Case number: 2600460/2021

EMPLOYMENT TRIBUNALS

Claimant: Miss N Fofanah

Respondent: Hearts First Ambulance Ltd (1)
Collinson Group (2)

Heard at: Nottingham

On: 24, 25 & 26 October 2022 and in chambers on 3 November 2022

Before: Employment Judge Clark
Mr Javid Akhtar
Mr John Hill

Representation

Claimant: Miss Fofanah in person.
1st Respondent: Mr J Munro, Solicitor.
2nd Respondent: Mr D Soanes, Solicitor.

JUDGMENT

The unanimous judgment of the tribunal is that: -

1. The claim of detriment against the first respondent on the ground of making a protected disclosure **fails and is dismissed.**

2. The claim of detriment against the second respondent on the ground of making a protected disclosure **fails and is dismissed.**

REASONS

1. Introduction

1.1 This claim is a claim for detriment on the ground of having made protected qualifying disclosures. We have to answer the question why the claimant's deployment with the second respondent came to an end.

2. Preliminary matters

2.1 Mr King, the only witness for the first respondent, was not in attendance. He was attending conference in Greece and had been refused permission to attend remotely. That was due to the absence of diplomatic consent for such arrangements. We do not therefore need to address whether we would have permitted it as a case management decision, although we note that this final hearing had been listed since March 2021.

2.2 As a result, however, we had to address any affect his absence had on the fairness to the other parties. For the second respondent, Mr Soanes reviewed Mr King's short statement before us and concluded it gave little if any first-hand evidence, and the issues it touched on would be resolved by the other evidence before the tribunal. For her part, Ms Fofanah asked us to consider a postponement to a time when Mr King could be in attendance. We did consider this application but rejected it. We decided it would not be in the interests of justice for the hearing to be postponed for what could be a further year. On the basis that Mr King's evidence was of limited direct relevance, we decided to accept Mr King's evidence as hearsay and give it such weight as we saw fit in the circumstances.

Issues.

2.3 We agreed the following issues with the parties at the outset.

a) It is common ground that both respondents are properly respondents as an "employer" albeit in their slightly differing capacities as a result of the wider definition of employment found in section 43K of the Employment Rights Act 1996.

b) Did the claimant make the oral communications as alleged and, specifically, what communication was made?

c) Did any of those communications amount to a protected and qualifying disclosure?

d) It might be said there is one detriment of ending the deployment with the second respondent. We are reminded that it is not for us to recast the detriment

alleged and that there are in fact two detriments reflecting the role the two respondents played. They are put as follows: -

(i) *"the claimant relies upon the Second respondent's decision to write to the First Respondent and request that she be removed from the roster. This decision amounted to a detriment because it deprived the claimant of further work with the Second respondent on the EMA site*". (at paragraph 38 of the particulars of claim)

and

(ii) *Further or alternatively, the first respondent subjected the claimant to a detriment when it stopped providing the claimant with agency work at the second respondent's EMA site and/or generally. The First respondent undertook this act because it had been informed by the second respondent that the claimant was a troublemaker. However, the claimant avers that the second respondent branded her a troublemaker because she made the disclosures …*" (at paragraph 39 of the particulars of claim)

e) Have the respondents shown in accordance with section 48(2) of the 1996 Act the reason for the detriment? and

f) Was any protected and qualifying disclosure made a material cause for the detriment?

2.4 We had initially intended to deal with all issues at this hearing. We note, however, that an earlier case management order described the hearing as being "merits only". Not unreasonably, the parties had taken that to mean liability only. Whilst we explored whether the parties were in a position to deal with remedy at this hearing, the claimant is a litigant in person and it is clear from her witness statement that she anticipated a second remedy hearing if her claims succeed in any respect. On that basis we agreed we would decide liability only.

3. Evidence

3.1 For the claimant we have heard from Ms Fofanah herself and Ms Reece Squire, previously a colleague of hers at the second respondent. Ms Squire's evidence was not disputed.

3.2 For the first respondent we received the witness statement from Andy King. For the reasons given above, we accepted it as hearsay.

3.3 For the second respondent we heard from Laura McKeever, formerly the site manager at the EMA testing facility and David Spicer, the Chief Nurse.

3.4 All witnesses in attendance adopted written statements on oath or affirmation and were questioned. We received a bundle running to 358 pages and considered those documents we were taken to. All parties made closing oral submissions.

4. Facts

4.1 It is not the tribunal's role to resolve each and every last dispute of fact between the parties. Our role is to reach the findings necessary to determine the issues and to put them in their proper context. On that basis and on the balance of probabilities, we make the following findings of fact.

4.2 The second respondent was contracted to provide covid testing at various airports as part of the national response to the covid-19 pandemic. The purpose was to provide urgent testing and results for aircrew and passengers flying from the airport. This case takes place at East Midlands Airport ("EMA").

4.3 We find the service was set up with extreme urgency. The second respondent was on site at EMA from December 2020. The service had to be set up from nothing. An initial location was identified at a porta-cabin style building, slightly apart from the main arrivals lounge at the terminal. It had previously been used by porters. There seems little dispute that there were challenges to be addressed in providing this form of clinical service from scratch and from premises which were less than ideal. Eventually, the service would relocate to new premises at the EMA site but not during the time relevant to this claim.

4.4 The claimant was, at the material time, a registered nurse. Although her economic relationship with the second respondent can be measured in a matter of weeks, it encompasses two separate spells. She was first briefly engaged in December 2020. On this occasion she was engaged through an agency called PULSE. There is some dispute about the exact nature of this initial appointment, that is whether she was engaged as a nurse or a swabber. We find the swabber role is a lower graded role which, whilst it can be performed by a qualified nurse, need not be. On the second spell of employment, it is common ground that the claimant was employed as a swabber. To the extent it is necessary for us to reach a finding, we would conclude she was a swabber also in December.

4.5 This first spell lasted about three weeks between mid-December until 6 January 2021 when she and others were stood down temporarily. The claimant does not directly rely on having made protected qualifying disclosures during this first spell. She does, however, allege making a protected disclosure on her return in January by "repeating the points she had previously raised in December". She says she did this on the first day of her return on 23 January 2021, which marks the start of the second short period of engagement. We need to look at what was being said and done in December. We

have concluded that this is the high point of the claimant's factual case about having made disclosures.

4.6 First, we consider the context to be critical. We find all staff of all clinical functions were new to this service at this location and were urgently trying to set something up from scratch. We find the managers and the supervisors were actively engaging with all the staff seeking their views and comments about the physical facilities, equipment and systems that would be needed to administer the swabbing and testing process at this site. We find all the staff were making broadly similar observations about the physical facilities and necessary systems. Miss Fofanah herself described everyone being asked for their views and opinion of how the service should run.

4.7 The context of those discussions does not mean that somewhere within those general discussions one or more protected qualifying disclosure was not made. We find that everyone was making the same sort of general observations including the managers themselves. We find everyone was attempting to put in place the systems and facilities necessary to get the testing service up and running. We reject the claimant's contention she received flippant responses when she says she made observations about the workplace as this is at odds with what all parties say was actively being requested from staff.

4.8 We accept that those general discussions will have touched on a range of issues arising from the physical site and systems needed for the service to work. These included the size of the site and the effect the premises had on the flow of people, which was resolved by the systems adopted. They included, for a short spell in January, the second respondent itself limiting the number of people on site until it could link staffing more accurately with booked patient activity so as to reduce the number of staff on site at once. They included issues of the initial cleanliness, which was resolved by the staff cleaning it and further cleaning services being contracted. Indeed, the claimant herself described 'scrubbing" the walls and floors. They included the general state of repair of aspects of the site, including a broken fire door. We find the door was a fire door in the sense of its fire resistance, as opposed to being an escape route as it was a door to a closet. We find the building was not a warm place to work and heaters had to be provided but the need for ventilation compromised this. They included reference to a broken toilet in the building which was resolved by giving staff extra time out to walk across to the arrivals lounge to use the toilets there. They included floor getting wet by foot traffic during wet weather which was resolved by cleaning the floor. They included the number of hazardous waste bins which was resolved by obtaining more. We do not accept there was a problem as a fact with staff using ordinary black waste bin bags for disposing of clinical waste. That is inconsistent with the number of clinically trained people on site allowing it to happen including the claimant. We do not accept staff had

to take their breaks in the building, in fact they were not expected to and it would not have been appropriate for them to do so. These general discussions also touched on the privacy of patients coming for testing which was resolved by the purchase of a curtain screen between the two testing bays.

4.9 In short, so far as these topics were discussed, we accept they were the subject of general discussions amongst the staff in setting up the service, they were resolved or otherwise addressed in the systems put in place. As we say, the fact we accept that these topics were the subject of general discussion between all staff is the high point of the claimant's case. Crucially, we are unable to make a finding of any specific communication by any specific person on any particular issue. That deficiency includes the claimant. For reasons that we deal with further below, we do not accept as a fact that Ms Fofanah made the six specific allegations she relies on in her claim. The first is particularised in terms that she repeated the disclosures made in December. That Does not enable us to make findings of what was actually said to have been said. Without that we cannot conclude there was a protected qualifying disclosure.

4.10 David Spicer, the second respondent's chief nurse was responsible for these testing services being set up around the country. He attended the EMA site on 6 January 2021. He was concerned that the initial speedy set up of the services meant there were too many staff on duty to operate safely in a covid setting for the limited number of patients. He decided that some of the agency staff were not required until matters were better resolved. Those sent home included Ms Fofanah. She says she was told that she would be able to return in about 2 weeks when progress had been made with the initial systems. She also says that she was sent home because she was already seen as raising concerns and that the second respondent had dropped PULSE as an agency because the staff it provided were "speaking up". We reject that. We find the reality was that the second respondent needed labour from wherever it could get it. In seeking a supply of labour, we find as a fact that the second respondent identified only the role it wanted performing (e.g., swabber) and the agency would match that. We find the claimant was neither individually requested nor individually excluded from returning to this site by the second respondent. Secondly, we find that some agencies were more expensive than others. The first respondent was used extensively by the second respondent partly because it was one of the least expensive agencies. We find the fact that the second respondent sought, whenever it could, to draw its agency staffing resource from that agency is explained by that economic aim, and nothing else. In fact, we do not accept PULSE was in any way 'dropped' by the second respondent, it was simply a third-choice option for the supply of labour. If the first or second choices were able to meet demand, the second respondent would have no need to ask it.

4.11 We find as a fact that around this time the claimant joined the first respondent agency. As it was providing the bulk of the labour to the second respondent, it is no

surprise that soon after joining she was herself deployed to work at the EMA testing facility.

4.12 We reject the claimant's contention that she joined this agency in order to, as she put it, "return to East Midlands to vindicate that she had been dismissed on 6 January for raising concerns". We were left with no real explanation from the claimant as to how returning to work there would vindicate it. It became clear in the evidence that her focus was actually on the state of affairs in existence at the EMA testing facility, rather than any act of raising concerns. She said when she returned everything was as it was when she left. We do not accept that as a fact. Nor do we accept the inference that the working environment was still poor, at least relatively speaking. Whilst we do not accept her account of the state of affairs, we do find as a fact that the second respondent had no concerns about the claimant returning to work for it. We find Mr Spicer's reasons for releasing the claimant in early January were genuine and related to labour need, which was heightened in the context covid and having more bodies than necessary in a small workplace. We find she was not "dismissed" and, importantly, she was not the only person to be temporarily released at that time. Upon her return later in January, we find that it would have become immediately apparent to the second respondent that she was the same Neneh Fofanah who had worked on site only a couple of weeks earlier. There was no animosity towards the claimant whether as a result of any comments or observations she may have contributed to during the first spell or otherwise. Moreover, her return is consistent with the claimant's own evidence that all those sent home were told they could return to work later. We find these events undermine any suggestion that anything said by the claimant was seen as a problem to the second respondent.

4.13 We also note Ms Fofanah accepted the assignment to return to EMA without any real hesitation or concern. In the course of evidence, the claimant had to explain why, if her concerns were so grave, she decided to return? She suggested that she was forced to return to this site due to economic necessity based on a general limitation on the availability of agency work for registered nurses. There is no evidence of her trying to find alternative work unsuccessfully. Moreover, our knowledge of the working world during this time leads us to conclude as a panel there was very likely to be substantial opportunities for all levels of nursing staff during the covid pandemic. We do now know that the claimant had previously been dismissed from an NHS nursing role in 2020 for dishonest conduct. We know this would ultimately lead to 6 convictions for fraud in early 2021 and, in 2022, to her being struck off the Nursing and Midwifery Council register. That may explain why she was not able to obtain other nursing appointments at the time at some of the more obvious healthcare providers in the area, but whatever the reason for it, we do not accept that there was any general difficulty in qualified nurses obtaining paid employment in 2021. That leaves us unable to accept as a fact

that the claimant was as concerned about this working environment in the way we are now being told.

4.14 We note that the application form to join the first respondent required applicants to answer the question “Have you ever been convicted, or been the subject of, any investigation or enquiry into abuse or inappropriate behaviour”. The claimant answered that with a “no”. That answer was not true because of the circumstances referred to above. We do not accept her explanation that she was told to put this answer by the agency. Ms Fofanah says that she had a telephone conversation with someone at the agency in which she disclosed the fact that she had been dismissed from her previous NHS employer for dishonesty and that she was presently subject to a police investigation on suspicion of fraud. We do not accept as a fact that any agency providing labour into any healthcare setting being told that information would then invite a candidate to tick “no”.

4.15 The claimant was added to the second respondent’s books. On 17 January 2021 she was allocated her first batch of shifts with the second respondent starting on 23 January 2021. That deployment would last about 5 weeks until 1 March 2021.

4.16 There are six occasions on which the claimant alleges that she made protected qualifying disclosures. We are unable to conclude the alleged disclosures were in fact made.

4.17 The first disclosure is said to have been made on 23 January 2021, that is the very first day Ms Fofanah returned to the EMA site. The claimant does not evidence what she alleges she actually said. The information said to have been conveyed has not been set out in the claim beyond it being “a repeat of the disclosure made in December”. It is said to have been made to the two supervisors, Sarah and Gurprit. At this time Ms McKeever had not yet fully taken up her role as EMA site manager but was appointed and working remotely from her then role at Stanstead airport. Without being able to identify what was actually said, we have been unable to make the necessary findings that information was conveyed in order to perform the necessary analysis of whether there was a protected qualifying disclosure. We do not accept the contention that she “said the identical same things as she says she said in December”. First, for similar reasons we are unable to find that the claimant made protected qualifying disclosures in December and we have set out the extent of what was the topic of general discussion. For that reason, we are unable to work back to identify what the “identical” disclosures are said to be and on the basis there were none in December, there cannot have been any in January. Secondly, things had changed considerably since the site was first set up which makes it less likely that someone would repeat something in identical terms. In addition, we have a more fundamental concern about

how this, and all of the alleged disclosures, come before us. We return to that wider concern later.

4.18 The second alleged disclosure is said to have been made to "Mo", one of the supervisors in terms that "the toilet seat had been left to a point where it had broken off and staff members were now manually lifting it on and off the toilet bowl. Something of the nature of a broken toilet may well have been the subject of discussion amongst staff. We do not accept as a fact that these words were spoken to Mo by the claimant. The fact that there was already long-standing permission to staff to use the toilets in the neighbouring arrivals lounge to use the toilets makes this less likely but not impossible. What is concerning is that the defect is elsewhere said to be a crack to the toilet bowl itself, not the seat. Again, we do not accept this was made and, again, it falls within our general concern about the manner in which the disclosures come to be alleged before us.

4.19 The third alleged disclosure is said to have been made on 12 February 2021. Ms Fofanah says she made an extensive list of disclosures to an unidentified female member of the EMA Health and Safety team who, on that date, undertook one of a number of weekly site inspections across the site. Those inspections included the subcontracted services such as that operated by the second respondent. The claimant's case is that Ms McKeever was not present. That might have raised other issues as to whether any potential disclosure was made to the employer. As it is, we prefer Ms McKeever's evidence that she was in fact present at this and all inspections and that the claimant did not make any of the alleged disclosures. Part of the support for that recollection is that many of the matters the claimant alleges she raised were matters that had been part of the general initial set up discussions and were, by that time resolved. Other support comes from the written report from for the next weekly inspection, which took place on 19 February 2021. It is frustrating that the report for 12 February is not available and the only reasonably contemporaneous written evidence of these inspections before us is the following week's inspection report. For that reason, we treat it with some caution. However, what can be said is that it does not identify any of the alleged defects being present the next week. Of course, on the respondent's case that fact neither supports nor undermines the making of disclosures the previous week as the respondent says those matters were no longer issues, if they ever had been. However, that would be an odd state of affairs if, as the claimant says, those issues remained defective and of concern throughout the weeks that followed. The question arises why they were not captured the subsequent week, or why further disclosures were not made on subsequent inspections. Within the caution we apply to this limited evidence, we do find some support for Ms McKeever's recollection that they were not raised but our principal reason for rejecting the claimant's contention is the wider concern about how these disclosures come to be alleged.

4.20 The fourth alleged disclosure is said to occur on 13 February 2022 and is said to be a communication to Ms McKeever and Gurprit during a clinical team meeting. Four specific issues are alleged. They are: -

(i) That the claimant expressed concerns about a request by the managers for the clinical team to handle and check patients ID documents because as part of Collinsons' covid secure measures, the nursing staff had been told not to touch things in order to prevent the risk of cross-contamination."

(ii) "No facilities were provided for someone working a 13-hour shift to sit down and rest properly during their break. Further, there was no social distancing in the EMA Site".

(iii) "Staff reading the Covid-19 swab results that had been taken from passengers were sitting in the corridor on the EMA site, adjacent to large disinfectant tubs, bags, coats and dirty open waste bins".

(iv) "There was no heating at the EMA site and heaters which had eventually been supplied had been reallocated by management to the admin staff based elsewhere so that the clinical staff were now having to bring in their own portable heaters that had not been PAT tested"

4.21 We do not accept as a fact that the claimant made these comments. As we have found with the general staff discussions in December, it is possible that certain aspects of some of these topics were the subject of discussion amongst staff but we do not accept Ms Fofanah made them in the clinical team meeting as alleged. Ms McKeever's evidence was that these were not raised in any such meeting or at all. She explained how a change to the process of checking ID was a topic discussed. That leads us to think anyone expressing concerns would have registered with her. Of course, she or Ms Fofanah's evidence may be inaccurate for one reason or another and we have had to considered whether we accept the claimant's evidence or Ms McKeever. For reasons we return to below, we prefer Ms McKeever's evidence and reject that these alleged disclosures were said as a fact.

4.22 The next alleged disclosure is said to occur on 14 February 2021 to Gurprit and Ms Squires. The content of this alleged disclosure is said to be that Ms Fofanah "repeated the concerns which I had expressed the previous day". Again, we have concerns about being able to identify what the claimant says was actually said. Even if we were able to conclude one conversation took place, which we are not, it is inherently unlikely that two conversations arise in the same way with different people such that the words spoken on both occasions will be identical. Whilst some margin of variation may be permissible in cases of oral disclosures, we still have to have to be able to make a sufficiently clear finding of fact of the disclosure made to be able to identify the

information conveyed. Perhaps the biggest gap in the evidence comes from Ms Squires who says nothing of this alleged disclosure in her evidence. We are not able to find a disclosure was said for those reasons and the wider reasons we come to later.

4.23 The final alleged disclosure is said to occur on 17 February 2021 to Gurprit and Ms McKeever. The words spoken are not set out. In her witness statement the claimant says she "explained to them both that it was important for the hazardous waste bins to be emptied in the correct location and that it was not happening". The amended particulars had described the disclosure as being that she had said that it was "important for the waste bins to be emptied in the correct location and this was not happening at the present time". We note that there is a subtle difference between the account in the witness statement and that pleaded which leads us to conclude the claimant has varied the account of the words spoken. In isolation, that minor degree of variation may not have caused us any problem. In the context of how these disclosures come to be particularised, it forms part of the reasoning why we have been unable to accept that this alleged disclosure was in fact made.

4.24 That is the last of the six alleged disclosures. In all cases we have been unable to accept they were made as a fact. Our difficulties come from a number of factors. First is the fact that they are said to occur in oral discussions when the topics are generally being discussed. We need to be able to make findings of fact about the actual words spoken. We do not regard it as essential that there is a verbatim account for an oral disclosure to be made out, but there does have to be an account of words spoken with a reasonable degree of particularity and certainty to be able to identify the information conveyed and what it tended to show. Whilst we accept that at times the subject matter was the topic of discussion between some staff, we have been unable to find who was saying what and to whom. More particularly, we cannot make findings of exactly what the claimant said because in most cases she has not set out what she says she has actually said. To the extent she has, we are not satisfied the surrounding evidence gives any support for her having repeatedly made the disclosures. For example, there are no further actions of the claimant escalating her concerns higher up in the face of the alleged inaction in response by supervisors. Secondly, we found Ms Fofanah's evidence was confused as to whether she made disclosures to Ms McKeever directly or not. In her oral evidence she was adamant she did not do so, as her line of communication was through her supervisors. She made clear she would only use the line structure but was confident that her disclosures to her supervisors would have been passed up the chain of command so that Ms McKeever became aware. Ms McKeever's evidence is that none of the alleged disclosures were made to her directly nor were they brought to her attention by supervisors or others. We find it troubling that in oral evidence the claimant was so clear yet her pleaded case is that some of the disclosures were made directly to Ms McKeever. We can conclude as a fact that the claimant did

not make any communications to Ms McKeever that are said to be protected disclosures as that is her own oral evidence. We prefer Ms McKeevers evidence and find as a fact that she was unaware that any concerns had been expressed by the claimant in any respect.

4.25 We now turn to our wider concerns about these 6 alleged disclosures to which we have already alluded. These flow from the circumstances in which these disclosures have come to be alleged. First the initial assertions are specific, for example the number of hazard bins which then evolved into frequency of emptying and location of the bins. Similarly, without explanation the alleged concerns were not raised again when opportunity later arose at a time when the claimant's evidence was that the issue had not been resolved. In the context of this particular allegation, we cannot accept that a registered nurse would not have left the handling of clinical waste in the way suggested without escalating further, particularly with the repeated opportunities for it to be escalated. We were unable to progress from the generality that, in December, the topic of clinical waste removal was likely to have been discussed to an actual disclosure of information by the claimant as a matter of fact.

4.26 Secondly, we found some of the claimant's surrounding contentions lacked credibility. The first to arise was the stated reason to return to work at the second respondent for a second time as a means of "vindicating that she had been terminated for making disclosures". We do not accept that. However, we do consider that, if this is the claimant's case, it would tend to put the making of disclosures uppermost in her mind a few weeks later when her engagement was ended. That in itself raises the question why they weren't put front and centre of the complaints about her treatment.

4.27 Thirdly, on day two of this hearing Ms Fofanah suggested she had kept a detailed journal of everything that had happened at work on a day-by-day basis. That journal had not been disclosed. We had other matters of non-disclosure arise during the case including matters contained on the claimant's phone which she asked if she could show. We permitted it. Similarly, in respect of this journal we made clear we would consider any application to rely on late disclosed documents. We explained the approach we were taking was not for us to impose anything, in part as the respondent now had disclosure and either party could seek to see it and rely on it. No application was made by the claimant. We revisited the issue of this journal on day three. Still no application was made nor any hint of presenting the respondent or the tribunal with the journal.

4.28 We accept that the nature and extent of the duty of disclosure is sometimes lost on parties and litigants in person in particular. However, the significance of this alleged document is such that we cannot accept that Ms Fofanah can have failed to think it was relevant. It was volunteered only in the course of giving evidence on oath and was

done specifically a means of explaining why she was able to recount some of the disclosures with great detail. The failure to share it had a significant effect on our assessment of the other contemporaneous evidence, the result of which also points us away from a conclusion these alleged disclosures were made.

4.29 That contemporaneous evidence starts with the relative timing of events. The detriment occurs on 1 March 2021. The claimant was quick off the mark with her claim, commencing ACAS Early Conciliation the next day, on 2 March 2021. On the same day, she sent an email to Mr King at the first respondent. Ms Fofanah's evidence to us was that the only reason she was dismissed was because she had made what she believed to be valid complaints about the working conditions. One might expect there to be reference to this belief in the email to Mr King, and even more so in light of the suggestion that there was a detailed journal of such incidents. Instead, the email gives other reasons and says nothing about disclosures.

4.30 The claimant's ET1 was presented 2 days later on 5 March. The events complained about could hardly be fresher in her mind, whether or not there was a daily journal of events in existence. The disclosures now advanced are not referred to. There is an allegation of health and safety breaches, but these are set out in the narrative not as disclosures causing the termination, but as an explanation as to why the claimant had been taking time away from the workplace in rebuttal of the respondents' reasons for terminating the engagement. Of course, we readily accept that a litigant in person may not fully particularise their complaint. We accept there was enough in what the claimant did state to contemplate that there might be a claim of automatic unfair dismissal, albeit on health and safety grounds. For that reason, we had not initially viewed the failure to plead the alleged disclosures as being that significant. When the suggestion of a journal came to light, the failure then took on a new and crucial significance. Perhaps the most obvious omission was after the claimant was given a second opportunity to set out the alleged disclosures following the earlier case management hearing on 2 June 2021. At that time a wide range of claims were alleged including detriment for making a protected disclosure. The order set out a detailed explanation of the information required in all respects. It is worth setting out in full the salient part that the claimant was asked to provide. In respect of each of the alleged disclosures the claimant relies on, she was asked as follows: -

> ***(i)Claimant to set out the facts of each occasion on which she made a disclosure (that is conveyed information) including what was said, to whom it was said and when it was said. If it was in writing, identify the document. If it was oral, set out as accurately as possible the words actually spoken.***
>
> ***(ii)For each occasion, what is the relevant failure within s.43B(1) that the information tended to convey?***

4.31 That surely would be the obvious prompt to reach for the journal and simply recite the details of each of the occasions on which the disclosures were orally stated.

For reasons that have not been explained, that did not happen. Instead, after some chasing a response came back from the claimant and the nearest it got to answering those questions was in the line: -

> ***"5.Whistleblowing complaint on health and safety issues (protected disclosure) – suspect victimisation".***

4.32 The rest of the lengthy response repeated the Ms Fofanah's rebuttal of the respondents' stated reasons for terminating her placement. It is worth restating that this failure, viewed in the light of the assertion that there was a detailed journal containing all the answers, takes on a wholly different complexion to one of a litigant in person struggling to particularise their claim. There was no satisfactory explanation as to why she did not simply state the disclosures in that response.

4.33 That response prompted an application by the respondent which in turn led to an unless order being made ordering the claimant to comply with the previous directions by 30 November 2021. The claimant sought legal advice and, on 29 November 2021, amended particulars were drafted by Counsel on the claimant's instructions. Curiously, the claimant stated in evidence that she did not share her journal with her Counsel either. One might ask how the detailed pleadings came to be drafted? In that regard, we find that days before the amended particulars were filed, the claimant was in touch with Ms Squires. We have been provided with part of a message exchange between the two on 26 November 2011. This was disclosed by the claimant. It is clear the message chain is incomplete. In particular, we have not seen the question posed by Ms Fofanah that prompted the response from Ms Squires that we have seen. The reply from Ms Squires shows a list of matters baring a striking resemblance to the subject matter of the alleged disclosures now relied on. Whilst the claimant could not tell us the question asked, we are entirely satisfied that it was not "please can you remind me of the disclosures I made to the employer". The list concludes with Ms Squires saying, "if I think of any more I will let you know". We note that the claimant then responds to Ms Squires adding to the list "what about the ganged up" which is nothing to do with any alleged disclosures and which further supports our conclusion that this list is about something else but has been used by the claimant to reframe the issues in the workplace into an allegation of making disclosures.

4.34 Of course, whether or not there truly is such a journal, we are left with a concern about the claimant's evidence. If it does exist, we infer it does not support the claimant's case. If it does not in fact exist, the claimant has been prepared to mislead the tribunal in the evidence she has given on oath.

4.35 Finally, the respondents point to the fact that within a matter of weeks of the engagement being terminated, the claimant had been convicted in the Crown Court on 6 counts of dishonesty. We have been cautious about placing any particular weight on

that fact alone as a basis for assessing credibility. However, there are associated aspects of this matter which do raise some concern including the answers given by the claimant to the first respondent at the time of her appointment that she was not under investigation for inappropriate conduct at a time and also the more specific findings made by the Nursing and Midwifery Council fitness to practice hearing that reflected poorly on the claimants' self-awareness.

4.36 We now turn to the matters of concern that Ms McKeever says she had about the claimant arising at the end of February 2021 and which lead to her removal. On or around 27 February 2021 Ms McKeever received a complaint from another member of the team at the same level as the claimant. He was irritated about the claimant taking extended breaks away from the workplace. A similar concern was expressed to Ms McKeever by Gurprit. We are satisfied that there was genuine basis for concern about the claimant's time keeping. We find that Ms Fofanah became aware that there was concern about her timekeeping and her own evidence shows she sought to give her explanation for the time she spent off site. We find Ms McKeever's response was relatively soft touch in that she didn't single out the claimant but sought to modify the time recording process to include a rota for recording staff breaks. We accept as a fact that this is a common aspect of time recording in other airport settings and, indeed, Ms McKeever had already applied it for the administrative part of the EMA testing facility based elsewhere on the site. The aim of recording staff breaks was to ensure that the testing facility had adequate cover throughout the day and, because staff were taking breaks off site, to know who was on site and who was off site at any time. On 28 February 2021, Ms McKeever announced the planned change via the staff WhatsApp group. The message included a copy of the new rota layout with an additional column for breaks and stated: -

> ***"Finally, we do want people to account for their breaks. We've added a column to the shift tracker sheet for this purpose. We've done this as some breaks are running on for quite a long time and we do need to achieve balance so that our staffing levels are safe."***

4.37 We find the announcement resulted in a surprisingly hostile response from the claimant and some others within the clinical team. We find the claimant was particularly unhappy about it as she saw it as a direct attack on her and her own timekeeping, which of course in many respects it was. We find Ms Fofanah took the lead in demanding a meeting with Ms McKeever during the working day. She would be characterised as the ringleader of this challenge. We find Ms McKeever would have preferred to deal with the issue as part of the daily clinical team briefings held at either end of the day but the manner in which the meeting was demanded led her to believe Ms Fofanah was threatening that the staff would not undertake any further tests until the matter had been discussed and resolved. An impromptu meeting was therefore held with the staff. We find Ms Fofanah was vocal in challenging Ms McKeever on her decision to introduce the

new rota system and dismissed the respondent's objectives for doing so asking "should I record when I go to the toilet". We accept as a fact that this meeting took place in the clinical setting and could have been heard by patient but we are not able to conclude it actually was heard by a patient.

4.38 We find that Ms McKeever was extremely unhappy about the claimant's response to the changes to the rota and the manner in which she had voiced her challenges in the clinical setting, leading the clinical team in their opposition. She was concerned that this was a direct challenge to her authority and decided that she would ask that the agency did not send Ms Fofanah to site in the future.

4.39 At 17:03 she emailed Emma Rothwell, the person responsible for agency bookings. She set out her concerns about the claimant and two others who had been involved in the tense meeting that afternoon. The email refers specifically to the events that day and expressed her concern about Ms Fofanah in respect of time spent walking to nearby shops off site, the issue of the break column in the revised break rota and Ms Fofanah's exchanges in the impromptu staff meeting. It labelled Ms Fofanah a troublemaker and not taking instructions. Ms McKeever had formed this concern on first-hand experience. Other concerns were relayed to her second have in feedback from the supervisors. She ultimately requests to remove her from the roster.

4.40 We find some of those concerns about the claimant were not first-hand but were informed by supervisors giving their feedback to Ms McKeever around this time. We need to say something about the chain of command and this flow of information. We are satisfied that Ms McKeever had little in the way of direct dealings with the claimant and much of her understanding of the claimant and her work came through her supervisors, in particular Gurprit. We have not heard from Gurprit and are cautious in what findings we can make but we do find as a fact that there was a degree of exaggeration and moulding of the facts within the reports that came back to Ms McKeever. What little first-hand dealings Ms McKeever had with the claimant was of a kind that meant these critical reports seemed entirely plausible to her and she accepted them. Two issues in particular stand out and show to us that for one reason or another, the supervisors were content to paint a picture of Ms Fofanah that was not wholly accurate. They matters are in respect of "the tips" and "reading test results.

4.41 The reading of test results was the role of a nurse and not a swabber. However, we find there was some blurring at the edges arising from operational expediency. On one or two occasions we find the designated nurse had had to leave site early and an unidentified supervisor had asked the claimant to read the test result, a task reserved for registered nurses which. Of course. Ms Fofanah was at that time a registered nurse although she was employed as a swabber only. We find Ms Fofanah obliged but queried this practice. We can be sure of that as we have seen a text to her agency on 9

February 2021 to someone called “Kim”. This was more out of a sense of underpaying her. Kim confirmed that she was booked in her capacity as a swabber only. This blurring of edges was clearly not good practice but we cannot see that the claimant was doing anything that complying with requests from supervisors albeit with a degree of discomfort about the situation. We find other supervisors told her that this should not happen. We find on balance that there was some crossed information between the claimant initially being asked and what would ultimately be reported to the managers. At its worst, it may be that those supervisors who we have not heard from may have reconstructed the facts when the situation was later reported to the manager, Ms McKeever, so it did not show them to have been requesting the claimant’s help. In any event, what they relayed to Ms McKeever was not the complete or accurate picture Ultimately, however, we find Ms McKeever’s later belief and understanding would be based on this information and she understood it to be that the claimant had herself chosen to read test results, had been asked not to but had continued to do so. Whilst we find that was factually incorrect, we are satisfied that it was the genuine belief held by Ms McKeever based on what she had been told.

4.42 A similarly incomplete picture was given to Ms McKeever in respect of the tips matter. There is no dispute that an American pilot had left a tip for the staff. We can see why that was a concern to the management. Anything which might be seen to undermine the objectivity of the testing process potentially defeated its purpose. It was not really in dispute that the pilot in question had left before the money could be returned to him. It was equally understood by all that him leaving the tip arose genuinely from his cultural view of tipping for service and not as any bribe or influence. In any event, we find the claimant was no more directly involved in this incident than any other worker on duty at the time. The management agreed the money could go into the staff tea fund. Thereafter the picture is less clear. Ms McKeever was told that the money had been used by Ms Fofanah to buy cakes as she did not drink tea or coffee. We were also told there was potentially a second incident though that was not at all clear. We struggled to see what the issue was with the claimant’s conduct surrounding this matter. Ms McKeever’s uncertainty about these matters in the witness box had the hallmark of her having relied on an incomplete picture form another and potentially disclosed failings with the supervisors enforcing a new tips policy after the first incident. Once again, we find that Ms McKeever’s knowledge and understanding of this matter was based on the information that one or more supervisors had told her and that this was not a complete or accurate picture. Having heard the confused explanation about the two tipping incidents, we suspect part of the reasoning for this moulding of the truth was as much about the supervisors distancing themselves from failings. Nevertheless, we find it was genuinely the information that Ms McKeever relied on to make her decisions about the claimant’s continued role with the second respondent.

4.43 We are satisfied that the focus of Ms McKeever's concern was the claimant's response to a management instruction in respect of breaks and the recording of breaks in the rota. The other matters are matters that appear to us to have been added through Gurprit and others and form the basis on which the claimant believed lies are being told about her. For the reasons we have given, we entirely understand why the claimant formed the view lies were being told about her. However, we can be confident that the reason for action was the events that day as not only is Ms McKeever's correspondence contemporaneous with it but the undisputed evidence of the claimant's own witness, Ms Squires, supports that conclusion. She says: -

> ***"I was actually present in the room when Laura wrote an e-mail to a senior member saying that she was not happy with Neneh. We had just left a meeting where Neneh had voiced genuine concerns (and had asked me to be her witness). Laura stormed into the office in a very angry state. She said that she did not like how Neneh had voiced her concerns and that she had to go. It was very clear to me that her intention was to get Neneh out and that she very much disliked her. This was the same thing that Laura was also doing with other staff. In my opinion, I believe that Neneh's position was terminated because she spoke up."***

4.44 Later the same night the claimant also contacted her agency. At 19:38 she said (as it was written): -

> ***Hi Kim***
>
> ***Just thought to keep you in the loop not sure if you still on call this evening. I feel that I have accused of no wrongdoing following a discussion around staff leaving the building for longer period. Yesterday I went to get myself some food and walked to the services but made everyone aware that I will go off to the Marks and Spencer as it's the closest to my walking distance. Unbeknown to me on my return someone had reported that they saw me left the building at 12:30 PM and did not return when I was here all the time. This was brought to the manager's attention who failed to verify the truth but had a brief with us on our request as all the staff feels one sided messages are being passed on that are not true reflection of what's happening. I thought to bring this to you because as an agency you need to know that lies were made-up against me and it's hurtful.***

4.45 There is nothing in that communication to suggest any alleged disclosures were having an effect on the way she was treated or perceived.

4.46 There is no dispute that the claimant's engagement was terminated with the second respondent. To get that position however, Ms Rothwell referred the email to Mr Spicer. Mr Spicer and Ms McKeever then spoke about the incident on 28 February. They spoke about Ms Fofanah and the other two agency workers with whom there was some concern. We find Ms McKeever repeated to Mr Spicer not only the first-hand events at the meeting and the background to it, but also the concerns that had been expressed to her by Gurprit and others, some of which we have concluded did not accurately reflect the true position for one reason or another. We therefore find Mr Spicer was also labouring under a belief that there were wider issues of concern with

the claimant. We find neither Mr Spicer nor Ms McKeever took any steps to verify or investigate those wider matters. They were taken as read.

4.47 We find that whilst the request to remove Ms Fofanah from the agency workers being deployed on site started with Ms McKeever, it was not her decision to action it. The authority to make that decision was with Mr Spicer. After his discussion with Ms McKeever, he did authorise an instruction to the agency not to send Ms Fofanah anymore. On balance, we find that instruction was communicated by telephone through one of the staff of the second respondent's agency staffing team but their role was no more than that of a conduit of communication. We find Mr Spicer decided that the other two individuals with whom Ms McKeever had concerns should remain. He felt that work could be engage with them so as to bring about an improvement in their work.

4.48 We find the instruction was conveyed through the booking team to the first respondent which then actioned the instruction. We find that was a decision of Paul Bennet who then conveyed the decision by the first respondent. We find the claimant was thereafter not offered to work with the second respondent. For what difference it adds, we accept that the claimant was not removed from the first respondent's books insofar as she remained available for deployment to other end users. We find the factual reason why Mr Bennet decided to end the claimant's deployment to the second respondent was because he had been asked to do so by the second respondent. That action was followed up in writing in a messages dated 3 and 4 March limited by the view that the second respondent did not have to give reasons.

4.49 For completeness, we find that no one employed by the first respondent, and in particular, Paul Bennet, had any knowledge or belief of any communications that might amount to a protected qualifying disclosure. The reason Mr Bennet removed the claimant from the roster with the second respondent is because he had been instructed to do so by the end user client. That was enough reason to act. The extent of his knowledge of the underlying facts was that the second respondent considered her to be "a disruptive influence on-site" and he conveyed that to the claimant. For completeness, we find he did not know of any of the alleged facts concerning disclosures.

4.50 We have seen a copy of a letter dated 1 March that Ms Fofanah says was sent to Ms McKeever on that day. We do not accept that this was sent to or received by Ms McKeever or that Ms McKeever had seen it before these proceedings. In any event, it is not alleged to contain any disclosures or other acts to influence the decision to terminate the engagement. Even if it was received on that date, it post-dates the start of the process to remove the claimant and we have no explanation as to why it was not mentioned in the otherwise detailed factual pleadings produced by Counsel and nor

does it feature in any of the other contemporaneous correspondence sent in the days that followed.

5. Law

5.1 The right we are concerned with is set out at s.47B, which provides that:

> ***(1) 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.***

5.2 By section 43A of the Employment Rights Act 1996, a protected disclosure is a qualifying disclosure which is made by a worker in accordance with any of sections 43C to 43H. A qualifying disclosure is defined by section 43B which provides: -

> ***(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, is being or is likely to be deliberately concealed.***
>
> ***(2)For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.***
>
> ***(3)A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.***
>
> ***(4)A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.***
>
> ***(5)In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).***

5.3 Sections 43C to 43H define the circumstances in which a disclosure is communicated to qualify for protection. So far as is relevant to the issues in this case, section 43 C provides: -

> ***43CDisclosure 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.***
>
> ***(2)A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer***

5.4 Turning to the enforcement of a worker's s.47B right, s.48 provides that such a complaint is to be brought before an Employment Tribunal and that:

> ***(2) On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. …***

5.5 So far as the causal link between the detriment and the disclosure is concerned, it is sufficient if the disclosure was a material factor (in the sense of more than trivial) influencing the employer's treatment of the whistleblower (**Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA**). For that reason, in most cases it will be essential that the decision maker had knowledge of a disclosure having been made. The whistleblowing protection extends to both dismissal and detriment. In a dismissal claim, liability may still arise where an innocent decision maker without knowledge of the disclosures dismisses an employee for apparently genuine reasons but which have been influenced or manipulated by someone with knowledge of, and because of, the disclosures. **Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC**. That principle does not extend to detriment cases. We were referred to the EAT case of **Malik v Cenkos Securities plc EAT 0100/17** for the proposition that the decision maker has to have knowledge of the protected disclosure for the necessary causation to be made out. In other words, the principle found in the case of **Jhuti** does not apply to detriment cases in the way it can to unfair dismissal. We found that troubling and have carefully considered the extent to which it might limit the protection afforded by part IVA of the Employment Rights Act 1996, as considered in the earlier case of **Western Union Payment Services UK Ltd v Anastasiou EAT 0135/13**. The justification in **Malik** is based on the distinction between the correct respondent as between a detriment claim and an unfair dismissal claim. The unfair dismissal claim can only be presented against the employer. A detriment claim can be brought against anyone in the organisation whose actions amounted to a detriment and for that reason, it is incumbent on the party bringing a detriment claim to sue the correct respondent. We can see some arguments as to why that distinction no longer provides a clear separation. A dismissed employee could now also bring a claim against a colleague that the same dismissal was a detriment. Conversely, the fact that a detriment claim could be brought against the individual employee responsible for the detriment does not mean a claimant has to name the individual as a respondent in every detriment claim. They can still simply sue their employer. We have wrestled with this point but have concluded that, despite that caution, we are bound by **Malik** and seek to apply it in this case.

6. Discussion and Conclusion

6.1 We start with detriment. There is no dispute that, in general terms, the claimant suffered the detriment of her placement being terminated. We are reminded it is not for us to recast the alleged detriment and that, in fact there are two detriments reflecting the role the two respondents played in the termination of the placement.

6.2 The second respondent is the principal focus of the allegation and the detriment it is said to have imposed is set out at paragraph 38 of the amended particulars as: -

> ***"the claimant relies upon the Second respondent's decision to write to the First Respondent and request that she be removed from the roster. This decision amounted to a detriment because it deprived the claimant of further work with the Second respondent on the EMA site".***

6.3 There is no material dispute that the second respondent communicated the instruction to the first respondent orally in a telephone conversation. Sensibly, no "pleading" point was taken on the fact the instruction was not in writing as alleged and, had it been, we suspect we would have little difficulty in permitting an amendment.

6.4 There is equally no dispute that it was this communication that caused the first respondent to act as it did. The first respondent is said to have subjected the claimant to a detriment specifically as set out in paragraph 39 of the particulars as: -

> ***Further or alternatively, the first respondent subjected the claimant to a detriment when it stopped providing the claimant with agency work at the second respondent's EMA site and/or generally. The first respondent undertook this act because it had been informed by the second respondent that the claimant was a trouble maker. However the claimant avers that the second respondent branded her a troublemaker because she made the disclosures …"***

6.5 There is no dispute that the specific detriments alleged against each respondent were made out.

6.6 We then turn to protected disclosures. This has been answered by our findings of fact. The claimant has not established as a fact that she made one or more protected qualifying disclosures. In itself, that is fatal to the claim. As we have already stated, the high point of this part of the case is seen during the early weeks of this service being set up in December 2020. During that time there was widespread discussion amongst all the staff on topics which were capable of amounting to a protected disclosure. The respondent invited that from its staff. Indeed, the second respondent does not dispute that some of the information within the subject matter of those discussions would have been likely to demonstrate reasonable belief in a relevant failure and that it would have been in the public interest. That concession, however, is in the abstract as it can only be analysed after making a reasonably specific finding of fact about what was actually said by the claimant as opposed to others. In all cases involving an allegation of oral disclosures, the claimant carries that additional burden of proving, at least to a sufficient

degree of particularity, what was actually said. We do not think that has to be verbatim but it does have to be sufficient for us to be able to identify the information actually conveyed which tends to show the relevant failure and for us to be able to examine the context to establish the reasonable belief. Whilst that is a hurdle that Ms Fofanah has failed to overcome, in this case it went further. We were not able to accept that there were ever the discussions alleged.

6.7 We then turn to causation although this is now academic in the absence of a protected qualifying disclosure and that, in part, leads to a strained analysis of causation when the allegations of disclosures have not been made out. We have to identify each decision maker and what they did or did not know of any alleged disclosures. For the first respondent, Mr Bennet was the decision maker who received the instruction from the second respondent to end the claimant's agency deployment. We can say with confidence that he did not have any knowledge of what is alleged to be a disclosure. The information he had was that given to him by the second respondent. The high point was that the claimant was a troublemaker. For obvious reasons, that wording initially piqued our curiosity, particularly in respect of the risk of there being any secret manipulation of the decision makers, but there is nothing in our findings that can lead to a conclusion that Mr Bennet had any knowledge of any of the circumstances alleged to be disclosures. Indeed, we are satisfied that even the use of that word arose from the events of 28 February 2021 which did not involve any alleged disclosures.

6.8 This respondent's detriment is expressed as being further or alternative to that alleged against the second respondent. We can see how it might have been "further to", if the second respondent was found liable. However, if the chain of causation failed with the second respondent, we struggle to see how liability of the first respondent could have been "alternative to".

6.9 We conclude that Mr Bennet's decision, and the detriment that flowed, was therefore not in any way because of a protected qualifying disclosure. More specifically, we are satisfied that the first respondent has discharged its obligation under section 48(2) of the Employment rights Act 1996 by showing the reason why it subjected the claimant to that detriment was because it was instructed to by the first respondent. The claim against the first respondent therefore fails.

6.10 Going back in the chain of decision making, it was Mr Spicer who made the decision to instruct first respondent to end Ms Fofanah's deployment to it. Whilst in a practical sense, that decision was communicated through the agency booking team, it was no more than a channel of communication. Mr Spicer knew only that which Ms McKeever had told him. That is seen in the content of the email she wrote on 28 February 2021. We examined its content carefully in our findings of fact as it goes beyond the events of 28 February. We are satisfied, however, that it does not disclose

the making of any disclosures. For the reasons already given, we are satisfied Ms McKeever did not have any knowledge of what is alleged to be a disclosure. As we are satisfied that she did not have any knowledge of a disclosure, it is not possible for her to have conveyed that fact to Mr Spicer. Nor is it possible for her to have manipulated Mr Spicer into acting for other reasons, should the Jhuti approach be the correct approach and not that of Malik.

6.11 We conclude that Mr Spicers's decision, and the detriment that flowed from it, was not in any way because of a protected qualifying disclosure. More specifically, we are satisfied that the second respondent has discharged its obligation under section 48(2) of the Employment rights Act 1996 by showing the reason why it subjected the claimant to that detriment was because Mr Spicer believed that the claimant was disruptive on 28 February 2021 and, based on what Ms McKeever herself believed to be the case based on what she had been told by others, this was consistent with Ms Fofanah's response to other management instructions. The claim against the second respondent therefore fails.

Employment Judge Clark

24 January 2023