood tests to determine type.

49. The Claimant had also told them at the meeting that she felt that her diabetes had impacted on her attendance and performance as she was tired

constantly. The letter of 4 June 2021 confirms as much with the Respondent indicating that they wished to support the Claimant, that there would be a further discussion when the Claimant received the results of the blood test to understand what adjustments could be put in place to assist the Claimant, but that it was important that standards were maintained and that the Claimant should inform them if there were any changes that could affect her performance.

50. Following that a further email was sent to the Claimant asking her to let the Respondent know when she had the blood tests back so that a further meeting could be rescheduled [147]. The Claimant responded confirming that she would let them know on receipt of her tests, which she anticipated would be the end of that week [149].

51. What is not reflected in that letter, was what the Claimant said, if anything, about any concerns she held regarding health and safety and it is a matter of dispute as to what, if anything the Claimant did disclose in that meeting.

52. The following findings are important as they relate to the Claimant's complaint that at that meeting she made qualifying disclosures as set out in §10 of her ET1 Rider [15].

53. We found that at that meeting the Claimant did tell Chris Huxton and Amanda Browning that she had difficulty in moving heavy objects. We found that this was the limit of her disclosure. We did not find that the Claimant gave any other information to them.

54. We did not find that the Claimant told them that she was '*afraid of working at height because it was dangerous*'. This had been denied by both Chris Huxton and Amanda Browning and, on balance of probabilities, the Claimant could not demonstrate that this had been said.

55. For completeness, the Claimant made no disclosure at any time regarding the use of a cleaning fluid known as 'Tardis'. She admitted this on cross-examination and it did not, in any event form part of her claim that she had made a protected disclosure.

17 June 2021

56. It appears that a further meeting took place on 17 June 2021 although no documentary record of such a meeting exists.

57. At this meeting the Claimant was again instructed not to seek assistance from her husband if she needed assistance to clean the trailers and that she was to ask a Supervisors if she needed help.

58. During the period between 3 June and 2 July 2021, the Claimant's performance did not improve and a final meeting took place on 2 July 2021.

2 July 2021

59. At that meeting the Claimant again advised that she still did not have the results of her diabetes test.

60. At that meeting, the Claimant's employment was terminated and this was confirmed in writing by way of letter dated 5 July 2021 [150]. The letter confirmed that the Claimant was not entitled to a reason for her dismissal, that she was entitled to one week's notice and that she was not expected to work her notice. Her last day of employment was 9 July 2021.

61. On 7 July 2021, the Claimant's husband resigned [151]. In that email he referred to his wife being injured and money being wasted. In a later email, sent on 8 July 2021, he referred to harassment of women and that the Claimant had been instructed to clean behind fridges and washing machines which caused her to injure her back. He also referenced that she was afraid to climb ladders.

Sex Discrimination allegations

62. The Claimant made a number of allegations in her ET1 claim form regarding comments made by Chris Huxton, allegations which were denied in both the pleadings and in evidence by Mr Huxton.

63. We found that on balance of probabilities Chris Huxton had not engaged in the conduct as asserted by the Claimant and set out in §14-17 ET1 Rider on the following basis:

a. Whilst we accepted that Chris Huxton did speak to the Claimant's husband before speaking to the Claimant when seeking to her locate her for her performance meetings, we did not consider that this inferred any form of treatment based on sex. Rather, we accepted Mr Huxton's evidence that he was simply seeking to locate the Claimant on the premises.
b. We also accepted his evidence that the Claimant was increasingly difficult to communicate with following the commencement of the formal stage of the performance management.
c. We also found that at no time had the Claimant complained to Mr Huxton, or indeed anyone within the Respondent, about any jokes or conduct as alleged.
d. The Claimant was unable to provide any dates for the alleged conduct.

e. Whilst the Claimant is a litigant in person, both she and her husband cross-examined the Respondent's witnesses in some detail regarding her dismissal, the Claimant's husband asked little cross-examination and did not challenge Mr Huxton in relation to his evidence in relation to the sex discrimination allegations.

64. On 26 July 2021, the Claimant entered into early conciliation which ended on 12 August 2021 and on 29 September 2021 issued her ET1 claim [1].

The Law

Protected Disclosure – s.43A ERA 1996

65. Under section 43A Employment Rights Act 1996 ("ERA 1996"), a worker makes a protected disclosure in certain circumstances.

66. To be a protected disclosure, it must be a qualifying disclosure. A qualifying disclosure must fall within section 43B ERA 1996 and also must be made in accordance with any of sections 43C to 43H ERA 1996.

67. Section 43B says:

"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

68. Section 43C provides:

"*Disclosure to employer or other responsible person*

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure
(a) to his employer, or
(b) where the worker reasonably believes that the relevant failure relates solely or mainly to

(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility, to that other person…"

69. There are therefore a number of requirements before a disclosure is a qualifying disclosure.

a. First the disclosure must be of information tending to show one or more of the types of wrongdoing set out at Section 43B. In order to be such a disclosure "*It has to have sufficient factual content and specificity such that it is capable of tending to show one of the matters in subsection (1)"* (**Kilraine** v **London Borough of Wandsworth** [2018] ICR 185). Determining that is a matter for evaluative judgment by the Tribunal in light of all of the facts of the case.

b. Second, the worker must believe the disclosure tends to show one of more of the listed wrongdoings.

c. Third, if the worker does hold such a belief if must be reasonably held. Here, the worker does not have to show that the information did in fact disclose wrongdoing of the particular kind relied upon. It is enough if the worker reasonably believes that the information tends to show this to be the case. A belief may be reasonable even if it is ultimately wrong. It was said in **Kilraine** that this assessment is closely aligned with the first condition and that:

"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 to tending to show that listed matter, it is likely that his belief will be a reasonable belief."

d. Fourth the worker must believe that the disclosure is made in the public interest.

e. Fifth, if the worker does hold such a belief, it must be reasonably held. The focus is on whether the worker believes the disclosure is in the public interest (not the reasons why the worker believes that to be so). The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant motive for making disclosures: **Chesterton Global Ltd** v **Nuromhammed** [2018] ICR 731. 21. In **Chesterton** it was also said that there was no value in seeking to provide a general gloss on the phrase "in the public interest" but that the legislative history behind the introduction of the condition establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest. The question is to be answered by the Tribunal on a consideration

of all the circumstances of the particular case but relevant factors may include:

(a) the numbers in the group whose interests the disclosure served
(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
(c) the nature of the wrongdoing disclosed;
(d) the identity of the alleged wrongdoer.

f. Sixth, the disclosure has to be made to an appropriate person. A 'qualifying disclosure' means a 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 matters set out in 43B(1)(a)-(f) ERA 1996.

70. Section 43B(1) also requires that in order for any disclosure to qualify for protection, the disclosure must, in the reasonable belief' of the worker:

a. be made in the public interest, and
b. tend to show that one, of the six relevant failures, has occurred, is occurring or is likely to occur.

71. The test is a subjective one, with the focus on what the worker in question believed rather than what anyone else might or might not have believed in the same circumstances. That it is made in the context of an employment disagreement does not preclude that conclusion.

Automatic Unfair dismissal – whistleblowing - s.103A ERA 1996

72. S.103A ERA 1996 states that an employee will be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for that dismissal is that the employee made a protected disclosure. An employee will only succeed in a claim of unfair dismissal if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure and a 'principal reason' is the reason that operated in the employer's mind at the time of the dismissal (as per lord Denning MR in **Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA**). If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under s.103A ERA 1996 will not be made out.

73. In this case, the Claimant did not have the requisite two years' service to claim ordinary unfair dismissal and as such has the burden of showing, on balance of probabilities, that the reason for dismissal was an automatically unfair dismissal (**Smith v Hayle Town Council 1978 ICR 996 CA** and confirmed in **Ross v Eddie Stobart Ltd EAT 0068/13** as applying in whistleblowing cases).

74. With regard to causation, as confirmed in **Chief Constable of Werst Yorkshire Police v Khan 2001 ICR 1065** HL (a case concerning victimization contrary to the Race Relations Act 1976 but approved for the purposes of s130A ERA 1996 in **Trustees of Mama East African Women's Group v Dobson EAT 0220/05**) this is a factual not legal exercise. In establishing the reason for dismissal in a s.103A ERA 1996 claim, the Tribunal is required to determine the decision-making process in the mind of the dismissing officer. This requires the tribunal to consider the employer's conscious and unconscious reasons for acting as it did. In doing so I need to consider:

a. why did the dismissing officer act as he did?
b. What, consciously or unconsciously, was his reason?

Detriment – whistle-blowing - s.47B ERA 1996

75. S.47B ERA 1996 provides that a worker has the right not be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

76. In cases where the 'whistle-blower' is complaining that the employer has subjected him to a detriment short of dismissal, the employee has the burden of proving that the protected disclosure was a ground or reason for the detrimental treatment.

77. Section 47B ERA 1996 requires the Tribunal to consider the ground on which an employer acts or fails to act. This requires an examination of the mental processes of the person who engaged in the alleged detriment treatment: it is not enough that the protected disclosure is a but-for cause of the treatment (**Chief Constable of W. Yorks** *v* **Khan** [2001] ICR 1065 (HL)).

78. Section 48(2) provides that the onus is on the employer to show the ground on which any act, or failure to act, was done. If it fails to do so an adverse inference may be drawn against it.

79. In **Fecitt and ors v NHS Manchester (Public Concern at Work intervening)** *ICR 372, CA,*

a. Elias LJ gave guidance that causation is satisfied where the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower.
b. If the protected disclosure materially influences the employer's treatment of the whistleblower, this is sufficient to establish causation for the purposes of s47B ERA 1996.

Automatic Unfair Dismissal – s100 ERA 1996

80. s100 ERA 1996 provides that:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

……..

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

Detriment - Health and safety - s44 ERA 1996

81. Section 44 ERA 1996 provides as follows:

(1) An employee 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—

……..

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances

connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

82. Further under s.44 (1A) *a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—*

(a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or

(b) in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.

(2) For the purposes of subsection (1A)(b) whether steps which worker took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

Discrimination arising from disability - s.15 EqA 2010

83. Discrimination arising from disability is defined in s15 EA 2010:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

84. Section 15(2) applies only if the employer did not know (and could not reasonably have been expected to know) about the disability itself: ignorance of the consequences of the disability is not sufficient to disapply s15(1).

85. As for the correct approach when determining section 15 claims we refer to Pnaiser v NHS England and others UKEAT/0137/15/LA at paragraph 31.

S.20 Duty to make reasonable adjustments

86. Section 20 EqA states that: …

(3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

Section 21 EqA states that:
(1) A failure to comply with the first … requirement is a failure to comply with a duty to make reasonable adjustments
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

87. The Equality and Human Rights Commission's Code of Practice on Employment contains guidance on the Equality Act, on what is a reasonable step for an employer to take will depend on the circumstances of each individual case (para 6.29). The duty to make adjustments comprises three discrete requirements, any one of which will trigger and obligation on the employer to make any adjustment that would be reasonable and a failure to comply with the requirement is a failure to make reasonable adjustments and an employer will be regarded as having discriminated against the disabled person.

88. In **Environment Agency** v **Rowan** [2008] ICR 218, the EAT set out how an employment tribunal should consider a reasonable adjustments claim (p24 AB, para 27). The tribunal must identify:
(a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer;
(c) the identity of non-disabled comparators (where appropriate); and
(d) the nature and extent of the substantial disadvantage suffered by the claimant'.

Harassment related to sex - *s*.26 EqA 2010

89. Section 26 of the Equality Act defines harassment under the Act as follows:

(1) A person (A) harasses another (B) if –

(b) A engages in unwanted conduct related to a relevant protected characteristic [which includes the protected characteristic of sex], and

(c) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

(2) A also harasses B if –

(d) A engages in unwanted conduct of a sexual nature, and

(e) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if –

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –

a) the perception of B;

b) the circumstances of the case;

c) whether it is reasonable for the conduct to have that effect.

90. In **Richmond Pharmacology** v **Dhaliwal** [2009] IRLR 336 the Employment Appeal Tribunal set out a three step test for establishing whether harassment has occurred:

(i) was there unwanted conduct;

(ii) did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; and

(iii) was it related to a protected characteristic.

91. It was also said that the Tribunal must consider both whether the complainant considers themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The Tribunal must also take into account all the other circumstances. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct

should not be found to have that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for her, then it should be found to have done so.

92. In **Grant** v **HM Land Registry** 2011 IRLR 748 the Court of Appeal again reiterated that when assessing the effect of a remark, the context in which it is given is highly material. An Employment Tribunal should not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive" as they are an important control to prevent trivial acts causing minor upset being caught up in the concept of harassment.

Conclusions

Protected disclosures - s.43 ERA 1996, Automatic unfair dismissal (s.103A 1996) and detriment (s.47B ERA 1996)

93. What is in dispute is whether what the Claimant said to Tony Cosh in May and repeated to Chris Huxton and Andrea Browning at the meetings on 3 June 2021, amounted to qualifying disclosures.

94. If the Tribunal is satisfied that there was no qualifying disclosure, the complaint under s.103A ERA 1996 claim will fail, as will the s.48 ERA 1996 detriment complaint (whistleblowing detriment).

95. Even if the Tribunal was satisfied that there were protected disclosures, we must be satisfied that, on the balance of probabilities, that the Claimant has established that the principal reason for the dismissal was because she had made the protected disclosure.

96. Turning firstly to the May 2021 disclosure to Tony Cosh, that she could not move heavy machinery on her own, the Tribunal had found that the Claimant had conveyed information regarding her inability to move heavy equipment on her own. That was the limit of her disclosure however.

97. Indeed this was also the Tribunal's findings in relation to any disclosure made by the Claimant at the meeting on 2 June 2021 (or indeed subsequent meetings) in relation to moving equipment.

98. Likewise, we had not found that the Claimant had any discussions with Tony regarding working on a ladder, in May 2021 or at any time and had not told Chris Huxton or Amanda Browning, at any of the meetings held with the Claimant in June 2021 that she was afraid of working at height because it was dangerous.

99. In any event, the provisions of s47(B)ERA 1996 are clear, that a qualifying disclosure is something disclosed which in the reasonable belief of the

worker, is made in the public interest and tends to show one of the headings that follow is met.

100. Taking into account giving ‘information’ is ‘conveying facts’, we concluded that the Claimant had not conveyed anything other than telling them that she could not move heavy equipment on her own. We did not conclude that this information showed or tended to show that her health and safety had been was being or was likely to be endangered or that there was a failure to comply with a legal obligation. There was no suggestion that the Claimant had indicated that she would be injured, that she had no training such as manual handling training or even that she complained that she had to work unaided..

101. On the basis of our conclusions that the Claimant had not made any protected disclosure at any time both her complaint of unfair dismissal (s.103A ERA 1996) and detriment (s.47 ERA 1996) are not well-founded and are dismissed.

102. Whilst not required to do so, as we had found that the Claimant had not made a protected disclosure, when considering why Mr Huxton and Ms Browning, as the dismissing officers acted as they did, we asked ourselves what consciously, or unconsciously, were their reasons for dismissing the Claimant. In doing so, we accepted that the stated reasons for dismissal may not be the real reasons for dismissal and that they had consciously dismissed the claimant for having protected disclosures or raised health and safety concerns, it was unlikely that they would commit that to writing or would be candid in admitting to that fact.

103. Further, and in any event, we concluded that the reason for the Claimant’s dismissal was her poor performance and attendance and, taking into account the Claimant’s short service and increasing workload of the Respondent’s business, the Respondent determined to terminate her employment without further opportunity to improve.

104. We found both Mr Huxton and Ms Browning to be reliable and straightforward witnesses and concluded that nothing in the responses they gave, to the questions on cross examination, could lead us to conclude that consciously, or unconsciously, they dismissed the Claimant for any reason other than the stated reasons relating to the Claimant’s poor performance, and attendance.

105. Further, with regard to her detriment claim, we did not conclude that the Respondent had refused to remedy working practices and had found that the Claimant had been offered assistance in moving heavy equipment such as washing machines.

Automatic unfair dismissal (s.100 ERA 1996) and detriment (s.44 ERA 1996)

106. We concluded that the Respondent had a health and safety representative, Linzi Chellow and that it was reasonably practicable for the Claimant to have raised circumstances connected with her work which she believed were harmful or potentially harmful to health and safety. We concluded that the Respondent had taken steps to ensure that staff had access to the health and safety representatives by reason of the posters that were available that included names and contact numbers.

107. Any complaint under s100(1)(c) and/or s44(1)(c) ERA 1996 do not succeed and are dismissed.

108. We also dismissed any complaints under s.100(d) and/or (e) ERA 1996 and s.44(1A) ERA 1996 as no evidence was provided that the proscribed circumstances set out had existed: she did not demonstrate '*circumstances of danger'* that were '*serious and imminent'* she did not demonstrate that she had any time left or proposed to leave her place of work or took steps to protect herself as required by those statutory provisions

109. In those circumstances any claim under s100(d) and or (e) ERA 1996 and/or s.44 (1A) ERA 1996 in respect of 'detriment' fails and is dismissed.

110. Again, and in any event with regard to the 'detriment' of failing to remedy her concerns regarding moving equipment, we would repeat that we concluded that at no time was the Claimant required to move equipment on her own and that she was expressly told that she was to seek assistance and that she did, in fact seek assistance to move such equipment.

Disability Discrimination – s.15 and s.20/21 Equality Act 2010

111. It is conceded by the Respondent that the Claimant was at relevant times a disabled person but dispute that they knew or ought to know that the Claimant was a disabled person at the relevant time.

112. Whilst we concluded that the Respondent did treat the Claimant unfavourably by dismissing her, we were not persuaded that she had proven on balance of probabilities that her poor attendance, slow performance and or inability to move equipment was something arising from her disability.

113. Whilst at best it was possible that some of her absences might have been linked to her diabetes diagnosis, there was no medical evidence to support this assertion or indeed any link to her diabetes.

114. Whilst there was evidence that the Claimant had suggested during the performance meetings that she was 'slow' during this hearing the Claimant sought to argue the contrary, challenging the Respondent's witnesses that

she had in fact cleaned trailers faster than her colleagues, not slower. We were therefore not persuaded that the Claimant had any evidence that slow performance was something arising from her disability.

115. Finally, again, there was no evidence that her inability to move heavy equipment was something arising from her disability. Rather, it was her physical size as a female and fact that she was a lone worker that would likely have limited any ability to move heavy equipment, not her disability by reason of diabetes.

116. On that basis any claim under s.15 EqA 2010 would fail.

117. For the avoidance of doubt we did not consider that the claimant would have succeeded under any alternative direct discrimination claim.

118. Whilst the Tribunal was surprised that the Respondent had prepared no notes of the meetings with the Claimant, which falls well short of what would be considered best practice, we accepted the evidence of Ms Browning that where an employee has under two years' service, the formal procedures of the Respondent for all employees were truncated. This did not lead us to infer discrimination.

119. We were not persuaded that any other cleaner with similar performance and absence issues without the disability of diabetes would *not* have been dismissed and any direct discrimination claim too would have failed.

120. Finally, with regard to the claim for reasonable adjustments under s.20/21 Equality Act 2010, the Tribunal reflected on the 'PCP' that had been included in the List of Issues and accepted that the Claimant's claim was very much focussed on the sole issue of moving equipment and no other PCP, such as speed of work.

121. It follows from our findings that we did not conclude that the PCP of requiring the Claimant to move such equipment on her own had been applied to the Claimant and her claim of failure to comply with the duty to make a reasonable adjustment fails.

122. Further, even if that is incorrect, this did not substantially disadvantage the Claimant compared to another female cleaner without diabetes in that she too would have been unable to move heavy machinery on her own. In any event the suggested reasonable adjustment had been put in place as the Respondent did allow the Claimant to be assisted in moving such items.

123. The disability claims are therefore not well-founded and are dismissed.

Harassment - Sex – s.26 Equality Act 2010

124. Finally, with regard to the complaint of harassment related to sex, the Tribunal concluded that the Claimant had not proven facts from which we could find or infer discrimination.

125. The Claimant was unable to demonstrate to the Tribunal on balance of probabilities, that Chris Huxton had undertaken the conduct of which she complained and in those circumstances her complaints of harassment or, in the alternative, direct sex discrimination fail and are dismissed.

126. On that basis, the time issue does not require determination by this Tribunal.

_____

Employment Judge RL Brace
Dated: 22 November 2022

REASONS SENT TO PARTIES ON 23 November 2022

FOR THE TRIBUNAL OFFICE Mr N Roche