EMPLOYMENT TRIBUNALS

Claimant: **Miss C Partner**

Respondent: **Heheals Pharmaceutical Services t/a Christchurch Care Limited**

Heard at: **East London Hearing Centre (by video)**

On: **4, 5 and 6 April 2023**

Before: **Employment Judge P Klimov**

Members: **P Alford**
G Forrest

Representation
For the Claimant: In person
For the Respondent: Mr S Joshi, Solicitor

JUDGMENT having been sent to the parties on 12 April 2023 and written reasons having been requested by the Respondent on 16 April 2023, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

The Background and Issues

1. By claim forms dated 11 June 2021 (case No: 3204910/2021) and 8 November 2021 (case No: 3206819/2021), the Claimant brought claims of:

    a. harassment related to disability (section 26 Equality Act 2010 ("**EqA**")), alternatively, direct disability discrimination (section 13 EqA);
    b. victimisation (section 27 EqA);
    c. automatically unfair dismissal (section 103A Employment Rights Act 1996 ("**ERA**")) for making a protected disclosure; and
    d. detriment at work under section 47B ERA for making a protected disclosure.

2. The Respondent entered responses denying all the claims and contesting that the Claimant had a disability withing the meaning of s.6 EqA at the relevant times.

3. On 6 December 2021, there was a case management preliminary hearing before Employment Judge Fowell, at which the final list of issues was settled, and directions given. The final list of issues is reproduced in Annex to this judgment. EJ Fowell ordered a further preliminary hearing in public to determine the issue of disability.

4. On 25 March 2022, Employment Judge Moor sitting with members decided that "*the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 for the whole period of her employment with the Respondent*". The judgment was sent to the parties on 30 March 2022.

5. The Claimant represented herself at the final hearing. She had the benefit of a solicitor assisting her in preparation for the hearing. She also consulted with her solicitor during the hearing. The Respondent was represented by Mr Joshi.

The Evidence

6. The Tribunal was referred to various documents in the bundle of documents of 251 pages the parties introduced in evidence. References in this judgment in the format (p.XX) are to the corresponding pages in the bundle. The Claimant also submitted two audio recordings. During the course of the trial one of the recordings, which was most relevant to the issues in the case, was transcribed by the respondent. The transcription of the recording was agreed by the Claimant, subject to some minor amendments.

7. The Tribunal heard from four witnesses: the Claimant, and for the respondent: Ms Lisa King ("**LK**"), the respondent's Register Manager, Mr Baba Akomolage ("**AB**"), the respondent's Managing Director and Ms Michelle Kirk ("**MK**"), the respondent's HR manager. All witnesses gave sworn evidence and were cross-examined.

8. Before the hearing the Respondent applied for a witness order for Ms Gillian Hughes ("**GH**"), a former employee of the Respondent who at the material times worked together with the Claimant. However, on the first day of the hearing, Mr Joshi said that on reflection the Respondent did not want to pursue the application and wished to withdraw it.

9. At the start of the hearing, I clarified with the Claimant her complaints the Tribunal needed to decide. In particular, that her complaint of direct disability discrimination and harassment related to disability was limited to the allegations of the attack and assault by GH on 4 May 2021[1], and her claim for constructive (unfair) dismissal was on the basis of the factual allegations of (i) the attack/assault by GH on 4 May 2021 (issue 12(a)), and (ii) the Claimant being removed from the care rota for her client (issue 12(b)), which facts the Claimant

[1] The correct date of the incident is 3 May 2021, but nothing turns on that.

claims amounted to the respondent's breach of the duty of trust and confidence. The Claimant confirmed that.

10. At the end of the hearing, the Claimant submitted written closing submissions prepared by her solicitor. In the submissions the Claimant stated that the list of issues ought to be amended to include an additional allegation of direct disability discrimination. I explained to the Claimant that if she wanted to include that additional allegation, she would need to make an application to amend, and considering that all the evidence had been heard on the basis of the agreed list of issues, if her application were to be granted that might necessitate re-hearing the evidence, which in turn may mean abandoning this trial and having the claim re-listed for a later hearing. After consulting her solicitor, the Claimant confirmed that she did not wish to make an application to amend and was content to have her claim determined based on the settled list of issues.

The Facts

11. The Respondent provides domiciliary care services to various service users. The Claimant was employed by the Respondent as a carer from 27 August 2020 until 06 June 2021. She provided care services for an elderly lady who suffered from Alzheimer's decease and needed 24-hours' care ("**LB**"). The Claimant worked morning (7am to 3pm) or day (3pm to 10pm) shifts.

12. GH was another carer for that lady. GH also worked night shifts (from 10pm to 7am). Typically, only one carer provides service during the shift. There is usually 10-15 minutes shift handover between the carers.

13. On 13 April 2021, the Claimant reported to the Respondent that her cousin (**Yasmin**), who also worked as a carer for the respondent, had told the Claimant that GH had turned up for work at another service user's home (who happened to be the Claimant's nan) without wearing personal protective equipment ("**PPE**") and told Yasmin that she (GH) might had contracted Covid-19.

14. Later that morning, GH called the Claimant and said: "*why the fuck did you report me to the office?!*" and "*be careful Chloe because I can cause a lot of trouble for you*!"

15. In the afternoon of the same day, the Claimant received a text message from LK stating that an allegation of misuse of the LB's money had been raised against the Claimant.

16. On 14 April 2021, LK arrived at the LB's house when the Claimant was working her shift. LK checked purchase receipts. The Claimant told LK that she suspected that GH had taken LB's golf clubs from her the garage and was selling them on Facebook. The Claimant also told LK that GH had previously told the Claimant that she (GH) had taken tins full of change and a watch from the LB's house.

17. On 15 April 2021, the Claimant reported a concern that GH had purchased grocery items for LB in the total amount of £60, but some of the items on the receipt were not in the LB's house, and some of the purchased items were not what LB liked to eat.

18. On 29 April 2021, the Claimant reported to the Respondent that GH had started bringing a puppy to work, and LB was getting confused and frightened by the puppy.

19. On the same day, the Claimant reported that GH had been leaving LB's urine-soaked wet clothes on the bedroom's floor and not putting them in the wash.

20. Later that day, LK and MK met with the Claimant. They asked the Claimant whether she would be willing to do "double-rounds", meaning servicing other service users living in a walking distance from each other. The Claimant said that whilst she was not unwilling to do double-rounds, she very much enjoyed working for LB and had built up a good understanding of LB's needs and how to provide good service to her. MK and LK told the Claimant that there was not enough evidence against GH in relation to the complaints the Claimant had made.

21. The Claimant became concerned that the Respondent was not willing to address the issues she had reported, and later that day contacted the Care Quality Commission ("**CQC**") to raise her concerns about GH directly with CQC.

22. On 3 May 2021, the Claimant was on the afternoon shift at the LB's house. GH was taking over from the Claimant. During the handover, the Claimant asked GH if she was willing to draw a line and move on for the sake of LB. GH became angry, she raised her voice and swore. GH said: "*yeah, but I'm not having you telling fucking lies about me*". When the Claimant said that she never told lies about GH, GH replied: "*you and your cousin are the ones who found the box. I'm not being treated like a fucking mug, I spoke highly of you.*"

23. The Claimant became worried about GH becoming aggressive with her and turned on recording on her telephone. She recorded the following exchange (the name of the service user is replace with LB):

C: things have been said about me as well, so ……
GH: I do not need to lie, the only thing I have ever said to the office about you is the cake situation ….
C: cake situation?
GH: 1 receipt, you bought 30 ….. 7 boxes of cake ..fucking ridiculous she does not need to be eating that much cake and she shouldn't be –not good for her diet.
C: well, we both care for LB, I was doing what was best.
C: I know LB.
GH: You don't know her.
C: I do know LB.

GH: You don't know her…none of us know LB ..we have been here for 6 months …7 months.
C: Don't shout because you are going to wake her.
GH: She …don't talk to me like cunt, Chloe, ..cause I won't have it.
C: Okay, don't shout at me.
GH: right …don't talk to me like shit.
C: Don't shout at me in LB's home, I am going to leave now.
GH: You shouted at LB, you're lucky I did not report that.
C: You have reported that, I have been called in the office and I never shouted at LB.
GH: you did, you told me you did.
C: no, I didn't…have you got any evidence?
GH: Oh, is that what it going to come down to, be very careful where you tread, darling.
C: Don't put finger (near)(in) [unclear] *my face please.*
GH: I tell you what, you are lucky I am not going to smack you. You are a vile little piece of shit, they know what you are like in the office because your own cousin said what you are like…. said cause … told me all that stuff about … .nicking out of your mum's purse …I can cause trouble if I want to …I am not interested in causing family trouble…but you cause your own trouble, Chloe.
C: Okay have a nice night.
GH: Bye.

24. The Claimant left the LB's house distressed. She called the respondent's office and reported the incident. She also filed a written report of the incident with the Respondent and reported it to the police. The police took no action.

25. Around the same time, GH also telephoned the respondent's office and reported the incident. She was angry. She said she was not willing to continue working at LB's home and that it was her last night shift at there. She was advised to file a written report, which she did. In her report GH omitted to tell the Respondent that she had raised her voice and used swear words when talking to the Claimant.

26. On 4 May 2021, the Claimant came to the office. She met MK and told MK that she had the incident recorded on her phone. MK said that she could not listen to the recording because it had been made without GH's consent. MK asked the Claimant to come to a meeting with her, AB and GH to sort things out.

27. After the Claimant came to the meeting, AB and MK left the meeting room, leaving GH and the Claimant alone in the room. The Claimant felt uncomfortable being left alone in the room with GH. She asked GH whether she had taken LB's golf clubs. GH left the room and later came back with MK. GH said that the Claimant was paranoid because of her anxiety and panic disorder and that she (GH) knew about the Claimant's anxiety and panic disorder from Yasmin. MK agreed with GH and said that she (MK) had notes of her (MK's) meeting with Yasmin, at which Yasmin said those things. The meeting ended with no resolution.

28. On 5 May 2021, the Claimant emailed AB complaining about what had happened at the meeting. She said that she was going to take the matter further unless the Respondent was going to deal with her complaints properly.

29. AB replied saying that because "step one" of the resolution process had failed, "*we would go to step two which will most likely affect the round*".

30. The Claimant went to do her shift at the LB's house later that day. In the afternoon she received a text message from the respondent's office telling her to synchronise her rota diary on the phone because management had moved to stage 2. When the Claimant synchronised the rota, she saw that all her shifts at the LB's house had been cancelled. The Claimant became very upset and called the office several times asking for an explanation. She was distressed and crying. She did not receive an answer. The Respondent decided to replace the Claimant on her then current shift because it thought that she was not in a fit state to continue with the shift.

31. The Claimant left work. She was signed off sick for two weeks and prescribed anti-depressants. Her sick leave was later extended for another week.

32. On 13 May 2021, the Claimant emailed AB telling him that she had contacted CQC with her concerns about GH and how the Respondent had dealt with them. She sent her evidence of the alleged wrongdoings by GH to AB. AB replied saying that he "*will be deleting [the Claimant's] email*", and that the Claimant should discuss her concerns with the agency team upon her return to work.

33. On 16 May 2021, the Claimant reported to the Respondent that GH had uploaded a video on Facebook from the LB's house showing the puppy, and that LB's voice could be heard, and LB's name was mentioned in the video. The Claimant said that she had sent the video clip to CQC.

34. On 21 May 2021, GH raised a grievance against the Claimant. Her grievance was about the Claimant telling lies to the management about GH. She listed 10 examples of what GH said were the Claimant's giving false information to the management about her.

35. On 25 May 2021, MK invited the Claimant to a meeting to discuss the grievance lodged by GH against the Claimant. The Claimant wrote back saying that she was uncomfortable having a meeting with MK because of how MK behaved at the meeting on 4 May 2021.

36. On 26 May 2021, LK wrote to the Claimant saying that she would be taking over MK and inviting the Claimant to come to the meeting on 1 June 2021 to discuss the GH's grievance against the Claimant. LK also said that she would be looking into the Claimant's grievance against MK.

37. The Claimant wrote back saying that after consideration she had decided to hand in her notice of resignation. In her email the Claimant said she was resigning "*due to how the company has treated me, you had plenty of time to sort the issues out. Instead I was mocked, intimidated by the allegations. It led to me being attacked by another employee which still wasn't enough for you to take this further*".

38. On 1 June 2021, the Claimant attended the meeting with LK. At the meeting the Claimant outlined her grievance against MK. In particular, the Claimant said that she felt she was being discriminated against because of her disability by MK dismissing the Claimant's concerns about contracting Covid-19 and by MK refusing the Claimant's request for time off after receiving a vaccine as being driven by the Claimant's anxiety. The Claimant complained that MK had failed to investigate the assault by GH on 3 May 2021. She also complained about the way MK handled the situation, including, in particular, MK suggesting that the allegations the Claimant was making against GH was due to her (the Claimant's) mental health issues. The Claimant said that she had passed her concerns to CQC and would be taking the matter to an employment tribunal. LK said that the Respondent would look into the Claimant's allegations.

39. Shortly after the meeting, LK emailed the Claimant asking if the Claimant would come back to work, since her sick note had expired, to work the remainder of her notice period. The Claimant said that she would be happy to return to work for LB, but she wanted an apology from the company and be kept away from GH. LK responded stating that none of that was possible.

40. On 7 June 2021, LK emailed the Claimant stating that her grievance would not be taken forward because she had resigned.

41. Shortly after leaving the respondent, the Claimant applied for another job in the care sector via a recruitment agency. A recruiter, Amanda Johnson ("**AJ**"), emailed the Claimant asking whether the Claimant would be able to start at their client's learning disability service user and whether the Claimant would be happy to walk to the user's home. When the Claimant spoke with AJ on the phone, AJ told the Claimant that the job was hers if she wanted it, and they just needed to receive a reference and clear the DBS checks.

42. On 9 July 2021, AJ spoke with MK on the telephone. AJ wanted MK to provide a reference for the Claimant. Following the call at 11:28am, MK sent to AJ a reference for the Claimant stating: "*I can confirm that Chloe Partner worked for Christchurch Care Agency from 01/09/2020 to 08/06/2021 as a Care Assistant. I am sorry I cannot provide any other information.*"

43. Ten minutes later, at 11:38am, AJ emailed the Claimant saying: "*Unfortunately, we can't proceed with your application due to not meeting our compliance criteria*" and asking the Claimant for bank details to refund the fee for the DBS check.

44. The Claimant asked AJ whether she had received a bad reference. AJ replied at first saying that she could not provide a copy of the reference, but later, on

12 July 2021, AJ sent to the Claimant the email reference she had received from MK.

45. On 9 September 2021, the Claimant's manager in her new job told the Claimant that he had received a phone call from MK who had asked him whether he was aware that whilst working for the Respondent the Claimant had taken medication from a service user. The manager hang-up the phone.

46. CQC investigated the Claimant's concerns. On 23 June 2021, CQC concluded the investigation finding that the allegations of financial/material abuse and psychological abuse were inconclusive, however, the allegation of neglect or act or omission (GH putting a video clip on Facebook with a puppy in the LB's house) was substantiated.

The Law

Protected Disclosure

47. Section 43A of the ERA states:

> *"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*."

48. Section 43B of the ERA states:

> *(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,*
>
> *…*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(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*.
>
> …

49. In **Blackbay Ventures Ltd v Gahir** [2014] ICR 747, EAT**,** HHJ Serota QC at [98] gave employment tribunals the following guidance:

> *"98. It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.*
>
> *1. Each disclosure should be identified by reference to date and content.*
>
> *2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.*
>
> *3. The basis on which the disclosure is said to be protected and qualifying should be addressed.*
>
> *4. Each failure or likely failure should be separately identified.*
>
> 5. *Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered.*
>
> *If the tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied on and it will not be possible for the appeal tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.*
>
> *6. The tribunal should then determine whether or not the claimant had the reasonable belief referred to in section 43B(1) and … whether it was made in the public interest.*
>
> *7. Where it is alleged that the claimant has suffered a detriment short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied on by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act."*

50. In **Williams v Brown** UKEAT/0044/19/OO, EAT**,** HHJ Auerbach in the Employment Appeal Tribunal explained at [9] that:

> *"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the*

disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

Disclosure of information

51. In **Kilraine v London Borough of Wandsworth** [2018] IRLR 846, CA**,** the Court of Appeal held at [31]:

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

52. Also, in **Kilraine,** the Court of Appeal held at [35]-[36] (***emphasis added***):

> *"35 The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). **In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)**. The statements in the solicitors' letter in the Cavendish Munro case did not meet that standard.*
>
> *36 Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. **As explained by Underhill LJ in Chesterton Global Ltd v Nurmohamed [2018] ICR 731, para 8, this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief**."*

Reasonable belief that the information tended to show one of the listed matters

53. In **Chesterton Global Ltd v Nurmohamed [2017] IRLR 837,** the Court of Appeal held at [8]:

> *"The definition has both a subjective and an objective element: see in particular paras 81—82 of the judgment of Wall LJ. The subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed in subsection (1). The objective element is that that belief must be reasonable."*

54. In **Simpson v Cantor Fitzgerald Europe** [2020] ICR 236, EAT**,** Choudhury J in the Employment Appeal Tribunal said at [69]:

> *"The Tribunal is thus bound to consider the content of the disclosure to see if it meets the threshold level of sufficiency in terms of factual content and specificity before it could conclude that the belief was a reasonable one. That is another way of stating that the belief must be based on reasonable grounds. As already stated above, it is not enough merely for the employee to rely upon an assertion of his subjective belief that the information tends to show a breach."*

Tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation

55. In **Fincham v HM Prison Service** UKEAT/0991/01**,** the Employment Appeal Tribunal said at [33]:

> "*there must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the employers(sic) is relying."*

56. In **Eiger Securities LLP v Korshunova** 2017 ICR 561, EAT, Slade J in the Employment Appeal Tribunal held at [46]:

> *"The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation."*

57. In **Twist DX Ltd v Armes** UKEAT/0030/20, the Employment Appeal Tribunal said at [87] and [103] (***emphasis added***):

> *"87. This is not to say that the questions whether the worker mentions, for example, criminality or illegality or health and safety in their disclosure, or whether it is obvious that they had these matters in mind, are irrelevant. What they said, and whether the matter is obvious, are relevant evidential considerations in deciding what they believed and the reasonableness of what they believed, rather than these questions*

> *presenting an additional legal hurdle, as Mr Nicholls effectively contends. If the nature of the worker's concern is stated - if they say that they consider that the reported information shows criminality or breach of legal obligation or a threat to health and safety - it will be harder to dispute that they held this belief and that the professed belief that the disclosure tended to show the specified matter was reasonable. The point is the same if what the worker thinks is obvious from what they say in the alleged disclosure. Conversely, if the link to the subject matters of any of section 43B(1)(a)-(f) is not stated or referred to, and is not obvious, an ET may see this as evidence pointing to the conclusion that the worker did not hold the beliefs which they claim, or that the information is not specific enough to be capable of qualifying.* ***But what cannot be said is that unless it is stated that the information tends to show one or more of the specified matters, or it is obvious that the concern falls within section 43B(1)(a)-(f), the information is incapable of satisfying the requirements of that section because it cannot reasonably be thought by the worker that it tends to show any of the specified matters****. In my view, with respect to Mr Nicholls, this is flawed reasoning."* […]
>
> *…*
>
> *103. In summary, then, none of the cases relied on by Mr Nicholls in relation to this issue involved the EAT overruling an ET which had found that there was a qualifying disclosure despite a failure by the worker to identify in the disclosure the fact that they had an actual or potential breach of legal obligation in mind, still less despite a failure to spell out the legal obligations in question. Evans, in the EAT, shows an ET decision being upheld despite a failure by the worker to do so, and the other decisions are all ones in which the EAT upheld the ET's finding of fact that the disclosure in question did not satisfy section 43B(1) and then made observations about why such finding was open to the ET on the evidence.* ***The cases also show a range of formulations of when there need be no express reference to legal obligation – where it is obvious, common sense or sufficiently clear – but this tends to undermine the proposition that there is any rule other than that the worker's beliefs as to what the information tends to show must be reasonable.****"*

Multiple communications

58. In **Norbrook Laboratories (GB) Ltd v Shaw** [2014] ICR 540, EAT, the Employment Appeal Tribunal said at [22]:

> *"… an earlier communication can be read together with a later one as "embedded in it", rendering the later communication a protected disclosure, even if taken on their own they would not fall within section 43B(1)(d). … Accordingly, two communications can, taken together, amount to a protected disclosure. Whether they do is a question of fact."*

Reasonable belief that the disclosure was in the public interest

59. In **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837, the Court of Appeal provided guidance on the public interest test at [27]-[31] (***emphasis added***):

> *"27 First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula's case [2007] ICR 1026 (see para 8 above).* ***The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable****.*
>
> *28 Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to the "Wednesbury approach" (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful.* ***All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking - that is indeed often difficult to avoid - but only that that view is not as such determinative****.*
>
> *29* ***Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it****.* ***Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable****.*
>
> *30 Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to*

> *be his or her predominant motive in making it: otherwise, as pointed out at para 17 above, the new sections 49(6A) and 103(6A) would have no role.* ***I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it****.*
>
> *31 Finally by way of preliminary, although this appeal gives rise to a particular question which I address below,* ***I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression.*** *Although Mr Reade in his skeleton argument referred to authority on the Reynolds defence (Reynolds v Times Newspapers Ltd [2001] 2 AC 127) in defamation and to the Charity Commission's guidance on the meaning of the term "public benefits" in the Charities Act 2011, the contexts there are completely different. The relevant context here is the legislative history explained at paras 10—13 above. That clearly 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. This seems to have been essentially the approach taken by the tribunal at para 147 of its reasons."*

60. Section 43F of the ERA states:

> ***43F.— Disclosure to prescribed person.***
> *(1) A qualifying disclosure is made in accordance with this section if the worker—*
> *(a) makes the disclosure to a person prescribed by an order made by the Secretary of State for the purposes of this section, and*
> *(b) reasonably believes—*
> *(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and*
> *(ii) that the information disclosed, and any allegation contained in it, are substantially true.*
> *(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed*.

61. Pursuant to Public Interest Disclosure (Prescribed Persons) Order 2014/2418 Schedule 1 CQC is a prescribed person in matters relating to—

> *(a) the registration and provision of a regulated activity as defined in section 8 of the Health and Social Care Act 2008 and the carrying out of any reviews and investigations under Part 1 of that Act; or*

(b) the functions exercised by the Healthwatch England committee, including any functions of the Care Quality Commission exercised by that committee on its behalf; or
(c) any activities not covered by (a) or (b) in relation to which the Care Quality Commission exercises its functions.

Detriment

62. Section 47B of the ERA states:

"*(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.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or
any deliberate failure to act, done—
(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in
subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

….]"

Meaning of "detriment"

63. In **Jesudason v Alder Hay Children's NHS Foundation Trust** [2020] EWCA Civ 73 the Court of Appeal said at [27]-[28] (***emphasis added***):

"*27 In order to bring a claim under s 47B, the worker must have suffered a detriment.*
It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. ***There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases****. In Derbyshire v St Helens MBC [2007] UKHL 16, [2007] ICR 841, [2007] IRLR 540, paras [67]-[68], Lord Neuberger described the position thus:*

'[67] … In that connection, Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13 at 31A that "a detriment exists if a reasonable

> *worker would or might take the view that the [treatment] was in all the circumstances to his detriment".*
>
> *[68] That observation was cited with apparent approval by Lord Hoffmann in Khan [2001] ICR 1065, para 53. More recently it has been cited with approved in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.* ***At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'".*** *In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice".'*
>
> *28* ***Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective****."*

Causation: meaning of "on the ground that"

64. In **Fecitt and ors v NHS Manchester (Public Concern at Work intervening)** 2012 ICR 372, CA, Elias J said at [45]:

> *"In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."*

Burden of Proof

65. S48(2) ERA sates:

> *"it is for the employer to show the ground on which any act, or deliberate failure to act, was done."*

66. In **Serco Ltd v Dahou** [2017] IRLR 81the Court of Appeal held at [40]:

> *"As regards dismissal cases, this court has held (Kuzel, paragraph 59) that an*
> *employer's failure to show what the reason for the dismissal was does not entail the*
> *conclusion that the reason was as asserted by the employee. As a proposition of logic, this applies no less to detriment cases."*

67. In **International Petroleum Limited v Osipov** UKEAT/0058/17, EAT, Simler J in the Employment Appeal Tribunal held at [84] and [115]:

> "*84. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference: see by analogy Kuzel v. Roche Products Ltd [2008] IRLR 530 at paragraph 59 dealing with a claim under s.103A ERA 1996 relating to dismissal for making a protected disclosure."*
>
> *[..]*
>
> *115. Mr Forshaw submits and I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:*
>
> *(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.*
> *(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight at paragraph 20.*
> *(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."*

Unfair (constructive) dismissal

68. Section 95 of the ERA states:

> *"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if) –*
>
> *[…]*
>
> *(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

69. This is known as constructive dismissal.

70. In **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221, CA, the common law concept of a repudiatory breach of contract was imported into what is now section 95(1)(c). Lord Denning MR put it as follows:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as*

> *discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

71. The component parts of a constructive dismissal which need to be considered are as follows:

    (i) A repudiatory or fundamental breach of the contract of employment by the employer.
    (ii) A termination of the contract by the employee because of that breach.
    (iii) The employee must not have lost the right to resign by affirming the contract after the breach. Delay resigning might indicate such affirmation.

72. The implied term of trust and confidence most authoritatively formulated by the House of Lords in **Malik and Mahmud v BCCI** [1997] ICR 606 as being an obligation that the employer shall not:

> *"Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

73. Where an employer breaches the implied term of trust and confidence, the breach is 'inevitably' fundamental — see **Morrow v Safeway Stores plc** 2002 IRLR 9, EAT.

74. It makes no difference to the question of whether or not there has been a fundamental breach that the employer did not intend to end the contract — see **Bliss v South East Thames Regional Health Authority** 1987 ICR 700, CA.

75. Similarly, the circumstances that induced the employer to act in breach of contract are irrelevant to the issue of whether a fundamental breach has occurred — see **Wadham Stringer Commercials (London) Ltd v Brown** 1983 IRLR 46, EAT.

Automatically unfair dismissal

76. Section 103A ERA states:

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

77. For a dismissal to be automatically unfair under section 103A, the protected disclosure must be the reason or, if more than one, the principal reason for the dismissal.

78. A reason for dismissal is "*is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*." (**Abernethy v Mott, Hay & Anderson** [1974] ICR 323).

79. If the claimant does not have 2 years qualifying service to claim "ordinary" unfair dismissal, the burden is on the claimant to show that he or she was dismissed for an automatically unfair reason (see **Maund v Penwith District Council** [1984] ICR 143). In the context of constructive unfair dismissal, this means that the claimant must prove that the reason, or if more than one, the principal reason for the respondent's conduct which entitled the claimant to terminate the contract without notice pursuant to s.95 ERA was the claimant's protected disclosure.

Victimisation

80. Section 27 EqA states:

> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act—*
> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*
>
> *(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

81. The relevant legal principles can be summarised as follows:

a. The claimant is protected when he or she complains about discrimination even if he or she is wrong and there has been no discrimination, unless the complaint was made in bad faith, e.g. a false allegation without the employee believing he/she or someone else was discriminated against.

b. However, if the employer could not be held liable for the alleged discriminatory conduct (e.g. because it was not committed "in the course of employment"), the employee cannot rely on the allegation of such conduct as a protected act (see **Waters v Commissioner of Police of the Metropolis** 1997 ICR 1073, CA).

c. Essentially, the protection is against retaliation for raising a complaint of discrimination. The claimant is not protected against victimisation for simply complaining about unfairness. It is important to identify precisely

what the claimant said which amounts to a "protected act" (see **Beneviste v Kingston University** EAT 0393/05).

d. As a matter of logic, the protected act must have taken place before the detrimental treatment which is complained of, or if the claim is put under s.27(1)(b) the detrimental treatment must have taken place after the person accused of victimisation had formed his/her belief that the claimant had done or may do a protected act.

e. The meaning of a "detriment" for the purposes of s.27 EqA is broadly the same as the meaning of a "detriment" for the purposes of s.47B ERA (see paragraph 63 above). It involves examining the situation from the claimant's point of view and also considering whether a reasonable worker would or might take the view that the treatment in question was in all the circumstances to his or her disadvantage (subjective/objective test) – (see **Warburton v Chief Constable of Northamptonshire Police** 2022 EAT 42), An unjustified sense of grievance could not amount to a detriment. However, whether or not the claimant has been disadvantaged is to be viewed subjectively (see **Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337, HL).

f. Detriment cannot be because of a protected act in circumstances where the person who allegedly inflicted the detriment did not know about the protected act (see **Scott v London Borough of Hillingdon** 2001 EWCA Civ 2005, CA).

g. Decisions are frequently reached for more than one reason. Provided the protected act, had a significant influence on the outcome, discrimination is made out. (**Nagarajan v London Regional Transport** [1999] IRLR 572, HL, applied in the context of a victimisation claim in **Villalba v Merrill Lynch and Co Inc and ors** 2007 ICR 469, EAT). As with direct discrimination, the discriminator may have been unconsciously motivated by the protected act (**Nagarajan v London Regional Transport** 1999 ICR 877, HL).

Direct Discrimination

82. Section 13 of EqA states:

> "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*."

83. Disability is a protected characteristic (s.4 EqA).

84. A complaint of direct discrimination will only succeed where the tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment.

85. There is a substantial case law on the issue of how the question of causation should be approached by employment tribunals. In the majority of cases, the best approach in deciding whether allegedly discriminatory treatment was '*because of*' a protected characteristic is to focus on the reason why, in factual terms, the employer acted as it did.

86. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (***Nagarajan v London Regional Transport*** [1999] IRLR 572, HL).

87. The relevant legal authorities recognise that direct discrimination can arise in one of two ways: where a decision is taken on a ground that is inherently discriminatory — that is, where the ground or reason for the treatment complained of is inherent in the act itself, such as the employer's application of a criterion that differentiates by race, sex, etc. In cases of this kind, what was going on inside the head of the discriminator — whether described as intention, motive, reason or purpose — will be irrelevant (see ***Amnesty International v Ahmed*** 2009 ICR 1450, EAT), or

88. The other category of cases is where a decision is taken for a reason that is subjectively discriminatory — that is, where the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation; i.e. by the 'mental processes' (whether conscious or unconscious) which led the putative discriminator to do the act. In that latter category, the individual employee who carried out the act complained of must have been motivated by the protected characteristic. If he or she is innocent of any discriminatory motivation but has been influenced by information supplied or views expressed by another employee whose motivation is discriminatory, the correct approach is to treat the supply of information or view expressed by the other employee as the discriminatory action (see ***CLFIS (UK) Ltd v Reynolds*** [2015] EWCA Civ 439; [2015] IRLR 562, CA.)

Harassment

89. Unlawful harassment is provided for under section 26 the Equality Act 2010 ("**the EqA**"), the relevant parts of which are:

> *(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) 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.

[…]

(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 other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

90. The Equality and Human Rights Commission's Code of Practice on Employment ("**the EHRC Employment Code"**) at paragraph 7.9 states that '*related to*' should be given a broad meaning '*a connection with the protected characteristic*'.

91. When considering unlawful harassment, the context must be considered. Mere mention of a protected characteristic may not be enough, because it must still be shown that that characteristic was the ground or reason for the treatment to which objection is taken. In the EAT case of **Warby v Wunda Group PLC** UKEAT/0434/11 Langstaff J stated that paragraph 23:

"*we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context; the context here was that the dispute and discussion was about lying. The conduct complained of, as the Tribunal saw it, was a complaint emphatically made about lying; it was not made to the claimant because of her sex, it was not made to the claimant because she was pregnant, and it was not made to the claimant because she had had a miscarriage. In the words of* ***Ahmed*** *at paragraph 37, as earlier quoted:*

"The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of a sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."

92. The word '*unwanted*' is essentially the same as '*unwelcome*' or '*uninvited*' (see **Reed and anor v Stedman** 1999 IRLR 299, EAT and para 7.8 of the EHRC Employment Code).

93. The EHRC Employment Code notes that unwanted conduct can include '*a wide range of behaviour, including spoken or written words or abuse, imagery,*

graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour' (at para 7.7).

94. In **Reed** the EAT noted that certain conduct, if not expressly invited, can properly be described as unwelcome. Normally, conduct that is by any standards offensive or obviously violates a claimant's dignity will automatically be regarded as unwanted. In that case the EAT said, as an example of "inherently" unwanted conduct, that a woman does not have to make it clear in advance that she does not want to be touched in a sexual manner.

EqA Burden of Proof

95. Section 136 EqA states:

> *(2) If there are facts from which the court could decide, in the absence of any*
> *other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision*.

96. The guidance set out in ***Igen v Wong*** [2005] ICR 9311 (approved by the Supreme Court in ***Hewage v Grampian Health Board*** [2012] ICR 1054) sets out the correct approach to interpreting the burden of proof provisions. In particular:

a. it is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude that the employer has committed an act of discrimination, in the absence of an adequate explanation (para 79(1), see also ***Ayodele v Citylink Ltd and anor*** [2018] ICR 748 at paras 87 - 106);
b. it is unusual to find direct evidence of discrimination and "*[i]n some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in*"' (para 79(3));
c. therefore, the outcome of stage 1 of the burden of proof exercise will usually depend on "*what inferences it is proper to draw from the primary facts found by the tribunal*" (para 79(4));
d. "*in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts*" (para 79(6));
e. where the claimant has satisfied stage 1 it is for the employer to then prove that the treatment was *"in no sense whatsoever"* on the grounds of the protected characteristic and for the tribunal to "*assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge*

the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question" (para 79(11)-(12));

f. *"[s]ince the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof*" (para 79(13)).

97. In ***Igen v Wong*** the Court of Appeal cautioned tribunals "*against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground*" (para 51).

98. In ***Madarassy v Nomura International PLC*** [2007] ICR 867 Mummery LJ stated at [58] that:

> *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

Analysis and Conclusions

"Whistleblowing" Detriment 47B ERA claim.

Did the Claimant make a protected disclosure?

99. The Claimant relies on nine disclosures 9(a) – 9(j) (see the list of issues).

9(a) report her colleague, Gillian Hughes on 13 April 2021 for attending work without the required PPE, a health and safety concern.

100. Although the Respondent denies that the Claimant has made this disclosure, because it has no records of the disclosure in its alert recording electronic system, on the balance of probabilities, we find as a fact that the Claimant has made this disclosure.

101. We accept the Claimant's evidence on this, as set out in paragraphs 5-9 of her witness statements. Her evidence on this issue was not seriously challenged by the Respondent in cross-examination. The Claimant's witness evidence is corroborated by the documentary evidence (p.81) – the email from GH in which she brings a grievance against the Claimant and complains that "*Chloe took it upon herself to ring the office and stated I had Covid..again untrue*".

102. The fact that the Respondent has failed to record the Claimant's reporting this issue in its alert reporting system is not sufficient as the evidence to shift the evidential balance in favour of the respondent.

103. We also accept the Claimant's evidence that she was concerned for her nan's wellbeing, because the Claimant herself in the past had caught Covid and thought (rightly or wrongly) that she had got it from GH. The fact that GH's Covid test came negative is irrelevant.

104. This was clearly a disclosure of information, namely that GH was attending work without wearing the mandatory PPE. We find that in the circumstances it was reasonable for the Claimant to believe that the information tended to show that a person (GH) has failed, is failing or is likely to fail to comply with a legal obligation to which she is subject[2], and that the health or safety of any individual (her nan and other GH's service users) has been, is being or is likely to be endangered[3].

105. The Respondent was under a legal duty to its service users to provide due care. AB in his witness statement at paragraph 2 accepts that the respondent: *"is under a legal duty to exercise reasonable care and skill in the services it provided to vulnerable service users in its care*".

106. During the Covid-19 pandemic that necessarily meant taking all reasonable steps to avoid transmitting the virus, which in turn meant that the respondent's staff had to wear the mandatory PPE when working at service users' homes.

107. For the same reasons we find that it was reasonable for the Claimant to believe that this information tended to show a H&S issue.

108. We find that the Claimant genuinely believed that the disclosure was in the public interest and her belief in that was reasonable. We accept her evidence on this issue. In particular that she believed that the issue did not only concern health and safety of her nan (even though she was understandably very concerned for her), but that the wider public interest was engaged. That is because GH was providing services to many other vulnerable people, and potential lethal consequences for them if they were to catch the virus from GH.

109. Considering:

    (i) the nature of services the Respondent provides to the public, which necessarily requires close and prolonged contact between the carers and the service users,
    (ii) its legal duties, including its statutory reporting responsibilities toward CQC,
    (iii) the fact that the Claimant herself was under the express contractual duty (see employee handbook p. 160 - 212 and the relevant policies p.131 – 159) to report any "abuse" and "safeguarding issues",
    (iv) the respondent's service users base, many of whom are elderly and clinically vulnerable people, and
    (v) potential lethal consequences for them catching the virus,

[2] For the sake of brevity, I will refer to this provision later in this judgment as "a breach of a legal obligation".
[3] For the sake of brevity, I will refer to this provision later in this judgment as "a H&S issue".

we find that the Claimant's belief that the disclosure was in the public interest was reasonable.

110. We reject Mr Joshi's submission that in making the disclosure the Claimant was motivated by animosity towards GH and consumed by "savage bitterness".

111. Firstly, it was not the respondent's case until the closing submissions that the Claimant was acting out of spite or in bad faith. It was not put to the Claimant in cross-examination.

112. Secondly, we accept the Claimant's evidence that she had genuine concerns for health and safety of her nan, LB and other GH's service users. She was understandably upset by what she heard and saw because she genuinely believed that GH was abusing her position of trust and mistreating LB and possibly other service users. Even then, the Claimant was prepared to draw a line and re-set her relationship with GH. That, unfortunately, turned into a bitter confrontation, which is at the centre of this dispute.

113. Finally, the legal authorities (see paragraph 59 above) are clear – what motivated the Claimant in making her disclosure is not relevant as long as she reasonably believed that the disclosure was in the public interest.

114. For these reasons, we find that 9(a) was a protected disclosure within the meaning of s.43A ERA.

9(b) inform Lisa King, Manager on 14 April 2021 of concerns that Ms Hughes had taken money and items from a vulnerable client's home.

115. This disclosure is about the Claimant telling LK that she thought GH took LB's golf clubs when cleaning up the garage and was selling them on Facebook, and that GH took LB's tins full of coins and a watch.

116. Mr Joshi submits that there is no record of the Claimant informing LK on 14 April 2021 of these concerns. The precise date of that disclosure is not material. It is not disputed by the Respondent that the Claimant has made the disclosure, or that the alleged detriments took place after that disclosure. The evidence show that the Respondent has investigated the allegation (p.106), including by contacting LB's next of kin to check if LB had a set of golf clubs in the garage.

117. This was a disclosure of information. It was reasonable for the Claimant to consider that it tended to show a breach of a legal obligation and even a criminal offence (though the Claimant does not rely on this ground). Essentially, she was reporting a suspected theft and/or the tort of conversion and financial abuse by GH.

118. The respondent's Safeguarding procedure defines "abuse" as "*a violation of an individual's human and civil rights by any other person or persons"* (p. 138). The respondent's Safeguarding policy specifically identifies financial abuse as a form of abuse (p.146). Under the policy the Claimant was obliged to report that matter to the Respondent(pp.137 and 147).

119. Our findings with respect to the first disclosure (see paragraphs 107-108 above) equally apply here. For the same reasons we find that the Claimant genuinely and reasonably believed that the disclosure was in the public interest.

120. Of course, taking LB's golf clubs and selling them on Facebook and tins with coins and a watch (as the Claimant rightly or wrongly believed was the case) would not have endangered LB's or anyone else health and safety. However, other factors identified in paragraphs 107 - 108 above do apply: -

    a. the nature of the respondent's services,
    b. its legal duties to its service users and the regulator, including self-reporting obligations,
    c. the vulnerability of its service users,
    d. the seriousness of the alleged wrongdoing,
    e. the fact that GH was caring for other service users, and the duty on the Claimant to report such a matter.

121. For these reasons, we find that 9(b) was also a protected disclosure.

9(c) raise a complaint on 15 April 2021 that Ms Hughes was buying items for herself with the client's money.

122. We find that it was a protected disclosure for the same reasons as apply to the disclosure 9(b). Whether it was taking and selling golf clubs without permission or using LB's money to purchase products for personal use is immaterial. Equally, nothing turns on whether the disclosure was made on 15 or 16 April 2021. The Respondent accepts that the disclosure has been made. It has been investigated by the Respondent(p.101), as confirmed by LK in her evidence to the Tribunal.

9(d) inform the company on 29 April 2021 that Ms Hughes had been bringing her new puppy into work.

123. The fact of this disclosure is not disputed by the respondent. Also, the Respondent did not dispute that it was a disclosure of information. We accept the Claimant's evidence that she genuinely believed that LB's health and safety could be endangered by the GH's puppy running around LB's feet, considering LB's age and medical conditions. The Claimant was also concerned that due to her mental health issues LB was getting confused and mistaking the puppy for a child, and that was further affecting her mental health.

124. Whether or not the puppy was in fact a danger to LB's health and safety is irrelevant. Equally, the fact that GH might have had permission from LB's next of kin to bring it to the LB's house is neither here nor there.

125. We also observe that it appears that CQC shared the Claimant's concerns and asked the Respondent if a risk assessment had been carried out before allowing GH to bring the puppy.

126. For the same reasons, as articulated in paragraph 108 above, we consider that the Claimant's belief that the disclosure was in the public interest was reasonable. Of course, a puppy running around LB's feet would not be as dangerous as LB or another service user contracting Covid-19 from GH. Nevertheless, we find that it was reasonable for the Claimant to believe that GH's disregard of the LB's vulnerability (as the Claimant saw it) was endangering LB's health and safety, and potentially that of other service users.

127. Furthermore, that disclosure must be looked at in the context of other disclosures made by the Claimant, which, when viewed as a whole, reveal a picture of GH neglecting her duties and taking advantage of her position as a carer for a vulnerable person.

128. We, of course, make no findings whether or not GH was in fact neglecting her duties or abusing her position. This is not an issue this Tribunal is concerned with. Our findings are merely that in those circumstances the Claimant had reasonable grounds to form a reasonable belief that her disclosures tended to show a breach of a legal obligation and/or a H&S issue, and that she was making the disclosures in the public interest. Whether or not she was right or wrong on the substance of her allegations against GH is not relevant for the purposes of the issues we need to decide.

9(e) inform the company on 29 April 2021, via text, of concerns over Ms Hughes' treatment of a client, specifically leaving urine-soaked clothing on the floor.

129. The fact of the disclosure is not disputed by the respondent. We find that the Claimant reasonably believed that the disclosure tended to show a breach of a legal obligation, essentially GH neglecting her duties. This type of conduct is specifically mentioned in the respondent's Safeguarding policy as a form of abuse (p.146).

130. We find LK's explanation, at paragraph 7 in her witness statement that LB wanted to be independent, and it was difficult line to draw between preserving the service user's independence whilst ensuring they are being looked after, somewhat strange. The Claimant reported that GH was neglecting her duties by leaving dirty urine-soaked clothes on the bedroom floor. We do not see why putting dirty clothes into a washing machine could be considered as interfering with LB's independence. But, in any event, whatever the explanation for GH's not doing that might be, it is irrelevant for the purposes of determining whether what the Claimant reported was a protected disclosure.

131. What is relevant is that, as we found, the Claimant genuinely and reasonably believed that she was reporting a breach of a legal obligation, namely GH neglecting to properly care for LB as she was obliged to do.

132. We also find that the Claimant reasonably believed that the disclosure was in the public interest. If it was a one-off disclosure of an isolated incident, it would have been very unlikely to be reasonable for the Claimant to believe that she was making it in the public interest. However, considering her prior disclosures, we find that this disclosure formed part of a broader disclosure tending to show

that GH was neglecting her duties and endangering health and safety of LB and possibly other service users. Therefore, viewed in that context (as a disclosure about the pattern of behaviour by GH), we find that it was reasonable for the Claimant to believe it was in the public interest.

9(f) report to the company on 4 May 2021 that she had been assaulted by Gillian Hughes.

133. The fact of this disclosure or that it was a disclosure of information was not disputed by the respondent. The Respondent argued that there was no physical assault and no violence. We find this argument is misconceived.

134. It does not matter whether the Claimant was physically assaulted or physically attacked by GH. What matters is that the Claimant disclosed information, which in her reasonable belief tended to show a H&S issue and/or a breach of a legal obligation (and potentially a criminal offence – though the Claimant does not rely on this ground), which is undeniable. The report filed by the Claimant and the note taken by the respondent's staff (Amber) of the call made by the Claimant speak for themselves.

135. Considering GH's position as a carer for elderly and vulnerable service users and the overtly aggressive behaviour she displayed toward the Claimant, and taking into account the previous episodes of suspected abuse by GH of her position, we find that the Claimant held a genuine belief that the disclosure was in the public interest, and it was reasonable for the Claimant to hold such a belief.

136. Therefore, we find that this disclosure was too a protected disclosure under s.43A ERA.

9(g) raise a concern on 5 May 2021 over Ms Hughes' misuse of a client's money.

137. This disclosure was about a pint of milk not being recorded in the ledger (p.70). It appears it was on 22 April and not 5 May 2021. It was recorded in the respondent's alert system as received on 22 April 2021 (p. 103).

138. The Respondent said that in the past GH used her own money to purchase milk for LB. This, however, is not relevant for the purposes of deciding whether this was a protected disclosure. For the same reasons as apply to disclosures 9(b) and 9(c) (see paragraphs 115 - 122 above) we find that it was. It might appear as a petty matter. However, looking in the round and in the context of prior disclosures, we find that it formed part of a series of disclosures that the Claimant reasonably believed tended to show that GH was misusing LB's money and thus breaching a legal obligation, and she also reasonably believed for the reasons explained above (see paragraphs 107-108 and 119-120) that the disclosure was in the public interest.

9(h) raise a concern with the Care Quality Commission about Ms Hughes and the company's lack of action regarding these concerns.

139. Contrary to Mr Joshi's submissions on this point, CQC is a prescribed person (see paragraph 61 above). We have not seen the exact disclosure the Claimant has made to CQC. However, the fact that she has made the disclosure is not disputed by the respondent.

140. The content of the disclosure can be ascertained from the other evidence before us (the Claimant's email to AB informing him about the disclosure to CQC – p.75, CQC's correspondence with the Respondent following the disclosure - pp. 217 - 220, 225 - 232).

141. We find it was a protected disclosure because the conditions of s.43F (see paragraph 60 above) were met. We find that the Claimant reasonably believed that CQC was a prescribed person with respect to the matters she was reporting to CQC. That is recorded in the respondent's Safeguarding principles (p134, 139), Safeguarding policy (p.143) and Whistleblowing policy (p.157, 158), and the employee handbook (p.197). We also find that she reasonably believed what she was disclosing was true.

142. She disclosed to CQC information she had previously disclosed to the respondent, which we found were protected disclosures. Therefore, this disclosure to CQC was also a protected disclosure.

9(i) raise a safeguarding concern on 16 May 2021 regarding Ms Hughes uploading a video to Facebook with footage of a client.

143. The fact of the disclosure or that it was a disclosure of information is not disputed by the respondent. The Respondent has investigated that disclosure and determined it to be true, however, decided not to take any action. CQC expressed concerns about the video being put on Facebook (p.226) and ultimately determined that it was neglect, or act or omission, which resulted in the Respondent removing GH from her caring responsibilities for LB (p. 227).

144. For the same reasons as apply to other disclosures concerning GH conduct when providing her care services to LB – 9(a) – 9(e) and 9(g), we find that it was too a protected disclosure.

145. It follows that we find that each of those nine disclosures individually and taken together as multiple communications (see paragraph 58 above) are protected disclosures within the meaning of s.43A ERA.

Was the Claimant subjected to a detriment?

Detriment 12(a) - she was attacked by Gill Hughes on 4 May 2021

146. It is to be recalled that the Claimant's right is not to be subjected to a detriment by the Respondent(as her employer) or another worked (GH) in the course of that other workers employment (s.47(1A) ERA) and it is the thing is done by that worker (GH) with the knowledge or approval of the Respondent(s,47B(1C) ERA.

147. We reject Mr Joshi's submissions that there was no attack. The recording of the incident and the agreed transcript clearly demonstrate that GH's conduct towards the Claimant could only be described as aggressive, hostile and threatening. GH raised her voice, she pointed her finger at the Claimant, holding it near the Claimant's face, her speech was full of expletives, she threatened the Claimant with causing her trouble, she said "*you are lucky I am not going to smack you, you are a vile little piece of shit*".

148. The fact that GH did not physically attack the Claimant does not mean that what happened could not be properly described as an attack. The Oxford English Dictionary gives one of the meanings of the word "attack" as "*an instance of vehemently expressed antagonism or hostility, or of action intended to undermine or disrupt*". It is undoubtedly what GH was doing.

149. In any event, what really matters is whether that altercation could be reasonably considered as a detriment to the Claimant, whether you put a label of "attack" on it or describe it in some other way. It was certainly something that the Claimant did not invite or welcome. She found it highly distressing to the extent that she suffered a panic attack (p.106, 110). There was nothing unreasonable for her to feel in that way about the incident.

Was the detriment on the ground of the protected disclosures?

150. We reject the respondent's submission that what caused GH to confront the Claimant in that way was the Claimant saying to GH that she had no evidence of her (the Claimant) shouting at LB. That came later in the conversation. By that moment, GH had already sworn and shouted at the Claimant. We find what in fact caused GH to react in that way was the Claimant asking her whether she was willing to draw a line and that was by reference to the matters arising from the Claimant's protected disclosures, in particular allegations about GH stealing from LB. This is further corroborated by the documentary evidence (p.114) – report filed by the Claimant about the start of the exchange before she started recording.

151. The Respondent decided not to call GH as a witness. However, based on the evidence before us, we find that the GH's reaction was a response to the Claimant's disclosures, which GH clearly did not appreciate and considered those to be lies about her.

152. Putting it simply, GH was very angry and annoyed with the Claimant reporting her to the Respondent for various things. GH's patience with the Claimant ran out and she reacted in that aggressive and hostile manner when the Claimant suggested that all that should be forgotten and left behind. The GH's grievance (p.81-82) further supports our conclusion on the issue of causation.

153. The incident on 3 May 2021 happened during the shift handover process at LB's house. It follows that GH subjected the Claimant to a detriment in the course of GH's employment with the Respondent on the ground that the Claimant has made her protected disclosures about GH. It is immaterial whether GH's action was done with the knowledge or approval of the

Respondent(s.47B(1C) ERA). The Respondent did not run the defence under s.47(1D) ERA. Therefore, this part of the Claimant's claim succeeds.

Detriment 12(b) - being removed from the care rota for her client

154. The respondent's case is that the Claimant was removed from her rota at the LB's house because she had called the office 5 times on 5 May 2021 being in a highly emotional state, which the Respondent determined made her unsuitable to continue to provide care services on that day to LB. We accept that the Claimant called the respondent's office more than once (she says that herself in her pleadings – p.17). We also accept that she was emotional on the phone and might have raised her voice. We also accept that in the circumstances it would not have been unreasonable for the Respondent to decide that the Claimant was not a fit state to carry on with her care duties on that day.

155. All that, however, is irrelevant. The Claimant's case is that she called the office after she had realised that the Respondent had removed all her shifts at LB's, when she had resynced her diary. And that is the claimed detriment, not being relieving from her duties on that day, 4 May 2021.

156. We find it was AB's decision to do that. His email (p.73) states that because step one failed the Respondent was moving to step two "*which most likely affect the round*". Next day, while on shift at LB's home, the Claimant received a text message "*to resync [her] rota for tomorrow*" and that was because the Respondent had "*moved to stage 2*".

157. We accept the Claimant's evidence that when she had resynced her diary, she found that all her shifts at LB's had been cancelled and that meant instead of working 5 days a week she had only 1-2 days a week rota doing double rounds.

158. We do not accept LK's evidence that there was no change in the Claimant's hours. The Respondent did not present any supporting evidence (e.g., rota print outs) to show that. LK did not lead any evidence on that either, and only said it in cross-examination. That was inconsistent with LK's earlier answer that the removal of rota from the Claimant was only temporary.

159. We prefer the Claimant's evidence that the removal of her rota at LB's meant a reduction of 25 hours a week of work. As the Claimant was paid based on her actual hours worked, that meant a significant drop in her pay. That was clearly a detriment to the Claimant.

Was the detriment on the ground of the protected disclosures?

160. Now we need to consider whether the removal of the rota at the LB's was on the ground of the Claimant's protected disclosures.

161. We find that it was the Claimant's protected disclosures, which caused AB to intervene and try to resolve the matter by perhaps ill-thought-through attempt of getting the Claimant and GH to reconcile their differences by placing them in

the same room. That what AB called stage 1. Stage 1 has failed. AB then decided that GH and the Claimant should not work together at LB, and that it was the Claimant who was going to be removed from the rota at LB ("*go to step two which is most likely affect the round*").

162. On that basis we conclude that there is a clear and direct causative link between the Claimant's disclosures and the respondent's decision to remove her from her care rota at LB's. We also find that the Claimant's protected disclosure materially influenced the respondent's decision to remove her from her care rotas.

163. It follows that this part of the Claimant's claim succeeds too.

164. We shall return to the two remaining detriments when dealing with the Claimant's victimisation complaint.

Unfair (constructive) dismissal – s.103A ERA claim

Was the Claimant dismissed?

165. We find that GH attacking the Claimant on 3 May 2021 was a serious breach of the respondent's contractual duties to the Claimant. The Respondent was under the implied duty to provide safe working environment and the implied duty of trust and confidence. GH's conduct breached both of those duties. The Respondent is vicariously liable for breaches committed by its employees in the course of their employment. Therefore, GH's conduct put the Respondent in a fundamental breach of the Claimant's contract.

166. Furthermore, the way the Respondent handled the aftermath of the incident further undermined and ultimately destroyed the relationship of trust and confidence between the Claimant and the respondent.

167. We accept the Claimant's evidence that she was called into a meeting without any prior warning that GH would be in the same room, and then left alone with GH in the room. Just a few hours earlier GH shouted and swore at the Claimant and nearly physically assaulted her. Understandably, the Claimant felt frightened by being in the same room with GH.

168. We also accept the Claimant's evidence that at the meeting MK sided with GH. MK refused to listen to the Claimant's recording of the incident under what can only be described as a feeble excuse. Instead, MK accused the Claimant of being paranoid. The Claimant felt bullied by MK at the meeting. She raised a grievance against MK.

169. MK, in her evidence to the Tribunal, denied bulling the Claimant or siding with GH at the meeting. We, however, prefer the Claimant's evidence, which, unlike MK's evidence, is supported by contemporaneous documents (the Claimant's emails to AB and the record of her grievance meeting with LK). It appears that MK took no notes of the meeting on 4 May 2021, at least, none were provided in evidence by the respondent.

170. None of MK, LK or AB took any further steps to investigate the Claimant's complaints. Moreover, the Respondent for some unexplained reason decided to remove the Claimant (the victim) and not GH (the perpetrator) of the attack from the care rota at LB's.

171. The Respondent did not provide any satisfactory explanation in their evidence for that decision. As explained above, the purported reason of the Claimant calling the office 5 times on 4 May 2021 does not explain that decision because the Claimant called the office after and not before she had realised that the Respondent had removed her care rota at LB's.

172. In response to the Tribunal's question whether LK considered removing GH and not the Claimant, LK's answer was that the Claimant's behaviour of calling the office 5 times caused the Respondent to remove her from the rota and not GH. This, however, cannot be right for the reason explained above.

173. Taking a step back and looking at the entire situation, we find that the Respondent did not have a reasonable and proper cause to conduct itself in that manner and its conduct (GH's attack, the handling of the meeting, and removing the Claimant from the care rota at LB) had the effect of destroying or at any rate seriously damaging the relationship of confidence and trust with the Claimant. Therefore, we find that the Respondent was in a fundamental breach of the Claimant's contract of employment.

174. We also find that the Claimant resigned in response to that fundamental breach. We accept her evidence on that, and it is also clear from reading her letter of resignation (p.86). She did not wait too long or otherwise indicated that she was affirming the contract. From 5 May 2021 she was signed off sick suffering from a high level of anxiety. She remained on sick leave when she resigned on 26 May 2021.

175. It follows that we find that the Claimant was dismissed by the respondent.

What was the reason for the Claimant's dismissal?

176. To answer this question, we need to decide what the reason, or if more than one, the principal reason for the Respondent acting in the way, which we found had put it in a fundamental breach of contract, was. The test is different to the detriment causation test. Here we must consider the reason (and if more than one, the principal reason) for the respondent's conduct, and not merely what influenced the Respondent in a material (meaning more than trivial way) to act in that way.

177. For the reasons explained above, we found that it was the Claimant's protected disclosures what caused GH to attack the Claimant. We rejected the respondent's submission that it was the Claimant saying that GH had no evidence of the Claimant shouting at LB. The Respondent did not call GH to give an alternative explanation to her conduct. The Respondent did not lead any other evidence on this issue.

178. Therefore, based on the evidence before us, we find that the Claimant's protected disclosures was the sole reason for GH's conduct, which conduct was in breach of the implied duty of safe working environment and the implied duty of trust and confidence.

179. We also find that the reason the Respondent removed the Claimant from her care rota at LB's was because of the Claimant's protected disclosures. Our findings and conclusions at paragraph 160 - 161 equally apply here. For the reasons explained above, we reject the respondent's explanation that it was the Claimant's calling the office 5 times that caused it to remove her from the care rota at LB's. It follows that we find that the reason for the respondent's acting in that way was the Claimant's protected disclosure.

180. To make sure that we do not miss "the woods for the trees" we step back and look at the entire picture in the round. Our conclusion remains the same. We find that the Claimant's protected disclosures was the reason for the Respondent acting in the way, which we found put it in a fundamental breach of the Claimant's contract of employment.

181. In short, we find that AB, LK and MK were very unhappy that the Claimant kept complaining about GH and went as far as passing her complaints to CQC, which in turn resulted in CQC investigating the respondent. They decided that the way to stop it happening again, and as a punishment to the Claimant, was to remove the Claimant from her care rota at LB's.

182. Therefore, we find that the reason (or if more than one the principal reason) for the Claimant's dismissal was her protected disclosures. It follows, that the Claimant claim for unfair dismissal under s.103A ERA succeeds.

Harassment (s.26 EqA) and Direct Disability Discrimination (s.13 EqA) claims

183. I shall deal with these two complaints together. Both are in relation to the incident on 3 May 2021 – the attack/assault by GH on 3 May 2021.

184. We find that both complaints must fail on causation. As we found above (see paragraph 150-152 and 176) the reason GH attacked the Claimant was the Claimant's protected disclosure. Applying the burden of proof provisions in s.136 EqA and the relevant case law (see paragraphs 95- 98 above), we are not satisfied that the Claimant has presented sufficient evidence from which we could conclude that the Claimant's disability had anything to do with GH attacking the Claimant.

185. The Claimant relies on GH saying in that altercation with the Claimant "*they know what you like*" and the Claimant says that was referring to her anxiety and disorder and panic disorder. We reject that. That phrase must be read in the context of the entire sentence (*emphasis added*): "*they know what you are like in the office because your own cousin said what you are like…. said cause … told me all that stuff about … .nicking out of your mum's purse*".

186. We find that the "what you like" refers to the Claimant's cousin allegedly telling the Respondent that the Claimant had been stealing money from her mother and not the Claimant's anxiety and panic disorder.

187. The Claimant's evidence (para 43 of her witness statement) is that her cousin (Yasmin) never discussed her mental health with the respondent. The Claimant's evidence is that GH said at the meeting on 4 May 2021 that what cause the Claimant to complain about GH was her generalised anxiety and panic disorder. However, even accepting this evidence we find it is insufficient to show that what caused (in the sense influenced in more than a trivial way) GH's attack on the Claimant was Claimant's disability, as opposed to the Claimant's protected disclosures.

188. We find that in those circumstances GH would have acted in exactly the same way if the Claimant had no disability. GH was very unhappy about and reacting to the Claimant's protected disclosures, which GH thought were the Claimant "spreading lies" about her. The Claimant's disability was immaterial to that.

Victimisation – s.27 EqA claim

Did the Claimant do a protected act?

189. The Claimant relies on submitting her claim on 11 June 2021 and commencing Acas early consolation on 6 May 2021. Because the Claimant's claim alleged that the Respondent has contravened the Equality Act by discriminating the Claimant on the ground of her disability, under s.27(2)(c) EqA it was a protected act. Her Acas early conciliation was in respect to her claim and therefore was something done for the purpose or in connection with the Act (s.27(2)(b) EqA).

Was the Claimant victimised by the respondent?

Did on or about 9 July 2021, MK provide a malicious reference to the Claimant's prospective employer?

190. MK denied in her evidence giving any malicious oral reference to the Claimant's prospective employer. She said that in telephone conversation with AJ she only asked for AJ's email address to send a factual written reference.

191. The Claimant's case is based on circumstantial evidence. She says the job was as good as hers. AJ was even asking her whether she would be prepared to walk to a specific service user's home and telling her how far it was from the Claimant's home. The Claimant was told by AJ that all that was left to do was to get a reference from the Respondent and to receive the DBS clearance.

192. However, 10 minutes after AJ had spoken with MK, AJ wrote to the Claimant saying that the Claimant had failed their "compliance criteria". AJ then refused to answer the Claimant's question whether AJ had received a bad reference, but later forwarded the email reference AJ had received from MK.

193. The email itself contains only factual information and an apology by MK for not being able to provide any other information. There is no suggestion that the Claimant had failed the DBS check. In fact, it appears that no checks had been carried out by the time AJ has done the U-turn on the Claimant's application. That is because AJ was asking in the same email the Claimant for her bank details to refund the fee for the DBS check. Before and after that the Claimant was successful in securing jobs in the care sector, and therefore there were no issues with her obtaining the necessary DBS clearances.

194. This was all shortly after the Claimant had commenced her first claim against the respondent, and MK as the HR person for the Respondent would have been well aware of the claim and the allegations of contravention of the EqA the Claimant was making in the claim. MK would have also been aware of the Claimant's grievance against her, alleging disability discrimination and bulling.

195. We find that the evidence presented by the Claimant is sufficient to satisfy the initial burden of proof under s.136 EqA (see paragraph 95 above).

196. Applying the principles in *Ingen v Wong* (see paragraph 96 above) we find, on the balance of probabilities, that MK did in fact give a malicious reference to AJ about the Claimant, which caused AJ not to progress the Claimant's application further.

197. We prefer the Claimant's (albeit circumstantial) evidence to MK's direct evidence on this issue. That is because we found MK's evidence to be generally unreliable and self-serving.

198. MK said in her evidence (by answering a leading supplemental question by Mr Joshi) that at the meeting on 4 May 2021 GH did not say that Yasmin had told the Respondent that the Claimant had anxiety. We, however, prefer the Claimant's evidence on this issue (at paragraphs 31, 32 and 43 of her witness statement) as further corroborated by contemporaneous documentary evidence (p.43). MK did not include any evidence on what happened at the meeting on 4 May 2021 in her witness statement, which is very surprising considering the issues in the case. Therefore, we find that MK's answer to Mr Joshi's leading supplemental question was her deliberately giving false evidence to the Tribunal, thus casting a long shadow on the reliability and veracity of her other evidence to the Tribunal.

199. Furthermore, our findings and conclusions on the second detriment (see paragraphs 201- 202 below) reinforce our conclusion on this issue.

200. The Respondent did not provide any other adequate explanation to show that the Claimant's protected act was not the ground for MK giving a malicious reference. Therefore, this part of the Claimant's claim for victimisation succeeds.

Did on 9 September 2021, MK contact the Claimant's new employer and made false allegations that the Claimant stole medication?

201. Again, MK denied doing that. However, we prefer the Claimant's evidence. In relation to this episode the Claimant's evidence, albeit hearsay, is much stronger. We see no reason for the Claimant to make up this story, and we see no reason why the Claimant's new manager would tell the Claimant that MK had telephoned him and made that allegation, if she had not done that.

202. We also note that in her grievance of 21 May 2021, GH accused the Claimant of talking LB's medication (p.81). The GH's grievance was handled by MK, so she would have been aware of that allegation.

203. It follows that we find that this part of the Claimant's victimisation claim succeeds too.

Detriments 12(c) and 12 (d)

204. Finally, these two detriments are also pleaded as detriments on the ground that the Claimant has made a protected disclosure.

205. We find that the Claimant has failed to prove, on the balance of probabilities, that what caused MK (in the sense influenced her more than trivially) to give a malicious reference to AJ and to contact her new manager was the Claimant's protected disclosure. There was a substantial time gap between the disclosures and the detriments. There was a far shorter time gap between the protected acts and the detriments. MK was not directly implicated in the Claimant's protected disclosures. However, she was subject of the Claimant's grievance alleging disability discrimination. As the HR manager, MK would have been more concerned about having to deal with the Claimant's tribunal claim.

206. For these reasons, we find, on balance, that the Claimant was subjected to these two detriments not on the ground that she has made the protected disclosures, but because of the protected acts. Therefore, this part of the Claimant's claim fails.

Employment Judge Klimov
Date: 21 May 2023

Annex

List of Issues

Was there a Public Interest Disclosure?

9. Miss Partner relies on:

a) reporting her colleague, Gillian Hughes on 13 April 2021 for attending work without the required PPE, a health and safety concern;

b) informing Lisa King, Manager on 14 April 2021 of concerns that Ms Hughes had taken money and items from a vulnerable client's home;

c) raising a complaint on 15 April 2021 that Ms Hughes was buying items for herself with the client's money;

d) informing the company on 29 April 2021 that Ms Hughes had been bringing her new puppy into work;

e) also informing the company on 29 April 2021, via text, of concerns over Ms Hughes' treatment of a client, specifically leaving urine-soaked clothing on the floor;

f) reporting to the company on 4 May 2021 that she had been assaulted by Gillian Hughes;

g) raising a concern on 5 May 2021 over Ms Hughes' misuse of a client's money;

h) raising a concern with the Care Quality Commission about Ms Hughes and the company's lack of action regarding these concerns;

i) raising a safeguarding concern on 16 May 2021 regarding Ms Hughes uploading a video to Facebook with footage of a client.

10. In each case, did these reports disclose information which in her reasonable belief tended to show that;

a) a person had failed to comply with a legal obligation;

b) the health or safety of an individual had been put at risk;

c) or that any of those things were happening or were likely to happen, and

that information relating to them had been or was likely to be concealed?

11. If so, did she reasonably believe that the disclosure was made in the public

interest?

Public Interest Disclosure - Detriment complaints

12. If so, was Miss Partner subjected to a detriment by the company or another worker as a result of existing disclosure(s) in that:

a) she was attacked by Gill Hughes on 4 May 2021;

b) she was removed from the care rota for her client;

c) on or about 9 July 2021 Ms Kirk, provided a malicious reference to a prospective employer;

d) on 9 September 2021, contacting Miss Parker's new employer and making false allegations that she stole medication.

Public Interest Disclosure - Dismissal complaints

13. Did Miss Partner resign in circumstances where she was entitled to resign without notice by reason of the employer's conduct, i.e. was the test for constructive dismissal met?

14. If she was constructively dismissed, can Miss Partner prove that the reason (or if more than one, the principal reason) for her dismissal was the protected

disclosure?

Disability

15. Did Miss Partner have a physical or mental impairment at the material time, namely Generalised Anxiety Disorder and/or Panic Disorder?

16. If so, did the impairment have a substantial adverse effect on her ability to carry out normal day-to-day activities?

17. If so, was that effect long term? In particular, when did it start and:

a) has it lasted for at least 12 months?

b) is or was the impairment likely to have lasted at least 12 months or the rest

of her life, if less than 12 months?

18. Note that in assessing the likelihood of an effect lasting 12 months, account should only be taken of the circumstances at the time the alleged discrimination took place, not afterwards.

Harassment on grounds of disability

19. Did Ms Hughes engage attack or assault Miss Porter on 4 May 2021?

20. Was the conduct related to her disability?

21. Did it have the purpose or effect of violating Miss Partner's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Direct discrimination on grounds of disability

22. Did Ms Hughes, in attacking or assaulting Miss Porter on 4 May 2021, treat her less favourably than it treated or would have treated someone else in the same circumstances apart from her disability.

Victimisation

23. The claim form was submitted on 11 June 2021. This amounted to what is known as a "protected act" under section 27 Equality Act 2010.

24. This complaint also relies on her commencing early conciliation on 6 May 2021as a protected act.

25. As a result of either act, did:

a) on or about 9 July 2021 Ms Kirk, provide a malicious reference to a prospective employer;

b) on 9 September 2021, contact Miss Parker's new employer and making false allegations that she stole medication.