EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112082/2021

Held in Glasgow on 8 – 11 August 2022; 14, 16 & 18 November 2022; and 24 April 2023

Meeting in Chambers on 18 May 2023

Employment Judge P O'Donnell
Members Mr I Ashraf and Ms L Taylor

Mr Paulius Serelis	**Claimant** **In Person**
Quarriers	**Respondent** **Represented by:** **Ms C Asbury - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is:-

1. The Respondent's application for the claim to be dismissed under Rules 10 & 12 is refused. This judgment was given orally at the hearing.

2. The Claimant's application for the response to be struck-out under Rule 37 is refused. This judgment was given orally at the hearing.

3. The claim under s47B of the Employment Rights Act 1996 was lodged out of time. The Tribunal is not prepared to exercise its discretion to hear this claim out of time. The claim under s47B of the 1996 Act is, therefore, dismissed.

4. The Claimant was not dismissed as defined in s95(1)(c) of the Employment Rights Act 1996. The claim of unfair dismissal is, therefore, not well-founded and is hereby dismissed.

REASONS

Introduction

1. The Claimant has brought a claim of unfair dismissal under the Employment Rights Act 1996 (ERA) alleging that he resigned in circumstances in which he was entitled to do so as a result of the Respondent's actions (that is, a constructive dismissal).

2. The Claimant also brings a claim under s47B ERA that he was subjected to detriments because he made protected disclosures. The detriments on which he relies are the same acts which he says caused his resignation.

3. The Respondent resists all the claims. They argue that the Tribunal has no jurisdiction to deal with the detriment claim because it has been lodged out of time. They also deny that the Claimant was subject to any detriment because he made protected disclosures. In respect of the unfair dismissal claim, the Respondent denies that there was fundamental breach of contract giving rise to a constructive dismissal.

4. The case was heard over multiple diets due to the fact that it was not possible for all of the evidence to be heard in the time originally allocated. This was due to the case management issues that arose throughout the hearing which are set out below.

Case Management issues at the August hearing diet

5. On the first day of the hearing (8 August 2022), a number of issues were raised, predominantly by the Claimant, relating to documents to be included in the bundle.

6. First, the Claimant was seeking a number of additional documents from the Respondent which were described as "body charts" being the means by which any bumps, bruises or other injuries sustained by service users were recorded. The Claimant was seeking all of these for the period January to April 2021. The charts which had been completed with information during

this period had been provided by the Respondent and Mr Asbury explained that any others would be blank. The Claimant considered that these were necessary because they would show when he had made protected disclosures. On the basis that the Respondent did not concede that completing these records amounted to a protected disclosure, they agreed to provide these and they were added to the bundle.

7. Second, there was a redacted document beginning at p133 and the Claimant sought the unredacted version. Mr Asbury explained that the redactions were intended to protect the sensitive personal data of service users. An unredacted version was provided to the Tribunal and the Claimant clarified that he was only seeking the removal of redactions in the sections of the document headed “Nails” and “Standing”. In respect of the former, subject to the name of the service user remaining redacted, the Tribunal ordered that the rest of the section should be unredacted. In relation to the latter, the Tribunal confirmed that this section did not relate to either of the service users to whom the Claimant’s disclosures related and he did not pursue this further.

8. Third, the Claimant sought originals of the rotas that appear from p141. Mr Asbury explained that he had not been aware that there was an outstanding issue with these and the information in the documents was what was held in the Respondent’s records having been extracted from the rotas. He was not aware if the original document still existed and required to take instructions. During a break in proceedings to allow for this (and for the full set of body charts to be obtained), Mr Asbury explained that hard copies of the rotas were scanned to the Respondent’s office and the data inputted from those but the hard copies were not routinely retained. However, paper copies of seven rotas were found and had been provided to the Claimant.

9. There were then some case management issues raised by the Tribunal to ensure there was a common understanding in relation to these:-

    a. The Tribunal confirmed with parties that as the initial burden of proof in both claims lay with the Claimant then he would give evidence first.

b. The Tribunal clarified with parties that the unfair dismissal claim was only being pursued under s98 ERA and that a claim of automatic unfair dismissal under s103A was not being pursued. Both parties agreed this was correct.

10. During the course of these discussions, each party indicated that they both sought to make applications, in effect, to strike-out each other's case. The Tribunal directed both parties to set out their applications in writing and they would then address these. The parties made submissions in relation to these applications on 8 August 2022 and the Tribunal issued an oral judgment in respect of them on the same day.

11. Dealing with the Respondent's application first, this related to the fact that the Claimant obtained two ACAS Early Conciliation Certificates (ECC). It was submitted that Rules 10 and 12 of the Tribunal Rules of Procedure deal with circumstances in which a claim can be rejected for reasons relating to ECC (for example, the lack of a certificate or difference in the respondent's name between ECC and ET1).

12. The Claimant had relied on the later ECC in his ET1 but where an ECC is obtained then any subsequent ECC is out of the scope of the statutory rules (*HMRC v Garau* 2017 ICR 1121).

13. Mr Asbury submitted that the Claimant had erred in relying on the later ECC and that the claim should have been rejected.

14. The Tribunal asked where Rule 12 gave it a power to, in effect, "unaccept" a claim that had already been accepted and he replied that the power in Rule 12 had no time limit.

15. In response, the Claimant stated that the reason for the second ECC was that he had submitted the first one as unfair dismissal and not constructive unfair dismissal so had been advised to do so again.

16. The Tribunal was not persuaded that Rule 12 has any application beyond the start of a claim when the Tribunal identifies, on the face of the ET1, that one

of the defects set out in Rule 12(1) applies. In particular, the Tribunal was not persuaded that it has a power to "unaccept" a claim.

17. In any event, the Tribunal considered that the alleged defect relied on by the Respondent (that is, Rule 12(1)(da)) would not be evident on the face of the ET1. The ET1 included an Early Conciliation number which was linked to an Early Conciliation Certificate. There is nothing on the face of the ET1 which would have alerted the Tribunal to the issue now being raised.

18. Even if the Tribunal is wrong about these matters, it considers that Rule 12(2ZA) applies. Taking the Respondent's case at its highest that the Claimant has made an error in putting the number for his second Certificate on the ET1, the Tribunal can see no basis on which it can be said that it would be in the interests of justice to now reject a claim where the Claimant had complied with the requirement to engage in Early Conciliation and the matter is being raised at the outset of a multiple day final hearing.

19. For these reasons, the Respondent's application was refused.

20. Turning to the Claimant's application for strike-out under Rule 37, he relied on his written application.

21. He alleged that the manner in which proceedings had been conducted was scandalous, unreasonable or vexatious, that there had been non-compliance with the Rules or an Order of the Tribunal and that it was no longer possible to have a fair hearing.

22. He submitted that the Respondent had to follow the Tribunal Rules and disclose the documents requested but they had not done so. Requests for documents had been made and he did not consider that he had been provided with what he had been seeking.

23. The strike-out application was opposed. Mr Asbury appreciated that the Claimant was in a difficult position given that his solicitor had withdrawn from acting on 2 August 2022 shortly before the hearing. He set out the sequence of events regarding the correspondence with the Claimant concerning the creation of the bundle. He submitted that this showed that there had been no

attempt to withhold documents. There was no basis on which it could be said that a fair hearing was not possible given the steps that had been taken to obtain documents sought by the Claimant.

24. The Tribunal reminded itself that strike-out is a draconian power to be exercised with great caution.

25. Whilst appreciating that the Claimant is a litigant in person, the Tribunal considered that he has proceeded with his application on the basis of a number of misconceptions.

26. First, there is no obligation under the Tribunal rules as they apply in Scotland for the Respondent to provide the Claimant with disclosure of documents. It is only where an Order is made for specific documents to be produced that the Rules place obligations on a party.

27. Second, a request for voluntary disclosure is exactly that, voluntary. If what is produced in response is not to the satisfaction of the requesting party then it is open to them to clarify their request or to seek an Order under the Rules for documents to be produced. No Order was sought.

28. Third, the direction made at the March hearing was for parties to exchange the documents they sought to rely on at the final hearing. It was not for the Respondent to provide the Claimant with the documents he seeks to rely on; if there were documents which he sought to include in the bundle which were not in his possession then steps should have been taken by the Claimant or on his behalf at an early stage for those to be produced in sufficient time for him to provide those at the point that exchange of documents had been directed.

29. In these circumstances, the Tribunal did not consider that any of the grounds relied on by the Claimant for strike-out have been made out; the Respondent's actions in seeking to respond to the Claimant's requests (which were being made shortly before the final hearing) were not unreasonable and certainly did not breach any Rule or order.

30. Further, the Tribunal did not consider that a fair trial would not have been possible even if any of the grounds had been made out. The documents were being provided by the Respondent and these can be led in evidence. The Claimant is not being prejudiced from advancing his claim.

31. For these reasons, the Claimant's application for strike-out was refused.

32. At the start of the hearing on 10 August 2021, the Respondent sought to add additional documents to the bundle. These were the daily logs of one of the service users for 1 April 2021. It was submitted that the relevance of this document had only become apparent during the course of the Claimant's evidence on the preceding day; the ET1 contains an allegation that the Claimant disclosed bruising on this service user on an unspecified date in March 2021; the Claimant's case management agenda narrowed the date down to mid-March 2021; it was only during the course of the Claimant's evidence that a specific date of 31 March 2021 was given in circumstances where the daily body chart for this date could not be found. In these circumstances, the Respondent sought to add the body chart for the next day which showed no bruises being recorded on the basis that if there had been bruises recorded on 31 March 2021 then it would be expected that these would also be recorded on the next day.

33. The Claimant opposed this on the basis that he did not see the relevance; if people did not want to do their job properly and chose not to record matters then this does not mean there was no record on the day before.

34. The Tribunal allowed the document to be added for the following reasons:-

    a. It was potentially relevant for the reasons given by the Respondent.

    b. The Respondent was not on notice of the date of this particular disclosure until the Claimant gave evidence the day before given that he had not specified the date in his ET1 or in his case management agenda.

    c. The Tribunal formed no view as to the weight or reliability to be given to this document until it was spoken to in evidence.

Case management issues at the November hearing diet

35. At the outset of the hearing on 16 November 2022, the Claimant asked whether he could be provided with further documents. This was the sixth day of the hearing, the Claimant had closed his case during the first diet in August 2021 and was part way through his cross-examination of the Respondent's second witness.

36. The Claimant clarified that he was looking for the full daily records (and not just the body charts which form part of those records) for the service users for the period from 1 January 2021 to April 2021 (the records for March 2021 were already in the bundle). He had not made a request for voluntary disclosure to the Respondents in advance of raising this at the hearing.

37. The Claimant said that this was relevant to the alleged lack of investigation as he believed that there would be missing records and this would show that he had brought matters to the Respondent's attention. The Judge asked whether the Claimant knew there were missing records, other than 31 March 2021, and the Claimant said that he did. The Judge noted that the Claimant had not led any evidence about this and questioned whether this was, in fact, an attempt by the Claimant to find new evidence (that is, a fishing expedition) rather than a specific request for documents.

38. The Respondent opposed the application. Mr Asbury noted that the first day of the hearing had been spent dealing with the Claimant's request for documents which had resulted in a considerable volume of documents being added to the bundle. There would be an issue of delay. There had been no mention of these further documents in the Claimant's evidence nor had they been put to the Respondent's witnesses in cross.

39. Mr Asbury indicated that the Respondent was becoming concerned at the Claimant's conduct of the hearing and that the issue of expenses may arise especially if the case cannot conclude by the end of the second diet in November 2022.

40. The Tribunal refused the Claimant's application taking account of the following matters:-

    a. It recognised that the Claimant was a litigant in person.

    b. The application came far too late in the proceedings.

        i. The Claimant had closed his case.

        ii. The Respondent was a significant way through their case.

        iii. A considerable amount of work had been done on the first day of the hearing to deal with the Claimant's request for documents and this could have been dealt with at that time.

        iv. There had been a long period between the hearing diets when these documents could have been requested.

    c. The Claimant had not provided an adequate explanation why the application was made so late. Neither had he adequately explained what issues for determination these documents would evidence especially where there had been no evidence led by him or put by him in his cross-examination of any alleged missing records other than that of 31 March 2021.

    d. It appeared to the Tribunal that this was no more than a fishing expedition.

    e. If the application was granted then further delay would be caused whilst these records were obtained and spoken to in evidence. This was not in the interest of either party and not in keeping with the overriding objective.

41. By the lunch break on 16 November 2022, the Tribunal had become concerned about the progress being made. The Claimant's cross-examination of the Respondent's second witness, which had started after lunch on 14 November 2022, was ongoing with no apparent end in sight. There had been a considerable amount of repetitive questioning by the

Claimant; he would ask the same questions several times or return to the same topic or document time and again with the same witness. The Judge had intervened a number of times to remind the Claimant that the witness had answered the questions but the Claimant persisted. It was increasingly clear to the Tribunal that the Claimant was unhappy that he was not getting the answers he wanted and was repeating his questions to try secure such answers.

42. A significant proportion of the Claimant's questions were also irrelevant to the issues to be determined. In particular, it was clear that he sought to prove that the allegations of abuse which he had made were true. The Tribunal explained to him on a number of occasions that it was not going to decide whether the information disclosed by him as part of his disclosures did, in fact, show that there had been abuse but, rather, the question was whether he had disclosed information which, in his reasonable belief, tended to show that. However, the Claimant persisted in such questioning.

43. The Tribunal, recognising that the Claimant was a litigant-in-person, gave him leeway before intervening to see how any line of questioning developed. However, by lunch on 16 November, it was clear to the Tribunal that the cross-examination of the Respondent's second witness was taking longer than necessary and more than adequate time had been allowed for this. There was no end in sight and, if the Tribunal did not take steps to manage this, there was a question of whether any of the Respondent's three remaining witnesses (let alone, all of them) could be heard before the end of the November hearing diet.

44. The Tribunal was particularly concerned with the possibility of the evidence of a particular witness not being concluded by the end of the last day of the diet, leaving them in the invidious position of being under oath or affirmation for what could be several months.

45. The Tribunal, therefore, decided to exercise its power under Rule 45 to timetable the questioning of the current witness and all future witnesses. This was confirmed to the parties after the lunch break on 16 November 2022 (the

Tribunal had indicated to parties before lunch that it was considering this). In respect of the Respondent's second witness, the Claimant was given a further 30 minutes to conclude his cross-examination (an adjournment of 15 minutes was given to allow the Claimant time to adjust his questions) with 15 minutes for questions from the Tribunal and then 15 minutes for re-examination.

46. It was explained to both parties that the timetable would be adhered to strictly and when the allocated time expired, no further questions would be allowed.

47. The Respondent's third witness was called on 18 November 2022 with 1.5 hours allocated for examination-in-chief, 1.75 hours for cross-examination, 15 minutes for questions from the Tribunal and twenty minutes for re-examination.

48. It was not possible to hear the remaining two witnesses for the Respondent at the November diet. A further day was listed to hear their evidence with timetabling put in place to ensure the evidence could be concluded in the allocated time. Directions were also made for written submissions to be lodged by both parties after the evidence was concluded. The continued hearing was listed for 30 January 2023 but, due to one of the witnesses being unavailable, this was postponed and relisted for 24 April 2023. It is noted that the Claimant did not respond to requests from the Tribunal for his availability for this continued date.

49. The Respondent made an application for strike-out on 25 November 2022. This was determined in a separate judgment which is referred to for its terms. For the purposes of this judgment, the Tribunal notes that the Claimant did not respond to repeated requests for his comments on the Respondent's application.

Case management issues at the April hearing diet

50. The Claimant did not attend the hearing on 24 April 2023. There had been no previous application for postponement or any indication that he would not attend. Attempts were made by the administration to contact the Claimant using the telephone number provided but he could not be reached.

51. The Respondent's representative and witnesses were in attendance. The Tribunal was conscious of the delays to the progress of the case arising from the various matters outlined above. The Tribunal considered that further delay was not in keeping with the Overriding Objective nor in the interests of justice. The Tribunal had noted that the Claimant had not engaged with more recent correspondence with the Tribunal.

52. In these circumstances, the Tribunal decided to proceed to hear the evidence from the remaining witnesses in the Claimant's absence. It noted that these witnesses were not speaking to the core issues in the case; Mr Dickson, in particular, was speaking to certain correspondence in the bundle which the Tribunal had already been taken to in evidence and which said what it bore to say.

53. There was a suggestion by Mr Asbury that the Tribunal also deal with submissions on 24 April 2023. The Tribunal did not consider that this was in keeping with the Overriding Objective; the Claimant had been told at the end of the November 2022 diet that written submissions would be used; if the Tribunal proceeded to hear oral submissions on 24 April the Claimant would be denied the opportunity to make submissions in circumstances where he had a reasonable expectation that he would be able to make written submissions; he would be denied the opportunity to hear the submissions made on behalf of the Respondent.

54. Mr Asbury had also raised the suggestion of a further application for strike-out (on the basis that the Claimant's non-attendance was a failure to actively pursue his claim) to be made at the hearing on 24 April. The Tribunal indicated that this would require the hearing to be discharged in order that the Claimant had a reasonable opportunity to make representations on any such application (as required under Rule 37(2)). The application was not insisted upon by the Respondent.

55. At the end of the hearing on 24 April 2023, the Tribunal made directions for parties to lodge their written submissions no later than 12pm on 2 May 2023

and for any comments on these submissions to be lodged no later than 12pm on 9 May 2023.

Evidence

56. The Tribunal heard evidence from the following witnesses:

a. The Claimant.

b. David McFadden (DMcF) who was the project manager for the Respondent's Connect service in Glasgow at the time at which the events giving rise to the claim.

c. Mark Foster (MF) who was team leader for the facility at which the Claimant worked. He was also team leader for another facility where the Claimant had worked previously, directly managing both facilities at the same time.

d. Sandra McLean (SMcL) who was the senior support worker at the facility where the Claimant worked.

e. Alisdair Dickson (AD) who was the Respondent's director of people and technology.

f. Chris Shearer (CS) who was a support worker at the facility where the Claimant worked.

57. There were a number of other employees of the Respondent who were mentioned in evidence and will appear in the judgment below:

a. Lorraine Friel (LF), Nicola Elliot (NE), Fiona McPherson (FMcP) and Bolaji (B) were all support workers at the facility where the Claimant worked.

b. Catherine McLaren (CMcL) who was the Respondent's operational manager for adult services.

c. Charlie Coggrave (CC) who was the Respondent's head of aftercare and safeguarding.

58. The disclosures relied on by the Claimant related to two service users who lived at the facility where the Claimant worked. The identities of these individuals are not necessary for the purposes of this judgment and so, to protect their privacy, the Tribunal will refer to them only as "A" and "B". The name and address of the facility where they lived will also not be given; the relatively small number of service users in the facility would mean that identifying it would potentially identify these individuals.

59. The Tribunal considers that all of the witnesses gave their evidence honestly and genuinely believed that what they said was true. There were some instances where witnesses could not recall specific details but that is only to be expected given the passage of time. Witnesses were open about matters they could not recall.

60. However, the Tribunal did not consider that the evidence of the Claimant was wholly reliable for a number of reasons:-

    a. There were issues of inconsistency between his pled case and his evidence (and within his evidence). For example, in his ET1, the Claimant alleged that, on 21 April 2021, SMcL threatened to take off part of his head. This allegation is important as it is the last alleged detriment and is also pled as the "last straw" for the constructive dismissal claim. However, in his evidence in chief, the Claimant gave evidence that this was, in fact, a discussion about his haircut and that SMcL had simply said that he needed some of his hair taken off to even it up. This is a very different matter from what was pled in the ET1. Similarly, the Claimant alleges in his pleadings that CS was a perpetrator of alleged abuse but led no evidence to this effect.

    b. There was also a degree of exaggeration in the Claimant's case. The allegation about SMcL is an example of this. In his evidence, the Claimant insisted that her comment about his haircut needing a bit taken off amounted to a death threat. The Tribunal considers that this is a wholly unreasonable interpretation of what had been said.

c. The evidence of the Claimant on certain points was inadequate. For example, he alleged that LF had bullied and harassed him after he had made his disclosures but, other than one incident, he could give no detail of this. The evidence amounted, in effect, to nothing more than an allegation that LF "did it all the time".

d. It was quite clear that the Claimant had come to a strident and intransigent view that A had been abused based on two marks he found on her on two separate dates in January 2021. Once he formed this view, everything that happened subsequently was viewed through this prism. As a result, he was unwilling to accept that more senior and experienced staff could not come to the same view and he would not accept any explanation for the marks found. This also affected his views about what was happening with B.

61. In these circumstances, where there is any dispute of evidence between the Claimant and the Respondent's witnesses, the Tribunal prefers the evidence of the Respondent's witnesses especially where it is supported by the contemporaneous documents.

62. There was an agreed bundle of documents prepared by the parties running to 435 pages. A reference to a page number below is a reference to a page in the bundles.

Findings in fact

63. The Tribunal made the following relevant findings in fact.

64. The Claimant was employed as a support worker by the Respondent from 6 May 2019 until he resigned on 10 August 2021. The Claimant was employed on a relief basis being offered shifts depending on the needs of the business. There was no obligation on the Respondent to offer shifts to the Claimant and the Claimant was not obliged to accept shifts. During the period relevant to the case, the Claimant worked 20-25 hours a week although it could be more or less than this depending on the needs of the business.

65. The Claimant worked in part of the Respondent's service which provided support to service users who lived in a house of multiple occupancy. These service users had a range of care needs arising from learning difficulties and physical disabilities. The purpose of the service was to allow them to live as independently as possible with support workers assisting them with various activities. The part of the service in which the Claimant worked covered two premises although for the period of time relevant to the case the Claimant was working in only one of these premises. There were four service users in the relevant premises at the time. Three of the service users were non-verbal and they all had mobility issues.

66. There were 3 support workers on the morning shift (9am to 3pm), 2 support workers on the evening shift (3pm to 9pm) and one worker on a sleepover (9pm to 9am).

67. The Respondent requires support workers to make daily written records in relation to service users. These include what personal care had been delivered, what they have had to eat and drink, a description of the activities undertaken by users, observations on their behaviour, relationships with others, well-being etc and body charts where any bruises, cuts or other marks can be recorded.

68. On 5 January 2021, the Claimant was supporting service user A when he noticed scratches behind their left knee. He asked them how the scratches occurred but A did not reply and started crying. He asked again later that same day and A made reference to another worker. The Claimant took a photograph of the scratches and recorded them on A's body chart for 5 January 2021 (p271). He did not raise this with anyone else on that day.

69. On 12 January 2021, the Claimant noticed some skin was pulled back on A's finger at the fingernail. He considered that it looked non-accidental and asked them how it had happened. A made reference to the same worker as they had on 5 January 2021. No body chart recording this was produced in evidence. The Claimant also took a photograph of this.

70. On 19 January 2021, MF was visiting the premises where the Claimant worked. He was the team leader for this part of the Respondent's service and managed staff at the two premises covered by this part of the service. He has worked for the Respondent for the best part of 15 years; he has left to work in other jobs in the care sector on two occasions but has returned to work for the Respondent.

71. MF worked between the two premises which he managed. He would, on average, be present in the premises at which the Claimant worked on 2-3 days each week depending on the needs of the business.

72. On 19 January, the Claimant approached MF saying that he needed to speak to MF urgently. He then alleged that A was being abused, explaining what he had seen on 5 and 12 January, the questions he had asked A and the photographs he had taken.

73. MF had a number of concerns about how the Claimant had dealt with the matter. MF was aware that A was a very vulnerable person with a number of disabilities, both physical and mental; they had epilepsy and could take seizures in clusters causing injuries; they had a habit of biting and picking at their fingernails; they would often wrap their fingers in their hair, sometimes so tightly that they could not get their fingers loose without assistance. These were potential alternative explanations for what the Claimant had observed and MF considered that more evidence was needed before any conclusions could be reached.

74. MF was concerned at the questions which the Claimant had asked; he considered that these were leading and not appropriate questions to ask of someone with A's disabilities and past history.

75. However, he was also concerned to ensure that there was nothing untoward happening. He contacted DMcF to report what the Claimant had said to him and, after this conversation, the following actions were taken:

a. MF spoke to SMcL to inform her of the Claimant's accusations. They both observed A to see if there were any marks or bruises visible but found none.

b. MF and SMcL both looked at the daily records for A, both on the days when the Claimant said he found the marks and on surrounding days. They looked at the body charts to see if these recorded any pattern of bruising, scratches or other marks but could not identify any. They also looked at the observations made about A's general behaviour; MF considered that this was important as evidence of abuse could manifest not just in physical injuries but also in changes to behaviour where a user might become withdrawn, be unwilling to eat, have trouble sleeping or become more easily upset. MF considered it was important to look at a wider range of dates to see if any such behaviours had manifested after the dates identified by the Claimant or if A's behaviour had changed after those dates. No such behaviours were identified in the records.

c. It was agreed that, over the next two weeks, MF and SMcL would observe A more closely to see if there were any signs of abuse. They would also continue to review the daily records to see if any pattern emerged. Neither of them observed anything which caused concern during this period.

76. MF and SMcL did not speak to the worker whom the Claimant had accused at this time (or later) about what had been said. Neither did they speak to any of the other support workers. The reason for this is that, if there was abuse going on, they wished to avoid anyone carrying it out being aware of the suspicions being raised. Any perpetrator may then cease their activities to avoid being caught and then resume them later. The Tribunal finds that none of the other support workers were informed of the Claimant's allegations of abuse until after his resignation on 10 August 2021.

77. SMcL had been working for the Respondent in care roles for just under 10 years at the relevant time. She held the role of senior support worker at the

time and has since been promoted to team leader. Prior to working for the Respondent she had worked for 8 years in care roles at BUPA.

78. On 27 January 2021, MF carried out a formal supervision with the Claimant. This is a process carried out with all staff to reflect on their practice, discuss issues which have arisen and identify any development issues. It is a two-way process where staff can raise issues they wish to discuss. A written record of the supervision carried out with the Claimant on 27 January is at pp124-127.

79. At p125, there is a record of a discussion between MF and the Claimant about the issues he had raised regarding A:

    a. MF sets out what the Claimant had reported to him on 19 January.

    b. He goes on to say that he explained to the Claimant the correct process for reporting such matters. In particular, these should have been reported immediately to a line manager because any delay in doing reporting means there is a delay in action being taken and leaves the service user at risk.

    c. MF explains to the Claimant that there were explanations for what the Claimant had reported; A is known to pick their fingers and twist them in their hair leading to staff having to pick them loose; there was no immediate explanation for the marks on A's leg but they could have been caused if A had pressed their legs against something sharp.

    d. The Claimant replies that he understands all of this but believes that something untoward is going on.

    e. MF goes on to explain to the Claimant that the questions he asked could be considered to be leading and A needs to be questioned in an environment appropriate to their needs.

    f. The Claimant was informed that SMcL has observed A for two weeks after 19 January and seen no reported marks or bruises. MF

reassured the Claimant that his concerns are being taken seriously but that he needs to understand that this has to be dealt with carefully.

g. It is noted that MF reported the Claimant's concerns to DMcF on 19 January.

80. On 2 February 2021, the Claimant notice a bruise on the inside of A's right thigh and recorded this on the body chart for the day (p272) describing it as slightly faded and the cause unknown. In his evidence the Claimant asserted that he reported this to MF on the same or the next day. He did not put this to MF in cross-examination. In response to a question from the Judge, MF denied that the Claimant had ever drawn p272 to his attention at the time and explained that he was on annual leave at this time because it was his birthday around that time.

81. For these reasons, and those noted above about the reliability of the Claimant's evidence, the Tribunal prefer MF's evidence on this and finds that p272 was not reported to him.

82. On 9 February 2021, the Claimant recorded a number of marks on A's left thigh and hand on the body chart (p274). There was a scratch and bruise on the thigh and the skin pulled back on the thumb. The Claimant asked other staff if they knew about these but they did not. He did not report this to MF or SMcL at that time.

83. Around this time, the Claimant alleges that other staff became hostile towards him. The Tribunal found his evidence to be unsatisfactory in relation to this; he could not give much detail as to what he says that they were doing in or around February other than saying that he found that certain, unspecified, tasks had not been done by other, unspecified, members of staff and he felt he had more work to do.

84. In particular, in relation to February 2021, he only made reference to one member of staff in terms of any hostility, LF. Even then, he could not provide any specific detail (other than noted below) of her behaviour other than to say

that she would be aggressive with him and swearing at him. He did not raise this with managers at any time during his employment.

85. The only specific allegation against LF was that on an unspecified date she had a conversation with the Claimant in which she asked him if he took a particular route to work and, once he had confirmed that he did, she told him that she had almost been involved in a car accident on that route. The Claimant, in his evidence, asserted that LF was threatening him. He did not, however, raise this at that time or at any time during his employment; the first time it is raised with the Respondent was in the ET1.

86. The Claimant also alleges that on an unspecified date in March 2021, NE asked him about his sexuality and when he did not reply made a comment that the Claimant *"liked boys".* Again, this was not raised with management during the Claimant's employment and was raised for the first time in the ET1.

87. On 17 March 2021, the Claimant made a note on A's body chart (p280) of two small, faded bruises on the right arm and a small scratch on the left shoulder. He approached MF about this and stated that he was not happy with what had been done in response to the concerns which he had raised in January.

88. MF was surprised at this as the Claimant had not raised any matters with him after the supervision on 27 January 2021. He offered to arrange a meeting with DMcF for the Claimant to discuss his concerns further. The Claimant agreed to this.

89. DMcF had worked for the Respondent for 20 years at the relevant time. He was the project manager for the Respondent Glasgow Connect service which consisted of five separate services including the service in which the Claimant worked. He was the registered manager for the service in terms of the Care Inspectorate. He was also a registered nurse.

90. He had been informed of the Claimant's concerns in January 2021 by MF and he reported these and the actions taken to look into them at the time to his line managers.

91. He had also reviewed the supervision record between the Claimant and MF at p124. He had similar concerns about how the Claimant had obtained the name of the support worker concerned as he considered that the information should have come more naturally from A rather than by asking leading questions.

92. DMcF's next involvement was when the Claimant asked for a meeting in March. This was organised by Teams and was on 18 March 2021. The meeting was attended by DMcF, MF and the Claimant. There was no written record of this meeting. The Tribunal finds that the following issues were discussed:

    a. DMcF emphasised to the Claimant that it was important to report concerns as soon as possible.

    b. The Claimant asked which incidents should be reported and DMcF explained that it was a matter of professional judgment drawing a distinction between a small bruise and one the size of a football.

    c. The Claimant made reference to training that had been delivered about adult protection and, specifically, the example of people using language that they would not normally use. DMcF asked why he was raising this and whether he had witnessed something of this nature. The Claimant replied he had and made reference to A saying they had bumped their shin. DMcF did not consider this was indicative of any abuse having occurred.

    d. It was said by the Claimant that if DMcF read the daily records then he would find all the evidence of abuse in those. DMcF asked what the Claimant meant by this and he made reference to people completing records for three users but not the fourth.

93. After the meeting, DMcF asked MF to provide him with the daily records for all service users over the previous months and reviewed these. He noted that on occasion a full record was not completed for certain service users. Where that was identified, he checked the daily records either side of those

dates to see if the body charts showed any marks/injuries or if there was any issue with the behaviour of the user. He found nothing at all, let alone anything that raised any concerns for him.

94. In terms of what was recorded on the body charts, DMcF did not consider any of this raised an issue; most of what was recorded were minor scratches and bruises; there was nothing out of the ordinary in the context of the disabilities and behaviours of the users.

95. DMcF did consider that some of the records were not as detailed as they should be and that there were some days missing. He instructed MF to remind staff of the need to be thorough in their record keeping. He also asked MF and SMcL to be more present and visible on the premises for a further period to carry out observations.

96. On 30 March 2021, the Claimant made a record on the body chart for service user B (p296) of a small bruise on the upper left arm and dry, papery skin on the inner thighs.

97. On 31 March 2021, the Claimant also recorded these matters on the Respondent's PACE system. PACE is computer system for recording serious incidents and accidents. These reports go directly to DMcF. The Claimant's record is at p129-131 and records that he was assisting B with the morning routine. B was in the bath and the Claimant recorded that he noticed the skin patches on the inner thighs which he described as being discoloured and papery. He describes B as appearing uncomfortable and splashing water towards the groin area.

98. The Claimant reported the matter to MF who attended the premises on 31 March 2021 to observe B. He was accompanied by SMcL and another support worker who was familiar with B. They observed scratches on B's thighs which appeared to be historic marks that had not healed. One of B's behaviours was to put their hands down their pants and scratch at themselves. Marks of this nature were not unusual for B given this behaviour and MF, SMcL and the support worker did not consider this raised any concerns.

99. On 3 April 2021, MF held a team meeting at the premises involving all staff to discuss various issues that had arisen which included the issues raised by DMcF regarding the need for proper record keeping. A minute of this meeting is in the bundle at pp132-136. The document has been redacted to remove any data which might identify different service users or disclose their personal data. As noted above, the Tribunal had sight of the unredacted document to confirm that the redactions did not exclude relevant evidence.

100. The Claimant alleges that at this meeting he was either subject to bullying by LF or that other employees raised LF's treatment of him during the meeting; the Claimant's position was not entirely clear and this was not pled in his ET1 or his further particulars. There is nothing regarding this recorded in the minutes and none of the witnesses who were present at this meeting (MF, SMcL and CS) could recall anything involving the Claimant. They could recall an argument involving LF, NE and another employee but the Claimant was not involved in this in any way. The Tribunal finds that there was no evidential basis for the Claimant's allegations.

101. In April 2021, A was moving out of the Respondent's premises to another care provider. The reason for this was that the local authority which funded A's care had made a policy decision that all persons whose care they funded should be moved to care facilities run by that local authority.

102. There was no other service users immediately replacing A and so there was a diminished need for support workers. MF advised the Claimant that, when A left, the Respondent would not be able to offer him hours at the premises but that there may be hours at other premises which could be offered to him. MF did try to contact the Claimant after 21 April 2021 to offer him shifts at the other premises which he managed but could not got hold of the Claimant.

103. The Claimant's last shift at the premises was on 21 April 2021. On this day, he had a discussion with SMcL about his haircut and she said that it was a bit uneven and needed a bit taking off at the back. The Claimant did not raise any complaint or grievance about this comment (that is, that he considered it

a threat) at the time or in specific terms in the correspondence recorded below. The first time he refers to this as a threat is in his letter of resignation.

104. There was an email exchange between the Claimant and DMcF regarding his review of the daily records on 21 & 22 April 2021 (p143). The Claimant emailed DMcF on 21 April 2021 asking what conclusions had been reached. DMcF replies on 22 April explaining that he had gone through several months of records; he noted that there had been the odd day missing here and there but that he checked the records either side of such dates and found nothing to show any unexplained marks being recorded; he explained that he had asked MF to remind the staff to be more diligent in making these records. He concluded by saying that he could see no evidence of any abuse from what he had reviewed. He provided the Claimant with CMcL's email address if the Claimant wished to escalate the matter to her. He did not do so directly.

105. On 22 April 2021, the Claimant sent an email (p176) to a group known as the Quarrier's Former Boys & Girls Association setting out his concerns about the marks he had seen on A and B, alleging that he has been threatened for raising his concerns with management and that management did not seem interested in investigating these concerns.

106. This Association is not part of the Respondent and has no role in the safeguarding of service users. They forwarded the email to CC who replied to the Claimant by email dated 26 April 2021 (pp146-147). He reassured the Claimant that any complaints would be taken seriously and offered to speak to the Claimant directly, providing his contact telephone number. The Tribunal notes that the Claimant did not make contact with CC by telephone.

107. CC escalated this to AD who also emailed the Claimant on 26 April (p149-150) providing the Claimant with a copy of the Respondent's whistleblowing policy and procedure. AD also offered to speak to the Claimant directly to discuss his concerns and asking him to provide further details. There followed an exchange of emails between the Claimant and AD on 27 & 29 April (p148-149) in which the Claimant provides more information. On 28 April 2021, AD speaks to the Claimant by telephone to arrange a meeting to

discuss this; initially this was to be in person but, because AD had recently had Covid, it was changed to a further telephone call.

108. On 3 May 2021, AD emails the Claimant (p148) to say that he has been trying to call him but there is no reply. He asks if the Claimant is free to speak by telephone or by Teams on 4 May 2021. There is no response from the Claimant. AD sends the Claimant an invite to a Teams meeting (p154) to be held at 10am on 4 May 2021. The Claimant did not attend. AD emailed him the same day (p153) stating that he had been trying to contact the Claimant but there was no reply. He asks the Claimant to contact him. The Claimant did not do so.

109. On 17 May 2021 (p156), AD emails the Claimant stating that he has been trying to contact him with no response. He attaches a letter to the email (p157-158) setting hot the issues raised by the Claimant and AD's attempts to contact him. He asks the Claimant to contact him to arrange a meeting to take matters further. There was no direct response by the Claimant to this letter.

110. AD sent the Claimant a further letter dated 26 May 2021 (p159-160) noting that there had been no response and stating that if the Claimant did not make contact by 4 June 2021 then AD would proceed to consider the Claimant's complaint based on the information available to him.

111. This letter also noted that another manager had been trying to contact the Claimant about the EU "settled status" scheme and the Claimant's continued right to live and work in the UK after the country had left the EU. It advised the Claimant that there was a deadline of 30 June for him to provide the Respondent with evidence of his continued right to work in the UK.

112. A further letter regarding the Claimant's settled status dated 15 June 2021 (p170) was sent to him because he had not responded in relation to this. The letter noted that, without evidence of settled status, it would be an offence for the Respondent to continue to employ him and that his employment "may be terminated" as a result.

113. A letter dated 30 June 2021 (p174) was sent to the Claimant reminding him of the deadline for applying for settle status. The letter also makes reference to the Respondent's relief policy and, specifically, that the policy states that any relief worker who does not work shifts for a period of 3 months would be removed from the relief register. It does not state that the Claimant will be removed, when he would be removed or that removal from the register amount to a termination of employment.

114. In June 2021, AD produces a report into the concerns raised by the Claimant (pp175-179). It sets out the emails from the Claimant in which he makes his complaints and the exchange of correspondence between AD and the Claimant seeking to gather further information. It records that AD had contacted the Respondent's safeguarding team to identify whether any concerns about A had been raised. It notes that there had been anonymous complaints made to the Officer of Public Guardianship and the relevant Health & Social Care Partnership about A's move to a local authority facility which included complaints that A's family were financially abusing them. The reports states that AD contacted DMcF to gather further information and sets out what DMcF had provided in relation to the issues the Claimant raised in the workplace and what actions had been taken. The report concluded that there was no evidence to support the Claimant's complaints and no action should be taken unless the Claimant made further contact.

115. On 14 July 2021, CMcL is contacted by email (pp183-184) by Glasgow City Health & Social Care Partnership (HSCP) regarding anonymous complaints received by the Care Inspectorate about the service in which the Claimant worked. From the terms of the complaints, the person from the HSCP has inferred that the complainer is an employee of the Respondent. It was not in dispute between the parties that it was the Claimant who made these complaints.

116. CMcL investigates the matter and produces a report dated 30 July 2021 (pp195-205). The report concludes that there is no evidence of any pattern of abuse. This report was provided to the HSCP and no further action was taken.

117. The Claimant took legal advice from a solicitor in early July 2021; he could not recall the exact date. The solicitor advised him to contact ACAS as soon as possible because any claim may still be in time. He did so on 20 July 2021 when he engaged the Early Conciliation process. An early conciliation certificate (p21) was issued on 12 August 2021.

118. The Claimant received advice that he needed to have resigned in order to be able to bring a claim to the Tribunal. He, therefore, resigned by letter dated 10 August 2021 (p216). A hard copy was posted through the door of the premises in which he had worked. It stated that the reason for his dismissal was the work environment of *"marginalisation, bullying and discrimination"* which made him unable to do his job and made his position untenable. Reference is made to the claimant reporting potential abuse of residents and this resulting in *"threats, pressure and undermining"* culminating in a senior member of staff making a threat to his person (a reference to SMcL's comment on the Claimant's haircut). The letter states that the Claimant did not feel safe to return to the workplace after this comment and that all subsequent contact with the Respondent has caused him severe mental distress. The Tribunal notes that nothing to this effect was raised in his correspondence with CC and AD.

119. The Claimant engaged the ACAS Early Conciliation process for the second time on 10 August 2021. He did so because he understood that the first certificate would not cover a claim for constructive dismissal. The second Early Conciliation certificate (p22) was issued on 8 September 2021.

120. The Claimant lodged his ET1 on 31 October 2021; he did so himself without the assistance of a solicitor or any other adviser. He could provide no explanation why he did not lodge it on an earlier date. He had received advice and understood that there were time limits for lodging his claim. He did not assert that he had faced any form of impediment which prevented him from lodging his claim before 31 October 2021.

Claimant's submissions

121. The Claimant lodged no written submissions and made no comments on the submissions lodged on behalf of the Respondent.

Respondent's submissions

122. The Respondent's agent lodged written submissions which are summarised as follows.

123. The submissions start by setting out the issues which the Tribunal requires to determine. They then go on to make comments about the evidence and make suggested findings in fact. For the sake of brevity, the Tribunal does not intend to set out the detail of the facts which it is submitted should be found but these are noted.

124. Turning to the unfair dismissal claim, it is submitted that the Respondent dismissed the Claimant on 2 August 2021 when it removed him from its relief register as per their policy. The terms of the policy was brought to the Claimant's attention by letter dated 30 June 2021. He was not, therefore, in a position to resign from his employment.

125. In the event that the Tribunal does not agree with the Respondent on this question, the submissions turn to the question of whether there was a fundamental breach of contract. The matters which the Claimant alleges amount to a breach of trust and confidence are set out.

126. The Respondent submits that no allegations of bullying or threatening behaviour had been raised by the Claimant prior to his resignation. Further, the evidence (for example, that of SMcL) did not support these accusations.

127. Further, it is submitted that the evidence led by the Respondent shows that the Claimant's concerns were taken seriously and looked into by managers within the Respondent's organisation.

128. On this basis, it is submitted that there was no breach of contract, let alone one which was fundamental.

129. The submissions make reference to various legal principles and authorities. Again, for the sake of brevity, these are not repeated here, particularly as they also appear below where the Tribunal sets out the relevant law.

130. The Respondent submits that the Claimant had affirmed the contract by delaying too long between the "last straw" and his resignation. Further, that the Claimant's engagement in correspondence with certain managers within the Respondent in the period immediate after the alleged "last straw" demonstrates that he had considered himself still in employment as does the wording of his resignation letter.

131. Further, it was submitted that there were other reasons for the Claimant's resignation and Mr Asbury sets out what these are said to be.

132. There are then submissions made about the fairness of any dismissal (if such is found by the Tribunal). Given the Tribunal's conclusions below, it does not intend to set out the detail of this other than to note that the Respondent sets out a position that any dismissal was fair.

133. Turning to the detriment claim, the primary submission is that this claim was lodged out of time. It is submitted that the claim was present outwith the normal time limit and the reasons for this are set out.

134. The law relating to the exercise of the Tribunal's discretion to hear such a claim out of time are set out in the written submissions. Again, for the sake of brevity and to avoid duplication with what is set out below, the Tribunal does not intend to set these out in detail.

135. It is submitted that the Claimant does not set out a clear reason why his claim was not lodged in time. It is noted that he had access to legal advice and ought to have known of the relevant time limits. It is said that it was reasonably practicable for the claim to have been lodged in time.

136. In any event, it is submitted that the claim was not lodged in a further period which would be considered reasonable given the length of the delay and the lack of an adequate explanation from the Claimant as to why he lodged the claim when he did.

137. The written submissions go on to address the substantive issues in the detriment claim. Given the Tribunal's decision as set out below and, once more, for the sake of brevity, the Tribunal does not intend to set out the detail of these. It notes that the Respondent submits that there was not a qualifying disclosure and that the Claimant was not subject to any detriment.

138. The submissions conclude by addressing issues of remedy which, for the same reasons as above, the Tribunal does not intend to set out.

Relevant Law

139. A disclosure is a protected disclosure if it meets the definition set out in s43A ERA read with ss43B-H:

43A Meaning of 'protected disclosure'

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 sections 43C to 43H.

43B Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).]

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …—

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

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

140. In order to be a qualifying disclosure, any communication must have sufficient factual content capable of tending to show one of the matters listed in s43B(1) and a mere allegation is not enough (*Kilraine v Wandsworth* LBS [2018] ICR 1850).

141. The factual accuracy of the allegations is not determinative of whether one of the relevant failures listed in s43B has been or is likely to occur but can be an important tool in deciding whether the worker had a reasonable belief that the disclosure tended to show a relevant failure (*Darnton v University of Surrey* [2003] ICR 615). The term "likely" in this context requires more than a possibility or risk of a relevant failure (*Kraus v Penna Plc* [2004] IRLR 260).

142. Any belief on the part of the worker must be genuinely and reasonably held at the time at which the disclosure is made (*Kilraine*).

143. In determining whether any disclosure is in the public interest, the Court of Appeal in *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731 set out factors which should be considered:

a. The number of people whose interests are served by the disclosure.

b. The nature of the interests affected and the extent to which they were affected by the wrongdoing disclosed.

c. The nature of the wrongdoing disclosed.

d. The identity of the alleged wrongdoer.

144. The EAT in *Dobbie v Felton t/a Feltons Solicitors* [2021] IRLR 679 summarised the position at paragraphs 27:-

27 There are a number of key points I consider it is worth extracting from Underhill LJ's reasoning, and re-emphasising:

(1) the necessary belief is that the disclosure is made in the public interest. The particular reasons why the worker believes that to be so are not of the essence

(2) 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 – Underhill LJ doubted whether it need be any part of the worker's motivation

(3) the 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

(4) a disclosure which was made in the reasonable belief that it was in the public interest might nevertheless be made in bad faith

(5) there is not 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

(6) the statutory criterion of what is 'in the public interest' does not lend itself to absolute rules

(7) 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

(8) the broad statutory intention of introducing the public interest requirement was that 'workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers'

(9) Mr Laddie's fourfold classification of relevant factors may be a useful tool to assist in the analysis:

i. the numbers in the group whose interests the disclosure served

ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed

iii. the nature of the wrongdoing disclosed

iv. the identity of the alleged wrongdoer

(10) where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest.

145. In the *Dobbie* case, the EAT went on to set out further guidance at paragraph 28 of its judgment.

146. Section 47B ERA makes it unlawful for a worker to be subject to a detriment on the grounds that the worker made a "protected disclosure".

147. The question of whether there is a detriment requires the Tribunal to determine whether *"by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work"* (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL).

148. Section 48(3)(a) ERA states that the Tribunal shall not consider a complaint under s47B unless it is presented within 3 months of the act or failure giving rise to the claim. Where there are a series of deductions then s48(3)(a) states that the time limit runs from the last deduction in that series.

149. The Tribunal has discretion under s48(3)(b) to hear a claim outwith this time limit where they consider that it was not reasonably practicable for the claim to be presented within the 3 month time limit and it was presented within a further period that the Tribunal considers to be reasonable.

150. Under s207B ERA, the effect of a claim entering ACAS Early Conciliation is to pause the time limit until the date on which the Early Conciliation Certificate is issued. The time limit is then extended by the period the claim was in Early

Conciliation or to one month after the Certificate is issued if the Early Conciliation ends after the normal time limit.

151. The burden of proving that it was not reasonably practicable for the claim to be lodged within the normal time limit is on the claimant (*Porter v Bandridge Ltd* [1978] IRLR 271).

152. In assessing the "reasonably practicable" element of the test, the question which the Tribunal has to answer is "what was the substantial cause of the employee's failure to comply" and then assess whether, given that cause, it was not reasonably practicable for the claimant to lodge the claim in time (*London International College v Sen* [1992] IRLR 292, EAT and [1993] IRLR 333, Court of Appeal and *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119).

153. One of the most common reasons why a claimant will not lodge their claim within the normal time limit is either ignorance of, or a mistake regarding, the application of the relevant time limit. The leading case on this is *Wall's Meat Co Ltd v Khan* [1978] IRLR 49 where, at paras 60-61, Brandon LJ stated:

"the impediment [to a timeous claim] may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable."

154. The test for whether it was reasonable for the claimant to be aware of the time limit is an objective one and the Tribunal should consider whether a claimant ought to have known of the correct application of the time limit (see *Porter, Khan, Avon County Council v Haywood-Hicks* [1978] IRLR 118).

155. Ignorance or mistake *"will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made"* (as per Brandon LJ in *Khan*).

156. Where the Tribunal concludes that it was not reasonably practicable for the claimant to have lodged his claim in time then it must go on to consider whether it was lodged in some further period that the Tribunal considers reasonable.

157. This is a question for the Tribunal to determine in exercising its discretion (*Khan*) but it must do so reasonably and the Tribunal is not free to allow a claim to be heard no matter how late it is lodged (*Westward Circuits Ltd v Read* [1973] ICR 301).

158. In assessing the further delay, the Tribunal should take account of all relevant factors including the length of the further delay and the reason for it. It will also be relevant for the Tribunal to assess the actual knowledge which the claimant had regarding their rights (particularly the application of the time limit) and what knowledge they could reasonably be expected to have or investigations they could reasonably be expected to make about their rights (*Northumberland County Council v Thompson* UKEAT/209/07, [2007] All ER (D) 95 (Sep)).

159. Section 94 of the Employment Rights Act 1996 makes it unlawful for an employer to unfairly dismiss an employee.

160. Section 95(1) of the 1996 Act states that dismissal can arise where:

"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."

161. The circumstances in which an employee is entitled to terminate their contract by reason of the employer's conduct is set out in the case of *Western Excavating v Sharp* [1978] ICR 221. The Court of Appeal held that there required to be more than simply unreasonable conduct by the employer and that had to be a repudiation of the contract by the employer. They laid down a three stage test:

a. There must be a fundamental breach of contract by the employer

b. The employer's breach caused the employee to resign

c. The employee did not delay too long before resigning thus affirming the contract

162. The breach of contract relied on as founding the dismissal must be by the employer. However, this is not restricted to the actions of the person or persons with the authority to dismiss the claimant. In *Hilton International Hotels (UK) Ltd v Protopapa* [1990] IRLR 316 it was held that the conduct of any supervisory employee will bind the employer provided the supervisor is acting in the course of his or her employment. On the other hand, the actions of employees who do not have a supervisory role may not be capable of amounting to a breach of contract by the employer. The extent to which the employer has vicariously liability for such actions (for example, where they are liable for the discriminatory acts by their employees under the Equality Act 2010) will go to the question of whether the actions of other employees can amount to a repudiatory breach by the employer.

163. A breach of contract can arise from an express term of the contract or an implied term. For the purposes of this case, the relevant term was the implied term of mutual trust and confidence.

164. The test for a breach of the duty of trust and confidence has been set in a number of cases but the authoritative definition was given by the *House of Lords in Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 that an employer would not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

165. The "last straw" principle has been set out in a range cases with perhaps the leading case being *Lewis v Motorworld Garages Ltd [1985] IRLR 465*. The principle is that the conduct which is said to breach trust and confidence may consist of a series of acts or incidents, even if those individual incidents are quite trivial, which taken together amount to a repudiatory breach of the implied term of trust and confidence.

166. The “last straw” itself had to contribute something to the breach even if that is relatively minor or insignificant (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833).

167. The *Kaur* case also set out practical guidance for the Employment Tribunal in addressing the issue of whether a claimant had affirmed the contract in the context of a “last straw” case:

> *“(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju v Waltham Forest LBC [2005] IRLR 35) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation ….)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?”*

168. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA). The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal.

169. In a constructive dismissal case, the reason for dismissal is the reason for the breach of contract by the employer (*Berriman v Delabole Slate Ltd* [1985] ICR 546, CA).

170. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

171. In considering s98(4), the Tribunal should take into account all relevant factors such as the size and administrative resources of the employer. There are two matters which have generated considerable case law and which are worth highlighting

172. First, there is the question of whether an employer has followed a fair procedure in dismissing the employee. The well-known case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 it was held that a failure to follow a fair procedure was sufficient to render a dismissal unfair in itself (although the compensation to be awarded in such cases may fall to be reduce to reflect the degree to which the employee would have been fairly dismissed if the procedural errors had not been made – the so-called "Polkey" reduction).

173. Second, the Tribunal needs to consider whether the dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

Decision – Protected Disclosure Detriment

174. The Tribunal will deal with this claim first and the starting point for this is the issue of time bar. The reason for this is that time bar is, potentially, a complete answer to the claim.

175. There is no question that the ET1 was lodged out of time:

    a. The last alleged detriment took place on 21 April 2021 and so, assuming that the earlier alleged detriments form a series of acts (the Tribunal has made no determination of this point), the ordinary three month time limit expired on 20 July 2021.

    b. The Claimant engaged ACAS on 20 July 2021 and the certificate was issued on 12 August 2021. The "stop the clock" provisions under s207B ERA, therefore, extend the time limit to 12 September 2021.

c. The ET1 was not lodged until 31 October 2021 and so was lodged out of time.

176. The question is, therefore, whether the Tribunal exercises its discretion to hear the claim out of time. The starting for this is whether it was reasonably practicable for the claim to be lodged in time.

177. The Claimant has not alleged any impediment which prevented him lodging the claim in time. He sought legal advice in July 2021, he engaged Early Conciliation timeously, he continued to receive advice and engaged Early Conciliation a second time. He was clearly capable of taking steps to progress his case.

178. The Claimant has not sought to rely on a lack of knowledge about his rights or time limits as an explanation. Indeed, his evidence was that he did receive advice about time limits in July 2021 which is what prompted him to contact ACAS on 20 July 2021. He was, therefore, aware that time limits were an issue.

179. When he was asked by the Tribunal why he lodged the ET1 on 31 October 2021, he could give not give any specific reason and said he could not recall. There was no evidence that there was something specific which prompted him to take action at that time and the Tribunal considers that he had simply failed to progress matters rather than being impeded.

180. For these reasons, the Tribunal considers that it was reasonably practicable for the ET1 to have been lodged in time; the Claimant was clearly capable of taking action to progress his claim; he was aware of the existence of time limits; he has presented no explanation why the ET1 was not lodged in time; the only inference which the Tribunal can draw is that the Claimant simply failed to act timeously.

181. The Tribunal, therefore, is not prepared to exercise its power to hear the detriment claim out of time.

182. The claim under s47B of the Employment Rights Act 1996 was lodged out of time. The Tribunal is not prepared to exercise its discretion to hear this claim out of time. The claim under s47B of the 1996 Act is, therefore, dismissed.

183. The Tribunal should be clear that, even if it had been prepared to exercise its discretion to hear this claim out of time, it would not have upheld the substantive claim for the following reasons:

a. In respect of the alleged detriments carried out by LF, NE and B, there was no evidence whatsoever that they were aware of the disclosures which the Claimant had made. The Tribunal accepted the evidence from DMcF, MF and SMcL that they deliberately did not inform the support workers of the allegations made by the Claimant whilst they carried out their observations in case such knowledge would lead to any perpetrator changing their actions to avoid detection. There was certainly no evidence that LF, NE or B had made reference to knowing about the allegations nor was there any evidence from which such knowledge can be inferred. If these individuals were not aware of the disclosures then, logically, they cannot have subjected the Claimant to a detriment because of the disclosures.

b. In relation to the allegation against SMcL (who was aware of the disclosures), the Tribunal does not consider that her comments on 21 April 2021 amounted to a detriment. There is absolutely no basis on which it can be said that a reasonable employee would interpret a comment that their haircut needs a bit taken off at the back to be a death threat.

c. In relation to the allegation that the Claimant's disclosures were not taken seriously and properly investigated, the Tribunal will set out the detail of its decision on this below when dealing with the constructive dismissal claim but, in summary, the Tribunal does not consider that there is any basis to conclude that the disclosures were not taken seriously and not properly investigated when viewed from the perspective of the reasonable worker. Rather, this is a case where

the Respondent and its officers did not reach the conclusions that the Claimant wanted them to reach but that is not, on its own, sufficient to meet the test under *Shamoon.*

Decision – Unfair Dismissal

184. The Tribunal will address the submission made on behalf of the Respondent that the Claimant was expressly dismissed on 2 August 2021 when he was removed from the relief register rather resigning on 10 August 2021.

185. On the face of it, this is a very odd submission which, potentially, does not assist the Respondent. If there is an admitted express dismissal (as defined in s95(1)(a) ERA) then the Tribunal does not need to concern itself with determining whether there was a dismissal as defined in s95(1)(c) and can proceed straight to determining whether the admitted dismissal was fair in terms of s98 ERA. It is not a complete defence to the unfair dismissal claim as the Respondent seems to think.

186. However, the Tribunal does not consider that there was a dismissal on 2 August 2021. A dismissal is not effective until it is communicated to the employee and a mere intention to dismiss is not sufficient (*Gisda Cyf v Barratt* [2010] IRLR 1073, SC approving the longstanding approach to this issue from cases such as *Brown v Southall & Knight* [1980] IRLR 130 and *McMaster v Manchester Airport plc* [1998] IRLR 112). In this case, there was no evidence that the Claimant was informed of his dismissal by the Respondent before he resigned on 10 August 2021; the communication of 30 June is, at best, the Respondent informing the Claimant that they may apply their relief policy at some unspecified date in the future. Until they communicate that they have removed the Claimant from the register and that this terminates the contract of employment then there is no dismissal.

187. In these circumstances, the Claimant's employment continues until he terminates it by resigning on 10 August 2021. The unfair dismissal claim, therefore, hinges on the question of whether this was a dismissal as defined in s95(1)(c) ERA and the Tribunal will address this first.

188. There is a fundamental problem for the Claimant in satisfying the *Western Excavating* test; he did not resign until almost four months after the "last straw" relied on by him. The Claimant's case is that the last straw was the comment by SMcL on 21 April 2021 (although for reasons set out below, the Tribunal does not consider that this is capable of being a last straw) and he resigned on 10 August 2021.

189. The Claimant gives no reason why he delayed for so long. The Respondent clearly considered that he was still employed by them after 21 April 2021; they offered him shifts; they contacted him about his EU settled status; AD sought to engage with him about his complaints. Although the Claimant gave evidence that he considered that he had left on 21 April 2021 and was not going back, when viewed objectively there is no evidence that he had resigned until his letter of 10 August 2021. In particular, given that the terms of the Claimant's contract was that the Respondent was not obliged to offer shifts and the Claimant was not obliged to accept them, there is nothing in the conduct of both parties during the period from April to August 2021 that is inconsistent with the terms of the contract.

190. During this time, the Claimant had sought legal advice from solicitors and ACAS. He was clearly capable of taking action about his case and there was no impediment to him resigning. This is not a case where, for example, the Claimant delayed his resignation until he had found a new job and mitigated any potential loss of wages.

191. The Claimant's evidence was that he only resigned when ACAS told him that he needed to do so in order to be able to pursue a claim.

192. In these circumstances, the Tribunal considers that the Claimant unreasonably delayed his resignation and must be considered to have waived any breach assuming there was one (see further below). He has not, therefore, satisfied the *Western Excavating* test and, for this reason alone, the Tribunal would find that there was no dismissal as defined in s95(1)(c) ERA.

193. However, the Tribunal also considers that other elements of the test have not been made out by the Claimant.

194. There is a question as to whether the Claimant resigned as a result of any breach. The Claimant's evidence was that he only resigned because he had been advised to do so as a prerequisite for bringing a claim. Given that the Claimant is alleging that it was the term of trust and confidence which had been breached, the Tribunal considers that it is difficult to reconcile the Claimant's evidence that he only resigned to be able to bring a claim with an argument that the Respondent's actions had destroyed or seriously damaged the employment relationship.

195. To put it another way, the Claimant does not appear to have considered the Respondent's actions to be serious enough to resign until he was advised that he need to do so to pursue a claim.

196. In any event, the Tribunal does not consider that the matters relied upon by the Claimant were such as to satisfy the *Malik* test.

197. In relation to the actions of other employees (with the exception of SMcL), the Tribunal finds that there was insufficient evidence that the Claimant was bullied or otherwise mistreated by those employees as set out in the findings of fact above. The evidence of the Claimant was simply not adequate and gave very little detail other than two incidents; the comment by LF that she had nearly had a car accident on the same route as the Claimant took to work which the Tribunal does not consider amounts to a threat as asserted by the Claimant; the questions being asked by NE about the Claimant's sexuality which are certainly intrusive.

198. In any event, even if other employees had mistreated the Claimant, the Tribunal does not consider that the actions of these individuals can, in any way, be deemed to be acts by the Respondent; none of these individuals were in a supervisory or management role and, rather, held the same status as the Claimant; they were not acting on behalf of the Respondent when allegedly making any of the comments relied on by the Claimant.

199. The position may have been different if the Claimant had raised a grievance about these actions and the Respondent took no action to address this. It could then be said that the Respondent had failed to provide the Claimant

with a safe working environment or was tacitly endorsing such conduct. However, that was not the case.

200. The Claimant did allege that other staff had raised issues with management about how LF was behaving towards him. However, the Tribunal prefers the evidence of the Respondent's witnesses that no such issues had been raised with them at any time and, in particular, not at the team meeting on 3 April 2021.

201. The position is different in relation to the comments allegedly made by SMcL on 21 April 2021 as she was someone in a supervisory role and so it is possible that her actions could be deemed to be acts by the Respondent.

202. However, for the reasons set out above in relation to the detriment claim, the Tribunal does not consider that SMcL's comments about the Claimant's haircut are capable of amounting or contributing to a fundamental breach of contract. The Tribunal considers that there is no basis on which the Claimant could reasonably have concluded that a comment that his haircut needs a bit taken off at the back amounted to a death threat as he alleges. The Claimant has taken what is clearly an innocuous comment and given far more significance and weight than it could possibly deserve.

203. Turning to those matters which are clearly acts by the Respondent, the Tribunal does not consider that there is any basis on which it could conclude that the Respondent was acting in a manner likely or calculated to destroy or seriously damage the employment relationship.

204. In coming to this conclusion, the Tribunal has taken account of the following matters:

a. MF advised his manager, DMcF, of the Claimant disclosures as soon as they were made.

b. MF conducted a review of the daily records (both activity sheets and body logs) in respect of A for several months prior to January 2021 shortly after the Claimant raised his concerns in January 2021. The

purpose of this was to identify any pattern in A's behaviour or in recorded marks/injuries that would indicate abuse. None were found.

c. MF and SMcL increased their presence in the workplace and carried out discrete observations of the interactions of the staff and service users for the months following the Claimant's disclosure in January 2021.

d. MF discussed the Claimant's concerns with him at his supervision in January 2021 explaining what was needed if there was to be evidence of abuse.

e. DMcF met with the Claimant in March 2021 to discuss the Claimant's concerns.

f. After that meeting, DMcF carried out his own review of the daily records for the same purposes as MF. He also found no evidence of abuse.

g. MF, SMcL and FMcP examined B immediately after the Claimant had raised concerns at the end of March 2021. The daily records for B were also examined for any changes in behaviour or other evidence of abuse. None were found.

205. In these circumstances, it is very difficult, if not impossible, to see any basis on which it could be said that the Respondent had not taken the Claimant's disclosures seriously and investigated properly. Indeed, when asked by the Tribunal during his evidence what more he expected the Respondent to have done, the Claimant struggled to identify any further steps that should have been taken by the Respondent other than that there should have been some formal investigation report. The lack of some formal report, on its own, is not something capable of destroying or seriously damaging the employment relationship in light of what was actually done by the Respondent.

206. The Claimant did suggest that the Respondent should have spoken to other support workers in their investigation but the Tribunal accepted that they had reasonable and proper cause for not doing so. If they had told staff about

the Claimant's concerns then, if there was abuse being perpetrated, those responsible would be on notice of the Respondent's investigations and could take steps to conceal their actions. Any abuse could then resume once the Respondent's guard was dropped.

207. The Claimant's evidence, in response to questions from the Tribunal, was that he had lost trust and confidence because nothing was discovered by the Respondent. The Tribunal considers that, in effect, the Claimant's case was that anything less than total agreement with his views was a breach of contract. It was clear to the Tribunal that the Claimant had, at a very early stage and on very little evidence, formed an entrenched and intransigent view that there had been abuse and was wholly unwilling to accept that more senior and more experienced staff could come to a different view.

208. Whilst the Tribunal was not making findings as to whether or not any abuse had occurred, it did consider that the Respondent had proper and reasonable cause for the conclusions they had reached; there was no evidence of any pattern of injuries or marks on A and B; both of these had disabilities or behaviours which could explain any bruising or other marks which were found; there was no evidence of any behaviour which would indicate abuse such as being upset or distressed.

209. For all these reasons, the Tribunal does not consider that there is any basis on which the actions of the Respondent could be said to meet the Malik test and so there was no fundamental breach of contract.

210. In these circumstances, the Tribunal concludes that the Claimant was not dismissed as defined in s95(1)(c) of the Employment Rights Act 1996 because there was no fundamental breach of contract, even if there had been such a breach then the Tribunal does not consider that the Claimant resigned in respect of such a breach and, in any event, the Claimant had unreasonably delayed in resigning to the extent that he had waived any breach.

211. The claim of unfair dismissal is, therefore, not well-founded and is hereby dismissed.

Employment Judge: **P O'Donnell**
Date of Judgment: **23 May 2023**
Entered in register: **24 May 2023**
and copied to parties