



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms J Thomas

**Respondent:** Stori Wales

**HELD AT:** Wrexham by CVP

**ON:** 20-23 & 26th  
June 2023

**BEFORE:** Employment Judge T. Vincent Ryan

## REPRESENTATION:

**Claimant:** Litigant in Person

**Respondent:** Mr O Lawrence, Counsel

**JUDGMENT** having been sent to the parties on 27<sup>th</sup> June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

**The Issues:** The following is the parties' agreed list of issues (initially dated 29 July 2023, but amended as required):

### **1. Health and Safety automatic unfair dismissal**

- a) Are the following allegations by the Claimant "circumstances of danger" for the purposes of section 100(1) Employment Rights Act 1996:
  - i. Lack of fire-fighting equipment, carbon dioxide extinguisher, fire blanket, carbon monoxide detector complained of by the Claimant between June - August 2021. This was essentially of great importance as Donna Evans had accepted a new tenant to move into the project in August/September 2021 who had a history of arson.

- ii. Lack of care regarding possible transmission of covid from 16<sup>th</sup> March 2020 when covid restrictions came into force to December 2021 (whereby I had left the company), in that clients were not asked or instructed to wear masks, maintain social distancing, clients using the same mugs as staff, lack of sanitizing gel, lack of batteries in thermometer, lack of handwash and unclean towels and tea towels.
- iii. Lone working;
- iv. Rusty nails poking out of a broken wooden bench in the garden in late Spring 2021. There were also chunks of wood missing from the table and benches giving rise to shards of wood and splinters protruding in effect to cause harm to staff and tenants.
- v. Hypodermic Needle - Raised H&S concern from December 2020 to 23<sup>rd</sup> August 2021. The danger is these needles transmit infectious diseases, especially blood-borne viruses, including HIV, Hep B AND Hep C.
- vi. ID Badge and Personal Safety Device - Raised this as H&S concern from December 2020 to July 2021. The danger of not having an ID Badge meant I could not be formally identified should an incident occur regarding a perpetrator either at the project or safe house. It also enhances security within the building.
- vii. Glass Table - I raised this as a H&S concern when the table arrived in Spring 2021, until I left in August 2021. The danger - I was concerned the glass would be smashed and used to either self-harm or as a weapon against a member of staff or tenant in the project. In addition, neither the table or chairs were screwed to the ground thus meaning the chairs could be thrown and used as weapons in the garden or indeed in the building as they were stored in the corridor overnight at the project.
- viii. Failure to Address Drug Abuse - Raised as a H&S concern from December 2020 to August 2021. The danger was both to me and the tenants. The continual use of cannabis in the building was overpowering on some days causing me to have nausea and headaches. The cannabis was also affecting the demeanor of the tenants who smoked it. Evidence of cuckooing and intravenous drug taking was discovered in Flat 9 of the project in December 2020. The North Wales Police were aware of this incident, and I believe attended the project to make safe the flat. Further evidence of drug use was confiscated from Flat 5 in 2021 when a female tenant left the project, in the form of helium balloon cartridges. I cannot be more definite of the date the cartridges were found as the tenant was not really known to me at the time of my employment. The cartridges were left on the worktop in the kitchen for some considerable time. They were not disposed of as directed by North

Wales Police. The cartridges were still visible in a box in the staff kitchen when I went sick in August 2021.

- ix. Wardrobe Blocking Fire Exit - Reported as a H&S concern on 22<sup>nd</sup> July 2021. The danger - If a fire had occurred in the project that evening the only means of exit from the top of the building would have been blocked.
- x. Carbon Monoxide Monitor - Reported as a H&S concern on 30<sup>th</sup> July 2021 as there was not one present in the kitchen of the project where staff and clients cooked. Further H&S concern raised on 19<sup>th</sup> August 2021 regarding lack of CMM in a safe house homing a young mother and baby. The circumstances of danger - The Failure to install can lead to carbon monoxide poisoning and possibly death.
- xi. Office Door Lock – I reported this as a H&S concern in June 2021 to Donna Evans and again on 18<sup>th</sup> August 2021 to Donna Evans. The circumstances of danger were – had there been a fire in the office or kitchen area, or any other emergency in the building or grounds of the project, neither I nor my colleagues would have been able to exit the building.
- xii. PAT Testing – I raised this as a H&S concern from January 2021 to August 2021. The circumstances of danger were that the portable electrical appliances had not been tested for four to five years. There was a danger that the appliances could cause a fire within the building overnight when the office is not manned causing risk to the tenants in the project.
- xiii. Other Health and Safety; failure to assess the danger of tenants carrying spades and other gardening equipment in the project garden – I raised this as a H&S concern from March 2021 to August 2021. The circumstances of danger were failure to carry out risk assessments for the vulnerable clients due to their mental health and aggressiveness. I felt the gardening equipment, spades, forks could be used as weapons against staff and/or clients living at the project.
- xiv. My line manager instructing me to creosote the garden fencing. – I raised this as a H&S concern in early Spring 2021 when the large tubs were delivered to the project. No risk assessment was undertaken by my line manager. The task not being disclosed in my job description. The circumstances of danger relating to this task were the lack of provision of overalls, safety goggles and gloves. In addition, inhalation of the chemicals within the creosote were a risk to my personal H&S. Lack of consideration shown regarding my disability.

- xv. My line manager instructing me to decorate and paint the walls and ceiling in the office at the project. – I raised this as a H&S concern from February 2021 to July 2021. No risk assessment was undertaken by my line manager. The task not being disclosed in my job description. The circumstances of danger relating to the task were lack of protective equipment. Being asked to climb ladders without any consideration to my disability and lack of supervision. I would not have been insured through my work to carry out such tasks. Inhalation of chemicals from the paint were a risk to my personal H&S.
- b) If so, did the Claimant reasonably believe those circumstances of danger to be serious and imminent and which she could not reasonably have been expected to avert while the danger persisted, refused to return to her place of work; or
- c) In the alternative, did the Claimant reasonably believe those circumstances of danger to be serious and imminent and did she take (or proposed to take) appropriate steps to protect herself or other persons from the danger and what were those steps and when were they taken? (the Claimant cannot rely on both s100(1)(d) and (e) in accordance with *Rodgers v Leeds Laser Cutting Ltd* [2022] EAT 69).
- d) Was the reason or principal reason for the Claimant's resignation on 10 September 2021 in respect of s100(1)(d) or (e) Employment Rights Act 1996?

### **The Facts:**

1. The respondent (R): The respondent is a registered social landlord supporting vulnerable clients through housing support contracts. It aims to promote and encourage independence by supporting people aged 16 – 25, and families, to manage "Occupation Contracts" (referred to as tenancies), to learn about healthy relationships, and to feel part of the local community. This case concerns a project, referred to as "the Project", in Ruabon, Wrexham where there were nine single person flats in a male block and female block, and three local safe houses. The individuals were variously described as "the boys" and "the girls", "clients", "service users", "customers" and "Tenants"; the preferred name is "Tenant". There were support workers, such as the claimant, and a Senior Support Worker in a line management position. All the Tenants were considered to be vulnerable; each Tenant had a personal Risk Assessment; some had substance abuse issues.
2. The claimant (C): C commenced employment as a support worker on 7 December 2020 resigning by letter dated 10 September 2021, the effective date of termination was 8 October 2021, that is she gave one months' notice of termination. Her resignation letter is at page 163. She was employed as a Support Worker; it was not a residential role. Throughout her employment the claimant was conscientious and diligent. I accept that she wished the

circumstances of the tenants were better than they were, in that she hoped to support them in their vulnerability and assist them in learning how to manage their tenancies, learning about healthy relationships and that they would become part of the local community; she wanted to police and prevent substance abuse. To that end she also had expectations of a higher standard of administration and management, and of the environment in which she worked and that the tenants lived, than she thought was the case. She was unhappy and disconcerted by the tenants' manifestation of their vulnerabilities. She was unhappy and unsettled by what she considered to be poor management and an unsatisfactory living and working environment. This led to her being disgruntled. That led to her seeking alternative employment. During the course of her employment and subsequently she has alleged that there were circumstances of danger which she says were serious and imminent and which she could not be expected to avert and so she left her employment. Further, and in the alternative, she says that she took appropriate steps to protect herself, presumably by resigning.

3. I take judicial notice of the fact that the events in question occurred during the sad time when the country was affected by the COVID pandemic. This had the effect, amongst many other things, of disrupting normal activity at work. Suppliers were unable to supply the usual provisions or to the same degree as before; people were asked not to stockpile provisions; traders and engineers and the like were unable to carry out visits for inspections and anything other than urgent repairs. In general, the provision of most services was suboptimal. That was inevitable. The disruption and the delays so described are a recurring theme throughout this case, running in parallel with that other recurring theme of the claimant's conscientious wish that circumstances, in general at the Project, should be better.
4. A further feature of the claimant's circumstances was that her partner was undergoing medical treatment and was, at all times during the pandemic, a vulnerable person. This naturally heightened the claimant's aversion to risk from cross-contamination; she wished to work from home, and with permission agreed a variation of the rotas so that she worked from home for 3 days each week and she also had the advantage of beneficial long-term leaves of absence. That said I find she was naturally anxious about attending at work, cautious about sanitary arrangements and unhappy that she was not granted the facility of whole-time remote working. These feelings appear to me to have fuelled her disaffection. This is not a criticism; it is an observation.
5. C's allegations concerning "circumstances of danger" for the purposes of section 100(1) Employment Rights Act 1996.
  - 5.1. Allegation #1: (Firefighting equipment) *Lack of fire-fighting equipment, carbon dioxide extinguisher, fire blanket, carbon monoxide detector complained of by the Claimant between June - August 2021. This was essentially of great importance as Donna Evans had accepted a new tenant to move into the project in August/September 2021 who had a history of arson:*

- 5.1.1. The property occupied by the Project was owned by Wales & West Housing Association (WWHA); it was responsible for the implementation of a fire risk policy, provision of equipment consistent with the current policy, and preparation of fire risk assessments (FRAs). It would send the FRAs to the Senior Support Worker who would be responsible to check through them and pass them on to R's Compliance Dept/Officer; she should print them off and place an accessible copy in the designated box in the office.
- 5.1.2. R is responsible as employer for the health and safety of its employees, who also have a statutory duty to take care of their own health and safety and that of others who may be affected by their actions at work.
- 5.1.3. The claimant considered that there should be fire extinguishers strategically placed throughout the building. The provision of fire extinguishers in the rooms of tenants, communal and office areas had been part of WWHA's policy but during the claimant's employment that policy changed. It seems that there is a general trend away from the provision of fire extinguishers to an emphasis on evacuation, and this is supported by the Fire Service. In line with the changed policy the respondent arranged, as instructed by WWHA, for the fire extinguishers to be removed. There was a delay. During the period of delay most of the decommissioned fire extinguishers were stored in the office. Some fire extinguishers remained in situ. This was referred to by a fire officer following an inspection as being inconsistent with the policy. Either there should be extinguishers in place or none; there was however no requirement to have the fire extinguishers which the claimant wished to have in place (save in respect of the kitchen area when in communal use).
- 5.1.4. The kitchen adjoining the staff office had a microwave oven for use by staff in. There was also a cooker. The cooker was intended for communal cooking by tenants. It was used at least on one occasion by the claimant to warm noodles for her lunch. I have no evidence of its use otherwise. The tenants were not permitted to cook communally during the period of Covid disruption and so the kitchen was not in general use. Until the fire officers visit in August 2021 when it was observed that there was no extinguisher or fire blanket, there had not been any, or rather it had been removed from its hook (presumably when other extinguishers were stored in the office). The respondent then provided the required firefighting equipment, that is on the same day that this omission was pointed out. The fire officer did not produce a formal audit report following her visit, but she sent an email to R identifying a few items that required action. The kitchen omission did not feature in the email; this indicated, as was confirmed in evidence, that the matter was not considered to be of primary importance; again, I presume, this was because R immediately corrected the situation. The claimant believed it was a serious matter or that it had been until corrected. There is no evidence of any event in kitchen where there was an evident risk to anyone of fire during the

claimant's employment save where she herself warmed through her own lunch. She was not required to do that. She could have averted any danger that she felt existed.

5.1.5. The claimant asked for a carbon monoxide detector to be fitted. This was not a legal requirement at the time. Upon request one was purchased by the Senior Support Worker, and it was installed immediately. There is no evidence of any incident where there was a leakage of carbon monoxide and indeed there was no evidence as to any source or potential source of such leakage.

5.1.6. There were deficiencies in the administration in that it appears the Senior Support Worker did not diligently scrutinise the FRAs before passing them on to R's compliance team and she did not print off the February 2021 FRA until August 2021. On occasion her checking appears to have been cursory; she herself described it as scan reading.

5.1.7. There was an inherent risk that in certain circumstances there could be a fire on the premises. Potentially a fire could be serious, but it may not be. There is no evidence that the claimant worked in or was required to work in an environment where such a serious risk was imminent.

5.1.8. The fire officer did not re-visit the Project until June 2022 to ascertain whether the items previously remarked upon (in August of the previous year) had been actioned. She wrote to R on 13 June 2022 confirming that she was satisfied that they had.

5.2. Allegation #2: ( COVID) *Lack of care regarding possible transmission of covid from 16<sup>th</sup> March 2020 when covid restrictions came into force to December 2021 (whereby I had left the company), in that clients were not asked or instructed to wear masks, maintain social distancing, clients using the same mugs as staff, lack of sanitizing gel, lack of batteries in thermometer, lack of handwash and unclean towels and tea towels.*

5.2.1. The claimant's partner was medically vulnerable. Understandably she was very concerned about the risk of contracting the virus and of passing it on. Upon her request the Senior Support Worker agreed that she could work from home on three days a week and attend the office two days per week. HR agreed a significant period of extraordinary leave, for which C was and is grateful. The available policies and procedures allowed for flexible working request to be made in accordance with statutory provision. C did not make one. She was not reminded of her right to make one. R considered that while some support could be given to tenants remotely there was a reasonable requirement for some personal involvement at the office.

5.2.2. Tenants would visit the office. The standing instruction was that tenants would be taken outside the office for one-to-one discussion as the office

was relatively small and 2 m social distancing could not easily be maintained. Tenants were asked to wear masks during such meetings. Some of the Tenants were exempted from wearing masks, and maybe some who were not exempted claimed to be so. R did not require support workers to conduct discussions with Tenants other than in accordance with social distancing and the taking of appropriate precautions by both parties. The conduct of such conversations was in the hands of a support worker at all times.

5.2.3. Staff and Tenants could either share cups and mugs or use their own but were required to clean them. If any member of staff or Tenant was wary of sharing, they could provide their own cup or mug or indeed they could re-wash and sanitise any previously used cup or mug to their own satisfaction.

5.2.4. When sanitising gel or hand wash ran short the Senior Support Worker would buy sufficient for the day. She did not stockpile. She did not buy in bulk. When C feared that the project would run short, she bought some with her own money. She was anxious that there would not be enough. R in general provided sufficient cleaning materials albeit there may have been some immediate shortage on any given day, but as I have said when that occurred the shortage was made good. The support workers and Tenants were not required to do without. C was not required to work in a situation where there was no available cleaning material.

5.2.5. When tea towels and towels became dirty, they were cleaned. On occasions C felt that they needed to be cleaned and she cleaned them. She was never required to use a dirty tea towel or towel.

5.2.6. The battery in a thermometer expired and was not renewed. The thermometer was not then used.

5.2.7. In the initial stages of the pandemic support workers were encouraged to travel alone in their cars. This policy was relaxed when, on one cited occasion, C was asked to travel in a car with a colleague wearing a mask and the car windows open. This occurred before July 2021.

### 5.3. Allegation #3: *Lone working:*

5.3.1. Lone working was an implicit part of the role of Support Worker. All support workers were issued with personal protection devices and instructions on its use.

5.3.2. C was issued with such a device during her first week of employment with instructions as to use. She received formal training on the use of the device in June 2021.



5.3.3. There is no evidence of any defect in the said device or of C experiencing any problems in using it, or indeed that she ever had need to or attempted to use it.

5.3.4. There is no evidence of any circumstances of danger created by, exacerbated by, or which could have been avoided by the device and its use.

5.3.5. C is dissatisfied that it took from December 2020 until June 2021 for formal training to take place. The training was given prior to the claimant's resignation.

5.4. Allegation #4 (Garden bench) *Rusty nails poking out of a broken wooden bench in the garden in late Spring 2021. There were also chunks of wood missing from the table and benches giving rise to shards of wood and splinters protruding in effect to cause harm to staff and tenants:*

5.4.1. The bench in question showed signs of wear and tear. It at least would have looked better if it had been painted; I have no reason to doubt that it was in a relatively poor state of repair and there was the risk that someone might get a splinter from sitting on it, or even a scratch/cut.

5.4.2. C was not required to sit at the bench, and neither was any other member of staff or Tenant. No one was threatened with any consequences of failing to use it, of averting any discomfort or perceived risk. I accept that they all may have been deterred by its appearance from sitting on it. Some people did use it and I have no evidence of anyone suffering any injury doing so.

5.4.3. The garden bench at best posed a remote risk of minor injury and its presence at the Project did not amount to circumstances of danger. C knew she and others did not have to use it if, having looked at it, they would rather not. WWHA replaced it shortly after C complained about it and well before her resignation.

5.5. Allegation #5 (Needle) *Hypodermic Needle - Raised H&S concern from December 2020 to 23<sup>rd</sup> August 2021. The danger is these needles transmit infectious diseases, especially blood-borne viruses, including HIV, Hep B AND Hep C:*

5.5.1. One of the claimant's colleagues reported that a needle had stuck in her soft shoe or trainer. She believed she had picked it up at the project.

5.5.2. At least one of the Tenants was diabetic and used a needle for injecting insulin. It also appears likely that at least one Tenant used needles and other drug paraphernalia to self-administer illicit drugs.

5.5.3. Following the report about the needle-stick the Senior Support Worker commissioned a needle sweep of the premises. None was found.

5.5.4. On occasions cannabis could be smelt at the Project. Whenever there was suspicion that a Tenant had breached the anti-drug policy, the Tenant in question would be spoken to and warned that their tenancy was in jeopardy, and a copy of the written policy would be distributed to each and every Tenant as a reminder, to reinforce the risk of eviction. R operated at all times within its anti-drug policy.

5.5.5. C was concerned at the lifestyle choices of some of the Tenants and the illegality of some of those choices. She is not accepting of any limitation placed on R by virtue of it trying to encourage and support vulnerable clients to wean them off illicit substances that are harmful to their health. C wanted stricter enforcement via police involvement, although the police cooperated with and worked with the Project and R at all times.

5.6. Allegation #6: *(ID Badge) ID Badge and Personal Safety Device - Raised this as H&S concern from December 2020 to July 2021. The danger of not having an ID Badge meant I could not be formally identified should an incident occur regarding a perpetrator either at the project or safe house. It also enhances security within the building:*

5.6.1. it was R's practice to issue ID badges to new starters and all staff. Staff were not obliged to wear the ID badges at all times at work. As a matter of policy, they were not to display the badges when visiting a safe house for fear of alerting neighbours. The support workers met the Tenants and were assigned client Tenants and so they were known and recognised by them. If a support worker was to visit a safe house, they would in general have met the resident first but, in any event, would not visit unannounced and without prior arrangement.

5.6.2. When C commenced her employment the machine for making the badges was broken. She, amongst others, was not issued with a badge. C asked repeatedly for a badge and referred to the availability of a store discount to which she would be entitled upon production of a badge (or as it happens other identification as an essential care worker). She also raised with R that another colleague who did not have a badge was "almost", but not, refused an essential-worker vaccination against covid; in other words, there was a potential for this entitlement to be refused but it did not arise. Staff who were not given a badge, and indeed all staff during the period of Covid, were issued with a letter by way of identification showing that they were employed by R and that they were essential workers; this was the principal method of identification for those who did not have a badge. C was issued with such a letter.

5.6.3. C found it embarrassing when she visited the local food bank to have to explain who she was. She would like to have had a badge to show to an occupant of a safe house, albeit that would have been contrary to policy. C felt that she did not have sufficient identification.

5.6.4. There is no evidence before me that C, or anyone else, was put at actual risk of a dangerous event, or could have been, bearing in mind that she had identification by way of a letter.

5.6.5. There were continuing problems and delays. The delays were in part due to Covid. There were hardware and software problems with the provision of a badge. An engineer was unable to visit the premises until August 2021 when the problem was resolved and those who were then employed who did not have a badge were issued with a badge.

5.7. Allegation #7 (Glass Table) *Glass Table - I raised this as a H&S concern when the table arrived in Spring 2021, until I left in August 2021. The danger - I was concerned the glass would be smashed and used to either self-harm or as a weapon against a member of staff or tenant in the project. In addition, neither the table or chairs were screwed to the ground thus meaning the chairs could be thrown and used as weapons in the garden or indeed in the building as they were stored in the corridor overnight at the project.*

5.7.1. R ordered a glass topped table and some chairs for the garden at the project.

5.7.2. C was and is concerned that the glass could be smashed and thereby cause a hazard and that either the table or the glass or the chairs could be hurled as weapons by anyone so inclined. She raised this concern.

5.7.3. R considered that the table and chairs were appropriate as items of furniture, not dissimilar to furniture elsewhere in the premises any of which could have been used as weapons by anyone so inclined.

5.7.4. There is no evidence that the table has ever broken or that chairs have ever been used as weapons or that there has ever been a threat of their use as weapons any more than there is any evidence before me that any other furniture was so misused.

5.8. Allegation #8:(Drug abuse) *Failure to Address Drug Abuse - Raised as a H&S concern from December 2020 to August 2021. The danger was both to me and the tenants. The continual use of cannabis in the building was overpowering on some days causing me to have nausea and headaches. The cannabis was also affecting the demeanour of the tenants who smoked it. Evidence of cuckooing and intravenous drug taking was discovered in Flat 9 of the project in December 2020. The North Wales Police were aware of this incident, and I believe attended the project to make safe the flat. Further evidence of drug use was confiscated from Flat 5 in 2021 when a female tenant left the project, in the form of helium balloon cartridges. I cannot be more definite of the date the cartridges were found as the tenant was not*

*really known to me at the time of my employment. The cartridges were left on the worktop in the kitchen for some considerable time. They were not disposed of as directed by North Wales Police. The cartridges were still visible in a box in the staff kitchen when I went sick in August 2021:*

5.8.1. as I have already found, R had and abided by an anti-drug policy.

5.8.2. I have already made findings about the suspected use of cannabis and the steps taken by R in relation to that.

5.8.3. R discovered, in a vacated flat, a stash of helium balloon cartridges which were empty. The empty cartridges were stored in the kitchen prior to disposal. I do not know when and how they were disposed of, but this did not involve C. There is no evidence that the empty cartridges posed a hazard. C was concerned at their use but as I understand it at the time of the discovery the Tenant who was responsible for the stash had vacated the premises.

5.9. Allegation #9:(Wardrobe) *Wardrobe Blocking Fire Exit - Reported as a H&S concern on 22<sup>nd</sup> July 2021. The danger - If a fire had occurred in the project that evening the only means of exit from the top of the building would have been blocked:*

5.9.1. C was concerned that a wardrobe was blocking a fire exit on the top floor of one of the blocks. It was reported.

5.9.2. EW, in exercise of her senior managerial responsibilities, checked with one of C's colleagues who said that the wardrobe did not block the fire exits, that is the stairwell, from the top floor and that although it was out of place there was sufficient space for the occupiers of the top flats to pass it and evacuate by the stairway.

5.9.3. C finished for the day and left work at the time that EW was checking.

5.9.4. On the next working day, the Senior Support Worker moved the wardrobe so that it was no longer even a potential blockage. It did not affect C in any event. Had there been a blockage of a fire exit it would have potentially affected the upstairs occupants but thankfully there was no fire or other events requiring evacuation at the time even though I am satisfied by R's evidence that the exit was not blocked.

5.10. Allegation #10: (Monitor) *Carbon Monoxide Monitor - Reported as a H&S concern on 30<sup>th</sup> July 2021 as there was not one present in the kitchen of the project where staff and clients cooked. Further H&S concern raised on 19<sup>th</sup> August 2021 regarding lack of CMM in a safe house homing a young mother and baby. The circumstances of danger - The Failure to install can lead to carbon monoxide poisoning and possibly death:*

5.10.1. I have already made findings in respect of the monitor. The monitor was installed prior to the claimant's resignation and at her request without delay.

5.11. Allegation #11(Office lock) *Office Door Lock – I reported this as a H&S concern in June 2021 to Donna Evans and again on 18<sup>th</sup> August 2021 to Donna Evans. The circumstances of danger were – had there been a fire in the office or kitchen area, or any other emergency in the building or grounds of the project, neither I nor my colleagues would have been able to exit the building:*

5.11.1. In June 2021 there was an incident when the office lock jammed and the occupants including C could not get out without calling for assistance.

5.11.2. At the time it was thought that this was a one-off incident whereby something had temporarily caused the lock to seize. Once the door was opened there was no apparent problem for the rest of that month, all of July, and most of August.

5.11.3. On 18 August 20 21 a similar incident occurred. The Senior Support Worker managed to climb out through a window and release the lock from the outside. Realising that this was not a one-off problem and there was a risk of re-occurrence, R commissioned the removal of the faulty lock and replacement with a working lock. The problem was solved.

5.11.4. There is no evidence before me that there were ever any other problems with that lock on that door. The lock was fixed before C's resignation. No one, including C, had considered that there was a continuing problem with the lock between June and August 2021 or after its repair.

5.12. Allegation #12 (PAT testing)*PAT Testing – I raised this as a H&S concern from January 2021 to August 2021. The circumstances of danger were that the portable electrical appliances had not been tested for four to five years. There was a danger that the appliances could cause a fire within the building overnight when the office is not manned causing risk to the tenants in the project.*

5.12.1. Regular and frequent PAT testing is recommended in commercial premises. It is required to be undertaken on a five yearly cycle.

5.12.2. The appliances in the project were tested in 2017. C was employed between December 2020 and October 2021.

- 5.12.3. There is no evidence before me that any electrical appliance posed a risk during the period of C's employment.
- 5.13. *Allegation #13: Other Health and Safety; failure to assess the danger of tenants carrying spades and other gardening equipment in the project garden – I raised this as a H&S concern from March 2021 to August 2021. The circumstances of danger were failure to carry out risk assessments for the vulnerable clients due to their mental health and aggressiveness. I felt the gardening equipment, spades, forks could be used as weapons against staff and/or clients living at the project.*
- 5.13.1. There was a garden at the project. R's support workers tried in vain to interest the Tenants in gardening. Management considered that it would be in the best interests of the Tenants to involve themselves in a communal activity of mutual benefit, and a healthy environmental activity at that.
- 5.13.2. The suggestion was made to the Tenants that they join in gardening activities. Had they come forward to volunteer R would have carried out relevant risk assessments with regards to the use of tools. The Tenants had their own individual assessments at all times in any event.
- 5.13.3. There were no volunteers from amongst the Tenants. No risk assessments were carried out. The gardening tools remained locked in the garden shed. The tools seem to have comprised a shovel, a spade and perhaps a trowel, and there may have been one or two other such items. C did not see any gardening tools being used by any of the Tenants at any time during her employment.
- 5.13.4. The claimant was not required to supervise Tenants using gardening tools at any time during her employment or to be in close proximity with anyone using gardening tools as they were never used. One of C's colleagues and her husband attended to the garden eventually and they brought their own tools with them.
- 5.14. *Allegation #14 and 15 :My line manager instructing me to creosote the garden fencing. – I raised this as a H&S concern in early Spring 2021 when the large tubs were delivered to the project. No risk assessment was undertaken by my line manager. The task not being disclosed in my job description. The circumstances of danger relating to this task were the lack of provision of overalls, safety goggles and gloves. In addition, inhalation of the chemicals within the creosote were a risk to my personal H&S. Lack of consideration shown regarding my disability AND Allegation #15: My line manager instructing me to decorate and paint the walls and ceiling in the office at the project. – I raised this as a H&S concern from February 2021 to July 2021. No risk assessment was undertaken by my line manager. The task not being disclosed in my job description. The*

*circumstances of danger relating to the task were lack of protective equipment. Being asked to climb ladders without any consideration to my disability and lack of supervision. I would not have been insured through my work to carry out such tasks. Inhalation of chemicals from the paint were a risk to my personal H&S:*

5.14.1. The Senior Support Worker considered that both the office and a garden fence at the project could do with freshening up. She wanted them to be painted.

5.14.2. She involved C and her colleague choosing the paint colour for the office. C and her colleague said they were not prepared to decorate the office. They were not required to do so but a decorator subcontractor was commissioned to do the work and he did.

5.14.3. The Senior Support Worker ordered fence paint; it was to be a Ronseal single coat product in brown. C considers that what was delivered was creosote. That is denied by R. Either way it has never been used. C was not required to paint the fence or to creosote it and was not instructed to do so at any time.

## 6. Resignation:

6.1. C continued in her role as support worker up to her last day of work on the 20 August 2021. She was certified as unfit to work from 23 August 2021 by reason of lumbago and sciatica. She did not return to work. A subsequent sicknote, the third one (dated 17 September 2021) also referred to work related-stress exacerbating lumbago and sciatica.

6.2. It was C's intention to return to work following her sick leave and I accept her statement that she loved the work and wanted to be at work. Her absence on 23<sup>rd</sup> August was due to physical ailments only.

6.3. While on sick leave she spoke on the telephone to one of her colleagues who commented that in her absence "nothing had changed". There is no evidence as to whether C enquired as to specific details either of her colleague or by questioning the R's management to ask about a specific aspect of work or the working environment that then troubled her or that she wished had been changed. It seems that all she knew was that the work and the working environment was as she left it on 20 August 2020.

6.4. The claimant applied for a job elsewhere. She asked for and was given a reference by R. C received an unconditional job offer on 3 September 2021, subject only to completion of a satisfactory probationary period. She was made aware by R that a reference had been given for her to her prospective new employer.

6.5. On 10 September 2021 the claimant resigned by letter which is at page 163. The claimant gave one month's notice to expire on Friday, 8 October 2021 with a view to commencing employment in her new job elsewhere on the next

working day, Monday 11 October 2021. She stated that working for R had been a “great pleasure” and she wished R “continued success”.

6.6. C resigned from her job because she was unhappy in it and preferred the prospect of working elsewhere. She was disappointed that she had not been allowed to work from home five days per week while her partner was ill and/or receiving treatment. She did not consider that the project was well managed, and she was critical of the administrative standards of the Senior Support Worker. Despite her commitment to supporting vulnerable people she believed that a stricter approach to controlling illicit drug use should have been adopted. She took exception to being asked to decorate the premises although I have not found that she was directly asked, and she was not instructed to do so; I accept she believed that this was the implication. Either way she did not consider that such work fell within her job description. She had been upset on two occasions when a door jammed. The claimant felt that a request for a badge, which amongst other things would have saved her embarrassment of explaining her job role and would have entitled her to consumer discounts, was being overlooked. She felt put upon when as a precaution she bought additional supplies of cleaning products over and above that provided by R. All in all, she just wished that R ran the project as efficiently as she thought would amount to an acceptable standard.

6.7. Had the claimant not been offered alternative employment she would have returned to work at the expiration of her sicknote. She had a financial imperative to work and she loved working for R, so she said in evidence, notwithstanding her criticism of the Senior Support Worker and frustration with HR.

**The Law:**

7. S. 100 Employment Rights Act 1996 (ERA) provides that an employee who is dismissed shall be regarded as having been unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is amongst other things that in circumstances of danger which the employee reasonably believed to be serious and imminent, and which she could not reasonably have been expected to avert, she left (or proposed to leave) or (if the danger persisted) refused to return to her place of work or any dangerous part of the place of work or in circumstances of danger which the employee reasonably believed to be serious and imminent, she took (or proposed take) appropriate steps to protect herself or other persons from the danger.
8. S. 95 ERA provides that an employee is dismissed by her employer in certain circumstances including where the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer’s conduct. This is referred to as a constructive dismissal. It is established law that the employer’s conduct referred to must be such as to amount to a fundamental breach of contract, where the conduct is intended or likely to destroy or seriously damage the relationship of trust and confidence and so amounts to a breach of a fundamental



breach of contract or there is another such breach of an express clause of the contract.

9. Mr Lawrence has provided a written submission both on law and liability. I confirm that he has cited the applicable law appropriately. Ms Thomas has had an opportunity to read that submission and I do not consider either party will be assisted by my further paraphrasing it.

**Application of law to facts:**

6. s.100 ERA gives protection to workers in specified circumstances of endangerment or reasonably perceived endangerment. That involves some element of immediacy or at least temporal proximity (imminence), whereby the action of the worker is a reasonable and justifiable reaction for their immediate or proximate safety. Typically, it is relied upon when the actions of the worker are urgent.

7. There is no urgency, immediacy, or co-terminous action by the claimant in this case. The action envisaged by S.100 ERA need not be spontaneous or reflex; it can be considered and deliberate. It must however be in response to circumstances reasonably believed to be both seriously and imminently dangerous. In this case the claimant resigned after most on the issues raised had been addressed by management, when there was no obvious urgency anyway. She only resigned after she had secured alternative employment following a period of sick leave; had she been unsuccessful in securing that alternative employment she would have returned to work for R at the project at the end of the period covered by her fit-note. In other words, she was safely away from what she cautiously, and with a disaffected perception of management, considered to be risky, or previously risky.

8. R addressed the majority of matters raised by C and did so willingly; C was not subjected to any detriment for having raised issues that concerned her. There is no detriment claim.

9. R applied its policies appropriately. Its record keeping could have and should have improved, including making FRAs accessible by having them printed and available for inspection. It could have better explained and made known the change in policy with regard to provision of fire extinguishers. It may have been more diligent in chasing up disposal of decommissioned extinguishers and gas cannisters. These administrative shortcomings did not in themselves create a serious and imminent risk to health and safety. When equipment was required for the kitchen, it was installed, as was a requested monitor. The wardrobe that was potentially, but not actually, impeding escape was moved on request shortly after that request (on the next working day).

10. C was given instruction on the use of a lone worker safety device and subsequently formal training, both well before she tendered her resignation.

11. Garden tool risk assessments could have been prepared in advance but that would have been in vain anyway.

12. WWHA replaced the bench that was in poor condition when the matter was raised and there is nothing obviously more dangerous about the glass garden table and accompanying chairs than any other item of furniture, crockery or glazing at the Project, all of which have the potential to be used as weapons. None was.
13. A needle sweep was carried out in response to that incident and in conjunction with the local police R adhered to and re-enforced its drugs policy.
14. The office lock was replaced once it was obvious that there was a problem, that is on the second incident, as the first time appeared to be a one-off. There is no evidence of continuing issues before the second lock-in and there was none after it.
15. The PAT testing matter is a non-issue in that it has been done in accordance with the statutory requirements although it could be done more often. There is no evidence that electrical equipment was faulty or that the gaps between tests led to any incident or likelihood of an electrical accident.
16. C was not required to use paint or creosote; she was not put at risk from either.
17. C could have requested flexible working. She did request and receive extended extraordinary leave and a change to the rota so that she could WFH 3 days per week. She was not required to breach COVID guidance and was not put at additional risk either in the office or travelling arrangements at the time of her resignation, and there was no urgent and imminent risk before that over and above what was then facing the world.
18. C wished the working environment met her standards, but R did not act in a way that was intended or likely to destroy trust and confidence. It did not breach the claimant's contract. Its conduct did not entitle C to terminate her employment without notice (whether or not notice was given – and it was). In short, C was not dismissed in accordance with s.95 ERA. She resigned.
19. C's claims fail in the absence of a dismissal. There were no circumstances of serious and imminent danger.
20. At the outset of the hearing, I struck out the claimant's claim of constructive unfair "whistleblowing" dismissal. The claimant was unable to show, or to put forward any allegations that would show, that any of her allegations of conduct that she says breached her contract of employment (the implied term) was by reason (or if more than one, the principal reason) that she had made a protected disclosure. Her argument in fact was that each of her allegations was down to mismanagement in general and that it was a continuous feature of R's running of the Project. She accepted that she was not saying that any of the matters that she says constituted risks were brought about, exacerbated, or allowed to persist because she had complained about any breach of legal obligation, endangerment to health and safety, criminal offence or any other matter that could constitute a protected disclosure. There had earlier been a strike out order in respect of the "whistleblowing" claim which perhaps misleadingly referred to a "detriment" claim.

C had not made such a claim. The claim throughout had been one of “whistleblowing” and health and safety dismissal. It is likely that the strike out related to the claim under section 100A ERA. In any event having considered representations from both parties I considered that such a claim had no reasonable prospects of success based on C’s explanation of how she would have argued it. Her explanation added nothing to the health and safety dismissal claim which is dealt with above, save to say that she complained on numerous occasions about numerous matters. She did. In general, the complaints were heeded, and remedial steps taken by R without delay. Other complaints related to the general state of affairs much of which was inevitable or at least to be expected and was not influenced whatsoever by any complaint made by C; by this I mean R did not do anything intended or likely to destroy or seriously damage the relationship of trust and confidence related to the complaints, and this is what seemed obvious from C’s submission in support of her opposition to the strike out. In any event having heard all the evidence it is evident to me that R did not breach C’s contract because of any complaint.

21. C also applied at the outset of the hearing for amendment to her claim to add two further allegations of endangerment, namely with regard to car sharing during Covid-times and in relation to the contents of a first-aid box. These were new matters. This claim has been the subject of numerous hearing case management hearings and the list of issues has gone through various iterations before being agreed. The amended application was made late. There had been full disclosure and exchange of witness statements. The hearing bundle has been prepared. Parties to litigation are entitled to certainty, especially where uncertainty compromises the overriding objective of the Tribunal and will often cause delay and expense. I considered the balance of prejudice to the parties. C has a number of allegations that she wishes to pursue; I did not consider that she was adding so much extra to her claim that it would be unjust to her if she were not allowed. I consider the balance of prejudice would be against the respondent and it would be unjust to it to expect it to answer the further allegations at this late stage. I refused the amendment application. I have in any event made a finding of fact in relation to the car sharing point; how about amendment been allowed I would have found against the claimants in the same way as I have regard to other allegations of serious and imminent endangerment.

Employment Judge T V Ryan

Date: 20<sup>th</sup> July 2023

REASONS SENT TO THE PARTIES ON 24 July 2023

FOR THE TRIBUNAL OFFICE Mr N Roche