EMPLOYMENT TRIBUNALS

Claimant: **Mr C. Htwe**

Respondent: **Runwood Homes Ltd**

Heard at: **East London Hearing Centre**

On: **20-21, 25-26, 28, 31 July and 14 August 2023**

Before: **Employment Judge Massarella**
Ms J. Forecast
Prof. J. Ukemenam

Representation
Claimant: In person
Respondent: Ms A. Rokad (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **by consent, the Claimant's claim of breach of contract succeeds; he was underpaid by £443.39 gross; the Respondent shall be responsible for making any necessary deductions for tax and national insurance;**

2. **the Tribunal does not have jurisdiction to determine the Claimant's claims of direct sexual orientation discrimination and harassment related to sexual orientation under Issues 1-13, 17-18 and 20 because they were brought out of time, and it is not just and equitable to extend time; they are dismissed;**

3. **the Claimant's other claims of direct sexual orientation discrimination and harassment related to sexual orientation are not well-founded and are dismissed;**

4. **the Claimant's claims of victimisation are not well-founded and are dismissed;**

5. **the Claimant's claims of whistleblowing detriment under Issues 1, 13, 23 and 24 are dismissed because the Tribunal lacks jurisdiction in respect of them; they were brought out of time, in circumstances when it was reasonably practicable for them to be presented in time;**

6. the Claimant's other claims of whistleblowing detriment are not well-founded and are dismissed;

7. the sole reason for the Claimant's dismissal was conduct; he was not automatically unfairly dismissed for making public interest disclosures;

8. the Claimant's claim of unfair dismissal is not well-founded and is dismissed.

REASONS

Procedural history

1. The claim form was presented on 6 September 2021, after an ACAS early conciliation period between 14 May and 23 June 2021. It contained claims of automatically unfair dismissal, ordinary unfair dismissal, whistleblowing detriment, disability discrimination, sexual orientation discrimination and a claim for unpaid sick pay. As for the disabilities, the Claimant said that he had hearing loss, an eating disorder and chronic obstructive pulmonary disease (COPD).

2. A preliminary hearing for case management took place on 28 March 2022 before EJ Elgot. The hearing had to be adjourned because the Judge decided that a telephone hearing was unsuitable. She ordered the Claimant to provide a disability impact statement and to disclose copies of his medical records and relisted the hearing. The Respondent did not subsequently concede disability.

3. A second preliminary hearing for case management took place in person on 16 June 2022 before EJ Moor. The Judge clarified the issues (subject to the provision of some further information by the Claimant) and listed a public preliminary hearing to determine whether the Claimant was a disabled person at the material time. She also listed the final hearing.

4. The Claimant's former solicitors came back on the record to assist him in providing the further information, which they did on 11 August 2022. The Claimant no longer relied on an eating disorder or COPD as disabilities.

5. The preliminary hearing on disability came before Acting Regional Employment Judge Burgher on 21 October 2022. The Claimant was represented by his solicitor. The Judge struck out the claim for disability discrimination on the ground that it had no reasonable prospect of success: there were no medical records showing that the Claimant had a hearing impairment; on the contrary, there was an audiological evaluation on 16 February 2022 stating that he had normal hearing.

6. We noted that at the preliminary hearings, the Claimant had explained that he might sometimes take longer to answer a question owing to the fact that English is his second language; he explained that he has some hesitancy in his speech. We made adjustments accordingly.

The hearing

7. The Tribunal lost two days of the original listing owing to the unavailability of non-legal members. We completed the evidence within the original listing and added a further day for submissions and deliberations; we told the parties in advance that judgment would be reserved.

8. There was a joint, agreed list of issues. Although there had been extensive case management, no specific orders had been made for the preparation of the final hearing. We had a core bundle of 641 pages, which was sent to the Claimant on 7 July 2023, apart from three documents which were added later. We allowed him to rely on his own bundle of 111 pages. Witness statements had not been exchanged until the first day of the hearing: the Claimant was ready to exchange on 11 July, the Respondent on 17 July, by which time the Claimant was no longer willing to exchange.

9. We decided to spend the rest of the first day reading the statements and some key documents, which would give the parties time to read each other's statements. We heard from the Claimant first, which meant that he did not have to cross-examine until the following week, giving him three full days to prepare his questions. We gave him some guidance on preparing questions. The Judge also prepared a new version of the agreed list of issues to assist the parties, grouping the claims by factual allegation in chronological order. The underlined subheadings below replicate that list; the paragraph numbers in the original list are shown in brackets. We reminded the Claimant that, if he wished to pursue a particular allegation in the list of issues, he must ask the relevant witness about it; the Judge reminded him to do so from time to time during the hearing.

10. Because the Claimant had not led evidence on time limits in his witness statement, the Judge asked him some open questions on the subject at the beginning of his oral evidence.

11. The Tribunal heard evidence from the Claimant and, on behalf of the Respondent, from the following:

    11.1. Ms Hope Thomason, Night Care Team Manager of Redmond Lodge;

    11.2. Ms Racquel Cruz, Deputy Manager of Redmond Lodge at the time;

    11.3. Ms Georgina Braithwaite, Home Manager of Humfrey Lodge in Thaxted, Essex at the time (the disciplinary hearing decision-maker);

    11.4. Ms Anne-Marie Prothero, Regional Operations Director at the time (the disciplinary appeal decision-maker);

    11.5. Ms Lorraine Lanigan, HR Adviser;

    11.6. Ms Susan Friend, Director of HR.

12. Part-way through the Respondent's evidence, and having gone back through the documents, Ms Lanigan agreed that the Claimant had been underpaid in relation to a period of sickness between 8 and 18 February 2021. The freestanding breach of contract claim was conceded in the amount of £443.39.

The Claimant confirmed that was the correct figure and the parties agreed that the Tribunal should give judgment by consent in that amount.

13. We had detailed written submissions from Ms Rokad. Other than clarifying the position in relation to the breach of contract claim, she did not add to her submissions orally. The Claimant chose not to provide written submissions or to make oral submissions, other than on one point; he simply asked us to consider his statement and all the evidence. Our findings and conclusions below are unanimous.

Findings of fact

14. The Respondent operates care homes providing residential care, dementia care and nursing care.

15. The Claimant was employed by the Respondent as a night care assistant at Redmond Lodge, Great Dunmow, Essex ('the care home'). His employment began on 19 January 2018.

16. The Claimant is gay; he is open about his sexual orientation and the fact that he has a long-term partner with whom he lives; his partner has some underlying health difficulties.

<u>The disciplinary policy</u>

17. The Claimant received the Respondent's handbook when his employment began in January 2018. The handbook does not contain the disciplinary policy, but it directs employees to it. The Claimant accepts he read the staff handbook but denies ever having seen the disciplinary policy.

18. On 19 January 2018, the Claimant signed a staff fact sheet which told him that he must read the staff handbook via the e-learning system 'along with all company policies and procedures as these form part of the terms and conditions of your employment.' The induction for new staff members was staggered over a period of several months. The Claimant completed a form on 9 September 2018, confirming that he had read the disciplinary and grievance policies. There was also a procedure to test the understanding of policies, which the Claimant completed on 15 February 2019. The disciplinary policy was also available to members of staff at all times.

19. On the basis that the Claimant confirmed by way of signature that he had read the disciplinary policy, we think it very likely that he did so; the Respondent was entitled to proceed on that basis.

20. The disciplinary policy contains a non-exhaustive list of gross misconduct offences, which in its first version includes 'sleeping whilst on duty'; in the second version this is expressed as 'gross misuse of company time e.g. sleeping whilst on duty'.

21. The Claimant said in his oral evidence that it was permissible to sleep while on a break because you were not on duty. We noted that the Respondent provided unpaid breaks for day-shift staff, whereas night-shift staff were contractually entitled to paid breaks. Night-shift staff were required to respond to residents' emergency and non-emergency call bells, including during their

breaks. They received specific training in this. They were required to be stationed near the electronic displays in the corridors, which showed which room was calling. There were no displays in communal rooms, such as the lounge and staff room, so night shift staff stationed themselves in or facing a corridor, to make sure they could see the displays.

22. Taking into account the fact that breaks during the night shift were paid, we accept the evidence of the Respondent's witnesses that night staff were on duty and required to be awake throughout their shift, including during breaks. We also took into account the fact that there were far fewer staff on duty at night; the Respondent was likely to require them to stay awake to ensure the safety of vulnerable residents.

Ms Thomason's awareness of the Claimant's sexual orientation

23. Ms Thomason knew that the Claimant was gay because he talked about his partner, whom she met at a party. Her evidence was that this did not affect the way she behaved towards him.

24. The Claimant hinted that something untoward had occurred between his partner and Ms Thomason at that party (which must have taken place before December 2019) and that since then she had treated him differently. Despite being asked by the Tribunal to be more explicit about what exactly happened, he did not do so, other than asking Ms Thomason in cross-examination: 'can you recall asking about us having kids', to which she replied no. He put to her that his partner had to leave the venue moments after speaking to her. She disagreed; he had been introduced to her and she had told him to help himself to food; she then went to the kitchen where she was busy helping. The Judge asked if the Claimant wanted to explore this any further; he did not. Absent any cogent evidence from the Claimant, we accept Ms Thomason's evidence that nothing untoward happened.

Issue 1 - Direct discrimination (12(b)); harassment (15(a)); victimisation (21(a)); whistleblowing detriment (26(a)) - Hope Thomason demanding from December 2018 to the end of employment, a greater level and increased standard of work from the Claimant across a shorter period of time than other employees in the Claimant's department (none of whom were openly in a same-sex relationship) who were allowed to start their morning tea trolley rounds earlier despite the Claimant having the same number of residents to attend to before all employees were supposed to have completed the morning tea trolley round.

25. The only matter the Claimant raised with Ms Thomason in cross-examination under this allegation was his not being allowed to start the morning tea trolley round for residents until 6 a.m. when other members of staff could start at 5.30 a.m. Ms Thomason agreed that she sometimes asked staff not to start until 6 a.m. when they were short-staffed; she denied singling the Claimant out.

26. Absent any evidence of specific occasions on which Ms Thomason is said to have treated the Claimant differently from others, we do not find that she did so. We accept her evidence that she did not always allow staff generally to start the tea trolley earlier than 6 a.m., which was the default time. Starting the process earlier might not have been suitable for residents who were still sleeping. The Claimant could not know what was happening across the

various units within the care home. There is certainly no evidence that there was a pattern of decisions of this sort across the very lengthy period identified by the Claimant in the pleaded issue.

Issue 2 - Harassment (15(b)) - Hope Thomason misleading the Claimant in the instructions that a resident had passed away, when they had not actually died on 28 August 2019.

27. The Claimant alleges that on 28 August 2019, Ms Thomason left instructions that a resident had died when they had not. Ms Thomason denies this.

28. The Claimant made no reference to this allegation in his witness statement. Asked how he could recall the date so precisely, the Claimant said because he was upset and spoke to two people (neither of whom were at the hearing). He did not explain how the fact that he remembers speaking to people about the incident would help him remember the date; there were no supporting contemporaneous documents; the Claimant did not even identify the patient; he has not led sufficient evidence to persuade us that this incident occurred.

Issue 3 - Harassment (15(c)) - Hope Thomason picking on the Claimant by stealing the Claimant's vape pen and a personal motion sensor on/around 19 October 2019.

29. The Claimant had a vape pen with him at work. In his witness statement he said that a male member of staff told him that he took it and hid it in October 2019 as a joke. The next the Claimant knew about it was when Ms Thomason approached him in April 2020, holding the vape and saying that she had found it in a resident's room. In his statement, the Claimant suggested that Ms Thomason 'revealed' she had had the vape all along. In cross-examination, the Claimant agreed that, in fact, because of the lapse in time, he simply assumed that she must have found it where the male staff member hid it and then held onto it for six months. Asked why she would do that, the Claimant said because it was expensive and she knew it would upset him, and also to 'weaponise' it against him.

30. Ms Thomason accepts that she did speak to him about his vape because she saw a resident holding it. She says that she was concerned about the vape, told the Claimant that it was dangerous and reminded him to go outside if he wanted to use it. She told Ms Cruz about it. She denied stealing it.

31. There is no evidence that Ms Thomason stole the vape; it was nothing more than an assumption on the Claimant's part.

32. As for the personal motion sensor, the Claimant said that the date in the list of issues is wrong. The motion sensor was the Claimant's own property. The Tribunal was surprised that he had it at work, given that it was not needed for his work and was not provided by the Respondent. Asked what he used it for, the Claimant gave two explanations: because, at certain distances, he could not hear the call buzzer (which made no sense); and because he used it to warn him when Ms Thomason had been near his belongings because (he believed) she had stolen/hidden his vape. Ms Thomason told the Tribunal that Ms Linda Aspinall, a care team manager, told her that she had spoken to the Claimant and instructed him not to use the motion sensor. Mr Richard Aspinall, who is Ms Aspinall's son, also told her that he had spoken to the Claimant about not using the sensor. We accept Ms Thomason's evidence.

33. The Claimant did not put to Ms Thomason that she stole it; there is no evidence whatsoever that she did so.

Issue 4 - Harassment (15(d)) - Hope Thomason pressuring the Claimant into signing his agreement to false and incorrect statement which would have led to the Claimant "admitting" to disputed allegations on 24 November 2019, that a resident had opened a child safe bottle that they clearly would not have had the physical ability to do, and that the Claimant had used vinegar to clean pots.

34. This allegation relates to some supervision notes, dated 24 November 2019. The Claimant says Ms Thomason tried, and failed, to pressurise him into signing them.

35. The notes do contain a reference to the Claimant using vinegar to clean items. Contrary to the terms of the pleaded issue, they do not contain a reference to a resident having opened a child-safe bottle; the criticism in the notes is that the Claimant left his vape bottle open near a resident.

36. In cross-examination, the Claimant said that Ms Thomason asked him to sign the notes at the end of the meeting, but the pen was not working. He said he would sign them at the end of his round and so Ms Thomason left them with him to sign. When he returned, he read through them and found they were not true. He told her he would not sign them.

37. There is no evidence that Ms Thomason put pressure on him to sign the notes; on the contrary, she left the document with him to read in his own time before signing it; he chose not to do so.

Issue 5 - Harassment (15(e)) - Hope Thomason removing the false and incorrect witness statement from 24 November 2019 from the Claimant's personnel file on/around November 2019.

38. The Claimant believes that Ms Thomason removed the supervision notes referred to in the previous paragraph from his file because she knew them to be untrue (in his statement he is more equivocal, alleging that she may have removed them, or simply never put them on file). He bases this belief on the fact that the notes were not among the Respondent's disclosure in these proceedings. The copy in the bundle was a photograph he took before returning them to Ms Thomason. She denies removing it from his file.

39. We are not satisfied that there is sufficient evidence before us that Ms Thomason removed the notes from the file, let alone that she did so for an improper reason.

Issue 6 - Harassment (15(f)) - Hope Thomason restricting the Claimant's access to the storeroom, by withholding the key. The Claimant would have access to the supply cupboard/storeroom when Hope was not on shift, but despite the Claimant asking once or twice a week for the key, Hope refused the Claimant access with no explanation. This occurred frequently from November 2019 until April 2021.

40. The allegation is that Ms Thomason refused to let the Claimant have a key to the storeroom 'frequently' over a period of two years. In cross-examination, his evidence was that this happened 'one or two times'. He said that other people

could reach her by phone, but he had physically to find her to gain access to the room.

41. Ms Thomason accepted that she did refuse to let the Claimant have a key, because she thought he might take things from the storeroom. She explained that he had 'lots of stuff, one time he brought in some things which she said he had bought. I'm not sure if it was from that room or his personal one.' She also said that the Claimant had got a copy of the storeroom key cut, which was not authorised. When this was discovered, Ms Cruz took it from him.

Issue 7 - Harassment (15(g)) - Hope Thomason making excessive noise within the Claimant's unit between November 2019 and April 2021 in order to disturb the residents that the Claimant was looking after, creating a more difficult role for the Claimant. This would occur on a near daily basis, when, in the middle of the night/early hours of the morning, Hope would shout reprimands at the Claimant across the different units that the Claimant worked in. This would include Hope Thomason shouting comments about the Claimant's footwear (as she did not like them or the sound they made), or loudly shouting insults at the Claimant, including calling him forgetful.

42. Ms Thomason accepts that she did speak to the Claimant about his footwear because he was wearing roller shoes (trainers with wheels on the bottom) on shift. She said they were dangerous and told him not to wear them again. The Tribunal was unsurprised by this: such footwear is obviously inappropriate in a care home.

43. Otherwise, Ms Thomason denies the allegation. Asked if the residents complained about her making noise, the Claimant replied 'I don't know about that kind of thing' before mentioning that a resident in room number 2 complained. He gave no date; there was no contemporaneous record of a complaint; the allegation, made late in the day, was generalised.

44. There was no mention in the Claimant's witness statement of Ms Thomason 'shouting reprimands' at him. As for 'loudly shouting insults at the Claimant', the only matter the Claimant referred us to did not involve shouting: it was a roster which Ms Thomason prepared in which she wrote his surname as 'Chita' which he says she pronounced 'cheater'. He said this led to people asking him if he had cheated on his partner. Ms Thomason said that this was the Claimant's nickname. She said many of the staff had nicknames and gave several examples. Her own nickname was 'Hopeya'. We accept that evidence.

45. There was no evidence of her shouting anything at the Claimant or calling him forgetful. No specific incidents were identified and the Claimant had to be reminded to put the latter allegation to her.

46. We find that the conduct did not occur as alleged.

Issue 8 - Direct discrimination (12(a)); harassment (15(h)) - Racquel Cruz, Sue King and Hope Thomason (plus all night staff who attended) excluding the Claimant from a work Christmas event hosted by Racquel Cruz at a function hall around 200m from the workplace, that all staff were invited to in December 2019

47. The Claimant alleges that he was excluded from a work Christmas event. He says he was not invited because he had brought his male partner to a

previous party. The Claimant agreed that he was guessing as to who was at the party, nor did he know who had issued the invitations.

48. Ms Cruz did not host a Christmas event in December 2019. She did not hold any private parties or events. There were occasional events for residents and staff, such as a summer barbecue, to which everyone was invited.

49. The Claimant accepted that the event in December 2019 was a private event, not a work event. It had been arranged by and for the local Filipino community. It was nothing to do with the care home, although some members of staff who were Filipino did attend. Both Ms Cruz and Ms Thomason attended; they are both Filipina; neither of them organised the event or issued invitations. Ms King (who is not Filipina) did not attend.

50. In our judgment, not being invited to a private social event is not a detriment to an employee in the context of their employment.

Issue 9 - Harassment (15(i)) - Hope Thomason blocking the Claimant's telephone number preventing him from properly notifying absences on 21 December 2019. Subsequently – on the same day – the Claimant was threatened by Hope Thomson with disciplinary action in respect of said failure to notify.

51. Ms Thomason gave out her private mobile number to colleagues, including the Claimant. She allowed them to contact her on it for work reasons. She agrees that she blocked the Claimant's number; she says she did so because he was texting what she described as 'nonsense' to her, i.e. non-work-related texts. We accept that evidence. In our view, she was entitled to be selective about who she allowed to contact her on her private number.

52. There was no detriment to the Claimant in not having the number. He accepted that there were other ways of reporting absence, including phoning the care home's landline. On this occasion he texted a colleague and asked them to pass on the message.

53. There is no suggestion that Ms Thomason took any action in relation to his absence on this day. The Claimant accepted that Ms Thomason did not threaten him with disciplinary action (let alone dismissal) to his face; he says he heard it through a colleague. This was no more than gossip.

Issue 10 - Harassment (15(j)) - Hope Thomason undermining the quality of the Claimant's work in January 2020 in front of his co-workers (namely Jake Orido, and Ann Marrie Todd), including by using inaccurate and untrue logbook records that criticised the Claimant's work.

54. The Claimant alleges that in January 2020 Ms Thomason spoke to the Claimant about inaccurate logbook records in front of other members of staff. The Claimant says she was questioning the quality of his work. Ms Thomason says that she does not remember anything about logbooks or speaking to the Claimant in the manner described.

55. The records were not produced; the inaccuracies/untruths were not specified; there is no contemporaneous record of the Claimant's concerns. He has not adduced sufficient evidence to prove that the incident occurred as alleged.

Issue 11 - Harassment (15(k)) - Hope Thomason of the Respondent arranging for her husband to make threats of violence including death threats to the Claimant in person, verbally, in January 2020

56. The Claimant alleges that Ms Thomason arranged for her husband to make death threats and threats of violence against him. He appeared to be confused about the date in his oral evidence. Ms Thomason denies that this occurred on any date.

57. It was pointed out to the Claimant that in his witness statement he does not refer to threats of violence or death. He replied that the words spoken were 'she will kill you' (meaning Ms Thomason). He then went on: 'the moment I heard it I thought it cannot be a serious threat, but the more I thought about it and the way it was spoken, the specific place that was chosen, it was not spoken in public, I started to think it was credible. If it was only a joke could have been made in front of everyone.'

58. At one point in cross-examining Ms Thomason, the Claimant put to her: 'I suggest you did try to kill me.' When it was pointed out to him that this was a different allegation, the Claimant said: 'I agree no one was trying to kill me.'

59. No context was provided which would make any sense of this allegation. It is clear from the Claimant's own evidence that, even if the words were used, his initial reaction was that it was a joke. We observe that the expression 'she/he will kill you' often means no more than someone will be angry or displeased.

60. We find that Ms Thomason's husband did not make any threats of violence, let alone death threats. This allegation is scandalous.

Issue 12 - Direct discrimination (12(d)); harassment (15(l)) - Hope Thomason and Ann Marie Todd not making any report following incidents in February 2020 where the Claimant has collapsed due to exhaustion

61. The Claimant says that he collapsed from exhaustion while at work in February 2020 and accuses Ms Thomason and Ms Todd of failing to report the incident. On the Claimant's own account several other members of staff were also present, none of whom made an accident report; neither did he.

62. We accept Ms Thomason's evidence that she did not report the Claimant collapsing because she did not know about it.

Issue 13 - Direct discrimination (12(c)); harassment 15(m); whistleblowing detriment (26(b)) - Hope Thomason providing the Claimant with instructions on 19 March 2020 in a format that would be difficult to find and easily misplaced (such as by providing instructions to the Claimant on tissue paper and leaving it on a table knowing it would be blown away or potentially thrown away and lost)

63. The Claimant alleges that Ms Thomason deliberately left instructions for him about which rooms he should attend to on a piece of tissue paper which might be lost, blown away or destroyed. He produced a photo of an example, which appeared to be in her handwriting.

64. Ms Thomason accepted that only she could give such instructions. She does not remember ever leaving the Claimant a note on tissue paper.

65. We find that this happened on this occasion and was not a professional way of giving instructions. There is no evidence that it was done on more than one occasion, nor that it was done deliberately to disadvantage the Claimant.

66. Asked why he thought Ms Thomason might have done this, the Claimant did not mention victimisation or whistleblowing. It cannot be either because the alleged disclosures/protected acts postdate it.

Issue 14 - Protected act (20(a)) - raising concerns about Hope Thomason's behaviour towards the Claimant with Sue King verbally on 16 April 2020 and via email on 20 April 2020? The Claimant asserts that he explicitly made reference to discrimination and the email sent by the Claimant to Sue King on 20 April 2020 referred to discriminatory behaviour

Issue 15 - Public Interest Disclosure (i) – to Sue King – 16 April 2020 - Hope Thomason was intentionally disturbing the residents by banging and shouting, breaching her contractual obligations and duty of care to the residents – s.43(B)(1)(b) ERA breach of legal obligation – para 4.9(j) of the claim

Issue 16 - Public Interest Disclosure (ii) – to Sue King – 16 April 2020 - Hope had failed to properly report a member of staff (the claimant) collapsing from exhaustion and requiring the Claimant to continue to work despite the potential risk to residents at that point - s.43(B)(1)(d) - health and safety was likely to be endangered - para 4.9(m) of the claim

67. We pause at this point to record that Ms King, to whom the Claimant says he reported allegations of discrimination and made public interest disclosures, neither attended the Tribunal nor provided a witness statement.

68. Ms Lanigan explained her absence on behalf of the Respondent. Ms King retired in August 2021. When the Respondent first received the ET1, HR contacted her about the case. She said she would attend the Tribunal. She cooperated in drafting a witness statement. It was only in June 2023, when the Respondent tried to contact her to finalise her statement that she said that she had been suffering from severe anxiety since her retirement, partly because of her experiences of Covid and partly because of her husband's ill-health. She had been having counselling. She was very anxious at the prospect of attending a tribunal hearing. The Respondent tried to contact her again, but she stopped responding. They considered applying for a witness order but, for compassionate reasons, decided that it would not be appropriate to do so.

69. Ms Lanigan was a careful and conscientious witness. Her explanation was clear and plausible. In the circumstances, we draw no adverse inference from the fact that Ms King did not attend the hearing.

70. The Claimant accepts that none of the issues identified in the disclosures were raised in writing with the Respondent. He relied on a photograph of a piece of paper, listing various concerns. The document is undated. He said he raised the matters on the sheet verbally with Ms King on 16 April 2019. It contains references to 'banging doors and shouting' and to 'non-report of staff's health risk'.

71. The Claimant said in oral evidence: 'I told [Ms King] if it is not discrimination, I don't know what it is.' We thought that highly improbable: there is no reference

to discrimination in the handwritten document, which we would expect there to be if the Claimant intended to raise it. There is then the email of 20 April 2020. This refers to 'latest development concerning with our last week conversation'. It recounts the history of the Claimant's hidden vape and concludes 'It looks like someone has a lot to explain.' It makes no reference to discrimination; we think it likely that the Claimant would have referred to it, if he had raised it orally a few days earlier. On the balance of probabilities, we find that the Claimant did not complain of discrimination orally on 16 April 2020 or in writing on 20 April 2020.

72. Despite Ms Thomason's evidence to the contrary, we think it likely that Ms King probably told her that the Claimant had complained about her, but she cannot have mentioned a discrimination complaint because there was none.

Issue 17 - Harassment (15(n)) - Sue King refusing to investigate claims and concerns raised by the Claimant on 16 and 20 April 2020

Issue 18 - Harassment (15(o)) - Sue King ignoring the Claimant's grievance both in paper on 16 April 2020 and at the meeting of 2 March 2021

73. We note that the Claimant did not raise a formal grievance; these were informal complaints made directly to Ms King. His evidence was that he did not follow them up because this occurred at the beginning of the Covid pandemic. There is no evidence that Ms King took any action to follow up on his complaints.

74. Asked why he thought this might be, and whether he believed it was related to his sexual orientation, the Claimant did not positively assert that he did. He said: 'only Ms King can answer why she didn't take any action.' The Claimant led no positive evidence that his sexual orientation was a factor in Ms King's response to his complaints.

Issue 19 - Public interest disclosure (iii) – to Sue King – 27 April 2020 - the problematic nature of the Respondent's COVID policy to on and in particular that it did not consider those who would need to shield or utilising the furlough scheme to protect their jobs whilst protecting their wellbeing - s.43(B)(1)(d) - health and safety was likely to be endangered – paras 5.14 and 5.22 of the claim

75. There is no contemporaneous record of the Claimant's alleged public interest disclosure. His witness statement is unclear and expressed in the most general terms. This was a recurrent problem in this case: the Tribunal was faced with an allegation which was generalised, witness evidence which was unclear, and a lack of contemporaneous evidence which might help to bring the issues into focus and support the Claimant's case.

76. We accept that he probably raised concerns of some sort to Ms King on or around 27 April 2020 about the Respondent's approach to the furlough scheme and to shielding. However, he has not identified with sufficient particularity what information he disclosed, what breach of a legal obligation he had in mind, or how he considered any policy of the Respondent endangered the health and safety of individuals.

Issue 20 - Harassment (15(p)) – Hope Thomason drawing derogatory pictures depicting a caricature of the claimant with exaggerated features of eyes and ears in

particular. These pictures were in his close observation folder and observed by the Claimant in around April 2020.

77. The Claimant accused Ms Thomason of drawing a derogatory picture of him 'with exaggerated features of eyes and ears' which he says found its way into a close observation folder.

78. In his questioning of Ms Thomason, the Claimant went further and suggested that the figure in the picture 'had very large earrings and very long eyelashes.' That is a different allegation, which had not previously been made.

79. The picture was not in the bundle. The Claimant could not be specific about when he discovered it in the close observation folder. There was a reference to it in the hand-written list referred to above (para 70); the photograph of that list is dated 2 December 2019, so the Claimant must have discovered it much earlier than April 2020.

80. The Claimant did not take a photo of the picture. He explained that he did not initially realise it was a picture of him and that he thought it was drawn by a resident. He said that his co-workers later told him that Ms Thomason had drawn it. He did not see her doing so.

81. Ms Thomason says that she did not draw any pictures of the Claimant. If he found pictures in his close observation folder, they were not drawn by her, and he did not make her aware of them.

82. The evidence that the drawing existed is scant; if it did, it is no more than an assumption that it was a drawing of him; the Claimant accepts that he does not know that Ms Thomason was responsible for it. On the balance of probabilities, we find that she did not make such a drawing.

83. We note that there is a gap at this point of some nine months in the chronology of alleged detriments (between April 2020 and January 2021).

Issue 21 - Public interest disclosure (iv) – to Racquel Cruz – 1 July 2020 - the poor ventilation conditions of the home, and the lack of air purification, including raising that the air ventilation systems were broken - s.43(B)(1)(d) - health and safety was likely to be endangered – para 7 of the claim

84. The Claimant says he raised concerns about ventilation by text. There were no supporting documents in the bundle.

85. Ms Cruz does not remember the Claimant raising concerns with her. It emerged in oral evidence that the only ventilation was in the laundry and the kitchen, but there were extractor fans in the residents' bathrooms. The Claimant then said that the allegation related to these. He said that he made entries in the logbook when he found one broken. Those records were also not in the bundle.

Issue 22 - Public interest disclosure (v) – to Sue King and Racquel Cruz – 13 January 2021 - the additional requirement imposed on night staff to come in during the day once a week for covid testing was a breach of the WTR as it allowed insufficient time for rest in between shifts, As well as being an unnecessary health and safety risk and

a unilateral variation of contract that was not agreed to.- s.43(B)(1)(d) - health and safety was likely to be endangered – para 5.14 of the claim

86. In early 2021, during the pandemic, all care home staff had to come in during the afternoon to have a Covid test twice a week. Night staff had to come in mid-afternoon, so that the tests could be collected by a courier at 5 p.m. The night shift did not start until 9.30 p.m. Staff were not paid for their attendance in the afternoon. We accept the Claimant's evidence that he raised this as a breach of the national minimum wage requirements, a breach of the legal requirement for workers to have proper rest breaks between shifts and as a health and safety issue. He was complaining on his own behalf but also on behalf of others who were affected.

87. Ms Cruz discussed the Claimant's objection with Ms King and proposed that he arrange the testing procedure himself to avoid him having to come into the home outside his shift. She told him that he could ask for a PCR test online via the NHS website and then forward the notification of the result to the Respondent.

Issue 23 - Harassment (15(g)); victimisation (21(b)); whistleblowing detriment (26(d)) - Hope Thomason forcing the Claimant to work alongside Richard Aspinall in January 2021, because he would work in multiple care settings, against CQC guidelines, during a pandemic. This was allegedly done without a proper health and safety risk assessment and increased the Claimant's risk of catching contagious diseases, such as Coronavirus.

88. Mr Richard Aspinall worked in the care home. He also worked in a hospital. In January 2021, the Claimant complained that Mr Aspinall might bring Covid into the care home from the hospital, which was particularly dangerous for him as he had COPD. This complaint is not identified as a public interest disclosure. The Claimant says that Ms Thomason deliberately assigned Mr Aspinall to work with him as a form of harassment.

89. The Respondent's case was that Mr Aspinall had completed a risk assessment, ostensibly in January 2021, but this was an assessment of potential risks to him, as opposed to risks potentially caused by him; it had nothing to do with Covid.

90. Ms Thomason accepts that the Claimant complained about Mr Aspinall working in the hospital at the same time as working at the care home and that she assigned the Claimant and Mr Aspinall to work together. She said in her statement that she did not know if this was against CQC guidelines at the time. She was not aware that the Claimant had COPD.

91. However, there was no evidence that Ms Thomason 'forced [the Claimant] to work alongside Mr Aspinall' because he made the protected disclosures which we have found that he had made prior to this point. He did not put to Ms Thomason in cross-examination that she was influenced by that factor; rather, his focus was solely on his sexual orientation. We think it fanciful that Ms Thomason made any arrangements in relation to Mr Aspinall's pattern of work with a view to targeting the Claimant because of his sexual orientation, careless as to the collateral impact on the health of others, including the Claimant, residents and Ms Thomason herself.

Issue 24 - Harassment (15(r)); victimisation (21(c)); whistleblowing detriment (26(c)) - Hope Thomason spreading false rumours that the Claimant had been suspended to Jake Orido or Francis Orido on/around 27 January 2021

92. In late January 2021, both the Claimant and another member of staff were self-isolating. The Claimant says that Ms Thomason spread rumours that they had been suspended. The other colleague was suspended; the Claimant was never suspended, even during the disciplinary process. The Claimant was told about the rumour by two colleagues. Because they both speak the same language as Ms Thomason, he assumed the rumour came from her.

93. Ms Thomason denies spreading rumours to anyone that the Claimant had been suspended. If there were rumours, there is no evidence that Thomason was responsible for them. The Claimant's case is purely speculative. He has not discharged the burden on him to show that the conduct occurred as alleged.

Issue 25 - Other payments: The Claimant's case that he is owed money, as he was not paid his full pay or even Statutory Sick Pay for his sickness period between 8 and 18 February 2021

94. The Respondent has conceded this freestanding claim of breach of contract.

Issue 26 - Public Interest Disclosure (vi) – to Hope Thomason – Around 28 February 2021 - the care plan that had been put in place for certain residents was directly against the wishes of the resident in question – s.43(B)(1)(b) ERA breach of legal obligation – para 5.53 of the claim

95. The Claimant led no evidence explaining how the care plan was contrary to the wishes of the resident. He was given the opportunity to do so when cross-examining Ms Thomason, but he declined. We cannot find that the Claimant made a public interest disclosure without knowing what the information disclosed is said to be.

Issue 27 - Public Interest Disclosure (vii) – to Hope Thomason, Kate Emery, Sue King, and Lorraine Lanigan – 1 and 8 March 2021 - breaches of the SSP Regulations 2020 – s.43(B)(1)(b) ERA breach of legal obligation – para 5 of the claim

96. The Claimant was off work in January 2021 with Covid. His partner, who was vulnerable, then contracted Covid and the Claimant took further time off to shield.

97. The Claimant considered that he should be paid when off work shielding. He raised the issue with Ms Thomason. We are satisfied that the Claimant disclosed the information that he was not being paid in respect of a period of self-isolation in early February, which he thought was happening more generally. He believed that this tended to show a breach of the SSP regulations which affected him and others; further, care staff were on minimum wage; if they were not paid SSP when self-isolating they could not afford to miss work; they would have to choose between working and self-isolating; they might do the former when they should be doing the latter, which might expose them and others to risk.

98. Ms Thomason told him to speak to the administrator, Ms Cranfield; she then had no further involvement. The Claimant spoke to Ms Cranfield and also to Ms King. A meeting was also arranged with Ms Kate Emery, Regional Operations Director, on 5 March 2021.

99. Ms Emery wrote to him on 17 March 2021, observing that his communications about the situation at the time had not been clear, but agreeing to pay him as a goodwill gesture.

100. The Claimant was then underpaid, owing to an administrative mix-up. This was not discovered until Ms Lanigan reviewed the records again during the Tribunal hearing, at which point the Respondent accepted that the Claimant still had not been paid the full amount of the wages due to him. Ms Lanigan gave a detailed explanation in her oral evidence as to how that had occurred, which we do not set out here as the wages claim has now been conceded and the sum due to the Claimant agreed.

Issue 28 - Harassment (15(s)); victimisation (21(d)); whistleblowing detriment (26(e)) - Sue King making the Claimant stop using a body motion sensor on 2 March 2021 that had been previously used throughout the performance of his role and had been endorsed by Sue King and the Respondent company.

101. The allegation is that Ms King made the Claimant stop using his body motion sensor. The Claimant said in oral evidence that Ms King took the decision because he had raised the sick pay issues with Ms Thomason on 1 March 2021; suddenly Ms Cruz told him on 2 March 2021 to stop using the motion sensor. He confirmed in cross-examination that he does not allege that his sexual orientation was a factor in the decision.

102. The Claimant gave a different account in his witness statement, which does not mention Ms Cruz. The Claimant described Ms King 'loudly accusing the claimant… that he was using the remote motion sensor to be notified when the care team manager comes to his unit, and it must be stopped'. In oral evidence, the Claimant confirmed that that was precisely how he was using the sensor.

Ms Thomason's illness on 1 March 2021

103. On 1 March 2021, Ms Thomason was feeling unwell. She phoned the deputy manager who told her that she would not be able to find cover for her at such short notice; she asked her to remain on shift but told her that she could rest in the lounge. Ms Thomason told the staff what was happening.

Issue 29 - Harassment (15(t)); victimisation (21(e)); whistleblowing detriment (26(f)) - Hope Thomason monitoring the Claimant on an enhanced basis on/around 8 March 2021 and more so than other members of staff, as Hope would frequent Claimants unit 8 times in one night, as opposed to once or twice for other units

104. The Claimant says that on 8 March 2021 Ms Thomason monitored him excessively, eight times during the shift. He said that the date was significant because he had recently made the complaint about sick pay and had had a meeting with Ms Emery. The Claimant described Ms Thomason creeping around the unit where the Claimant was working, with her shoes off so as not to be heard, peeking around corners. He likened her to a ninja. He said that he

'believed she had received a green light to move against me'. These details, which the Claimant gave the first time in oral evidence, were not in his witness statement. We thought them far-fetched.

105. It was put to the Claimant that what he was saying was that this was not connected with his sexual orientation but was related to his meeting with Ms Emery. He agreed and put this to Ms Thomason.

106. Ms Thomason denied excessively monitoring the Claimant. Her evidence was that the amount of time she spent on each of the five units depended on what had been discussed during and over, which might include a resident at high risk of falls requiring more checks. It also depended on how adequately call bells were being answered. If she was aware of the delay, she would go to find out why.

107. We accept Ms Thomason's evidence. We are not satisfied that she excessively monitored the Claimant around this time.

Issue 30 - Harassment (15(u)); victimisation (21(f)); whistleblowing detriment (26(g)) - Hope Thomason pressuring Abraham Wa-ay on 14 March 2021 to stop assisting the Claimant and no longer give him a lift to work.

108. Mr Wa-ay, another member of staff, sometimes gave the Claimant a lift to work. On 22 March 2021, Mr Wa-ay declined to do so. From the exchange of texts we saw, it appears that the Claimant's Covid status had previously been an issue for Mr Wa-ay. The Claimant was now fully recovered; Mr Wa-ay still refused ('Sorry Chit I can't').

109. Ms Thomason recalls that Mr Wa-ay told her that he was fed up because the Claimant was often not ready and he had to wait, making him late for work. She suggested that, if he was not happy, he should not give the Claimant a lift any more.

110. The Claimant's evidence was that they arrived early so that they could smoke in the car park before starting work. However, even that evidence was inconsistent: when he was being cross-examined he said they arrived at 9 a.m. for a 9.30 start; when he was cross-examining Ms Thomason, he put to her that they arrived at 9.15 a.m.

111. As for whether Ms Thomason put pressure on Mr Wa-ay, the Claimant mainly relies on his perception that Mr Wa-ay was 'visibly stressed' and said that he 'didn't want to be part of this fight, by which I understood he meant me and Ms Thomason'. The Claimant then said that he believed that Ms Thomason 'had a green light to make the move against me and was using everything in her disposal. This was one of the levers she can use. It was because I made a disclosure about the sick pay issue'.

112. The Claimant never identified who had supposedly 'given a green light' to Ms Thomason. The Claimant's theory appears to us entirely speculative. We find Ms Thomason's account more plausible. We are not satisfied that Ms Thomason put pressure on Mr Wa-ay.

Investigations into the alleged misconduct

113. On around 8 April 2021, Ms Thomason told Ms King that the Claimant had been found asleep on two occasions. Ms Thomason attended an investigation meeting with Ms King.

114. She said that at 01:59 on 15 March 2021 the buzzer in room 29 on Primrose Unit was going for several minutes. When she went to investigate, she found the Claimant sound asleep in the lounge; she woke him and told him to go and answer his buzzer. There is a photograph: it shows the Claimant sitting in an armchair in the lounge area, his head back, his eyes closed, and a mask tied loosely around his mouth and nose.

115. She said that, again on 29 March 2021 at 03.48, the Claimant was working on Daisy Unit; he was sitting by the lift; Ms Thomason had to wake him as room 7 was buzzing and he had not answered. There is a photograph: it shows the Claimant sitting in an armchair in a darkened corridor by the lift with his head slumped on his chest and leaning sideways.

116. On 6 April 2021 at 5.17 a.m., the Claimant was photographed by Ms Linda Aspinall with his head resting on his folded arms, face down on the desk. It was taken in the manager's office. Ms Aspinall provided Ms King with a statement, saying that the room 7 buzzer was going for a long time; when she went to investigate, she found the Claimant asleep in the manager's office, the light was switched off and the door was closed. She wrote that, when she asked the Claimant what he was doing sleeping on duty, he declined to answer her.

117. On the face of it, all three photographs showed the Claimant asleep. Two of them appear to suggest that he had fallen asleep while completing paperwork; in the third there is no paperwork visible.

<u>The investigatory interview with the Claimant</u>

118. The Claimant was interviewed on 12 April 2021 by Ms King, who asked for his explanation. The Claimant accepts that there was a discussion of the misconduct allegations and that he gave his account of what had happened to Ms King.

119. There are notes of this discussion. The Claimant alleges that the notes are not accurate and that he was only shown the first and last of the four pages, which were blank, before he signed the document; he says he did not see the second and third pages until later; essentially, he alleges that he was tricked into signing a blank form which was later populated with information which Ms King 'made up'. His explanation for signing the form was that Ms King told him that it was simply to authorise her to investigate.

120. The typed, template text at the top of the first page of the form states:

> 'This form should be used by the Investigating Officer to interview the employee who is the subject of a misconduct allegation. This is to gain as much information about the alleged incident as possible. This interview should be conducted by the appointed Investigating Officer.'

Further down on the same page, the following text appears:

> 'The purpose of today's meeting is to give you the opportunity to provide an explanation and give your account of events regarding this/these allegations and any mitigating circumstances.'

121. We think it improbable that the Claimant would have signed the document if it had been blank. We have concluded that the Claimant made this allegation because the contents of the document were harmful to his case.

122. The note records Ms King asking the Claimant why he was falling asleep at work and whether he had an underlying medical condition. It records him saying that he did not have an underlying medical condition and 'no harm had been done yet'. It records the Claimant relying on the fact that he had to catch a bus to work and that they did not run at normal times. At one point he denied that he was asleep and said that he was only resting. Ms King asked him if he understood the serious consequences of being asleep if a resident had fallen; the note records the Claimant saying again that 'nothing had happened to anyone yet'. We accept that the notes were accurate.

Issue 31 - Direct discrimination (12(e)); harassment (15(v)); victimisation (21(g) and (j)); whistleblowing detriment (26(h)) - Sue King commencing disciplinary action against the Claimant by letter on 15 April 2021

123. Ms King prepared a written report, dated 13 April 2021, summarising the allegations and saying that she had concluded there was a case to answer in respect of the charge of sleeping on duty on three occasions. She sent it to Ms Lanigan and attached the statements, photographs and notes of meetings as appendices.

124. On 15 April 2021, Ms Lorraine Lanigan of HR wrote to the Claimant inviting him to a disciplinary hearing on 20 April 2021 at the care home. The disciplinary charge was clearly set out. It was identified as a charge of gross misconduct. Ms King's report was attached with the appendices. The Claimant was told of his right to be accompanied. He was told that he could submit documentary evidence in advance of the hearing. He was warned that dismissal was one of the possible outcomes. He was not suspended.

Issue 32 - Harassment (15(w)); victimisation (21(h)); whistleblowing detriment (26(i)) - Sue King not giving the Claimant sufficient time to prepare for investigatory and disciplinary meetings around 15 April 2021

125. On 20 April 2021, the Claimant submitted a written 'defence statement'. He included a statement from Mr Robert Dale, setting out his recollection of seeing the Claimant and Ms Aspinall discussing when she had written her statement and how she had been asked to do so. The Claimant complains that he was given insufficient time to prepare for the meeting. In the event, the hearing was put back at his request to 27 April 2021.

126. In relation to the 6 April 2021 incident, under the heading 'fabricated witness statements', the Claimant speculated in his document that Ms Aspinall had been 'instructed by someone of authority or seniority to write the statement possibly in a certain way or manner, the exact nature forever left unknown with its disappearance'. However, he went on to say that Ms Aspinall's statement 'reads generally true' but asserted that it omitted certain facts. He wrote that it was Ms Aspinall 'who woke up the defendant [i.e. him]' and told him that room

7 was buzzing. Indeed, he notes that two other members of staff had been there before Ms Aspinall and 'did their best not to wake the defendant, one was even kind enough to close the soundproof door and switch off the light, leaving the defendant in peace'.

127. He denied that he was asleep on the other occasions and suggested that it was permissible to sleep while taking a break during the night shift. He stated that he was not aware of the disciplinary policy.

Issue 33 - Harassment (15(x)); victimisation (21(i)); whistleblowing detriment (26(j)) - Sue King not giving the Claimant access to the disciplinary policy prior to the disciplinary hearing on 15 April 2021

128. It is right that the disciplinary policy was not separately sent to the Claimant with the pack, but the Claimant had already read the policy during his induction and it was freely available to all staff at all times.

Issue 34 - Harassment (15(y)); victimisation (21(k)); whistleblowing detriment (26(k)) - Georgina Braithwaite not fully considering or recording the defence made by the Claimant at his disciplinary hearing on 27 April 2021

129. The disciplinary hearing took place on 27 April 2021, chaired by Ms Braithwaite. A different manager had previously been asked to conduct the hearing, but arrangements changed; nothing turns on this. Ms Louise Camfield took notes. The Claimant says they are wholly inaccurate.

130. The Claimant submitted what he described as a 'defence statement'. The notes of the meeting specifically refer both to that statement and to additional observations made by the Claimant at the hearing. He confirmed in cross-examination that he recalled Ms Braithwaite discussing his defence with him at the meeting.

131. In relation to the 15 March 2021 incident, the notes record the Claimant saying that the picture did not confirm that he was asleep; he did not know if he was asleep. Later in the notes the Claimant is recorded as saying 'the CTL then woke him up and said it is your buzzer that is going off'.

132. In relation to the 29 March 2021 incident, the notes record that the Claimant would not answer Ms Braithwaite's question as to whether he was asleep or not. He alleged that when the photograph was taken, Ms Thomason was laying on the sofa in the next room.

133. In relation to the 6 April 2021 incident, the notes clearly record the Claimant admitting that he was asleep. The Claimant now challenges these notes, notwithstanding the fact that in his own appeal document he wrote 'the defendant admitted he was asleep on his break'. The Claimant said that it was permissible to sleep between 1 a.m. and 4 a.m. He said that he had worked for the Respondent for three years and had never known that the night shift was a working shift, requiring staff to remain awake. He said that he was 'in shock' when he first found this out on 9 April 2021 from Ms King. The Claimant alleged that other staff slept, including Ms Thomason.

134. The Claimant said in oral evidence that he did not think that Ms Braithwaite was influenced by his sexual orientation. Ms Braithwaite's evidence was that

she did not know that the Claimant had made public interest disclosures. We accept that evidence: there was nothing before us to indicate that she did; the Claimant did not put to Ms Braithwaite that she was influenced by any of the disclosures, the Judge had to ask her on the Claimant's behalf whether there was a connection.

Issue 35 - Direct discrimination (12(f)); victimisation (21(l)); whistleblowing detriment (26(l)) - Georgina Braithwaite dismissing the Claimant on 30 April 2021.

135. Ms Lanigan prompted Ms Braithwaite for her decision on 29 April 2021. Ms Braithwaite spoke with Ms Lanigan in HR and provided her decision with reasons. Ms Lanigan drafted the disciplinary hearing outcome and emailed it to her to check before she sent it to the Claimant on Ms Braithwaite's behalf on 30 April 2021.

136. Ms Braithwaite found the charges proven. She was satisfied that the Claimant was asleep while on duty on three separate occasions, based on the photographs and the Claimant's answers at the disciplinary meeting. She wrote:

> 'Photograph 1. You said you could not confirm that you were asleep but then contradicted yourself by saying that the CTL woke you.
>
> Photograph 2. You would not answer when I asked you if you were asleep but said that you were on a break. The photograph showed you sitting in an armchair in a room with the lights off and your head has dropped to one side. I believe from the photograph that you were asleep.
>
> Photograph 3. You admitted that you were asleep.'

137. She rejected the Claimant's suggestions that it was permissible to sleep if on a break and that he was not aware of the disciplinary policy. She concluded that the Claimant had committed gross misconduct and summarily dismissed him with effect from 29 April 2021. She informed him of his right to appeal.

The disciplinary appeal

138. The Claimant lodged his appeal on 10 May 2021.

139. The disciplinary appeal hearing took place on 26 May 2021, chaired by Ms Prothero. A different manager, the director for the Claimant's region, had previously been asked to deal with the hearing, but the Claimant objected; the date had also been rearranged; nothing turns on this.

140. No allegations are made against Ms Prothero. Her evidence was that she was not aware of the Claimant's sexual orientation or of any of his disclosures. She was not responsible for the care home which was in a different region from hers. Nothing was reported to her about the Claimant before the hearing. The only reason she heard the appeal was because the Claimant had objected to the original choice.

141. The notes of the appeal hearing appear to be a verbatim transcript. The Claimant initially accepted that they were accurate, but withdrew that concession when Ms Rokad took him to passages which were unhelpful to him.

142. In relation to the 15 March 2021 incident, the Claimant is recorded at one point in the notes saying: 'the only reason I'm not reacting to my buzzer it's because I'm sleeping'. The Claimant sought to resile from that at the hearing; his attempt to do so was confused; he appeared to be suggesting that he could have been feigning sleep 'to highlight Ms Thomason's dishonesty'. Suffice it to say, he did not say that at the appeal meeting. We found the suggestion implausible.

143. In relation to the 29 March 2021 incident, the Claimant said at one point that 'the only reasons that [Ms Thomason] was able to take the picture was she woke up just before me'. When Ms Prothero tried to confirm that the implication of this was that he was sleeping, the Claimant tried to backtrack from his earlier statement, saying that he was 'sleepy'.

144. In relation to the 6 April 2021 incident, the Claimant wrote in the document that he prepared for the appeal hearing: 'the defendant admitted he was asleep on his break' but argued that he was on a break at the time. At one point in the hearing the Claimant accepted that his breaks were paid at night. Even so, in relation to the 6 April 2021 incident, Ms Prothero observed that he could not have been on a break at the time because the photograph (showing him asleep while sitting at a desk with his head down on some papers) was taken at 5:17 a.m. which was outside break times.

145. The notes show Ms Prothero asking neutral questions, giving the Claimant every opportunity to explain his position and probing his answers appropriately to clarify them.

146. Ms Prothero decided to uphold the appeal and Ms Lanigan drafted an outcome letter for her approval on 1 June 2021. It was sent to the Claimant on the same day. Ms Prothero's evidence to the Tribunal was that she thought that the Claimant contradicted himself during the meeting as, in her view, he had done throughout the process.

147. Ms Prothero recalls dismissing a staff member for sleeping on duty when she was a manager in around 2014. She was aware of other managers dismissing staff for the same reason but cannot recall the details. We were taken to two letters of dismissal for sleeping at work, one from 2017 and one from 2019.

<u>The Claimant's evidence on time limits</u>

148. The Claimant said that he did not know of the existence of employment tribunals, or about the ability to complain about discrimination, until 2021, when he started Googling and found out about the ET; he did not find out about time limits until he contacted ACAS; he went to the Citizens Advice Bureau in December 2021; he went to a solicitor in February 2022.

149. The existence of employment tribunals and the possibility of bringing discrimination and whistleblowing claims in them is now so widely known, and so easily researched, that we found the Claimant's explanation to be implausible. We note that he acted promptly in researching the Covid regulations, when he had concerns relating to pay. We do not consider that he gave a good explanation for his delay in bringing his claims, especially those relating to 2019 and 2020.

Findings of fact on contribution

150. The following findings in relation to the disciplinary allegations for which the Claimant was dismissed are the Tribunal's own, having heard evidence from the Claimant at the hearing. They are made on the balance of probabilities and are unanimous. We set them out separately here in relation to the Respondent's contention that the Claimant contributed to his dismissal by his own conduct.

151. In relation to the 15 March 2021 incident, the Claimant accepted at the disciplinary hearing that the team leader 'woke him up' (para 130 above). He denied in cross-examination that he had been woken up, saying that he 'never knew that picture had been taken until Ms King showed it to me'. He said that he only needed to open his eyes to see the room number and to act on it. In light of that answer, he accepted that he must have been working when the photograph was taken; he then said 'between 1 a.m. and 4 a.m. between tasks you are allowed to sleep even when on duty'; pressed on this point, he accepted the corollary of this was that after 4 a.m. workers were not allowed to sleep.

152. In relation to the 29 March 2021 incident, at the appeal hearing the Claimant said that 'the only reasons that [Ms Thomason] was able to take the picture was she woke up just before me' (para 142). At the hearing, the Claimant denied that Ms Thomason woke him up; he could not recall her telling him that he had not answered the buzzer for room seven. He suggested that Ms Thomason had specifically instructed him to sit where he was sitting as a form of bullying, notwithstanding the fact that he had never previously alleged this.

153. In relation to 6 April 2021 incident, he wrote in his own 'defence statement' for the disciplinary hearing that he was asleep (para 125). He admitted at the disciplinary hearing that he was asleep (para 132). He accepted in cross-examination that Ms Aspinall 'woke me up'. On the logic of his earlier answer, it was put to him that he should not have been sleeping at 5.17 a.m. The Claimant then said that that night was an exception because Ms Cruz had told everyone to be more vigilant during the night and he did not take a break until 5 a.m. That was not a logical explanation for why he considers he was permitted to sleep at any point during the shift. Despite his earlier reference to being woken up by Ms Aspinall, he then said told the Tribunal that he did not know whether he was sleeping or not.

154. We reject the Claimant's evidence that he thought it was permissible to sleep while on a night shift, including during a break. The Claimant was familiar with the relevant provisions in the disciplinary policy. He knew that he was paid for breaks and that this meant he was required to be awake and alert at all times. That is consistent with the fact that two of the photographs show him with working papers, albeit asleep next to them.

155. The Claimant made admissions at one stage or other that he was sleeping in relation to all three incidents. The fact that on other occasions he sought to resile from those admissions undermined his credibility in the Tribunal's eyes. In our judgement, the photographs speak for themselves: they show him sound asleep; his attempts to argue that they show anything else were not convincing.

156. Taken together with all the other evidence we have summarised above, we are satisfied that Claimant was asleep on all three occasions, when he should have been awake and that this was gross misconduct.

The law

Direct sexual orientation discrimination

157. S.13(1) EqA provides:

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

158. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [1999] ICR 877, *per* Lord Nicholls at 884). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

> **'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

159. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan* at 886).

160. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

161. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].

162. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at [36], the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic. In *Alcedo Orange Ltd v Ferridge-Gunn* [2023] EAT 78, the EAT confirmed that this may be contrasted with the position in whistleblowing cases in *Royal Mail Group v Jhuti* [2020] ICR 731, where the Supreme Court held that, in exceptional cases, it is possible to look behind the motivation of the decision-maker and

consider the influence of others who may have been motivated by the employee's status as a whistleblower.

163. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment' (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [35]). An unjustified sense of grievance does not satisfy that test.

Harassment related to sexual orientation

164. Harassment related to sexual orientation is defined by s.26 EqA, which provides, so far as relevant:

> **(1) A person (A) harasses another (B) if-**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—**
> **…**
> **sexual orientation**
> **…**

165. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered (in the context of the formulation in s.3A Race Relations Act 1976) by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 *per* Underhill P at [22]:

> **'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'**

166. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at [47] held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

167. He further held (at [13]):

> **'When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.'**

168. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ at [12], referring to Elias LJ's observations in *Grant*, stated:

> **'We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**

169. Guidance as to the construction of the wording '*related to* a relevant protected characteristic' was given by the Court of Appeal in *UNITE the Union v Nailard* [2018] IRLR 730. It imports a broader test than that which applies in a claim of direct discrimination. It was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. However, there are limits. The Tribunal in that case had allowed that a failure to address a sexual harassment complaint, made against elected officials of the union, could itself amount to harassment related to sex 'because of the background of harassment related to sex'. That, the Court of Appeal held, went too far. The Tribunal had not made any findings as to whether the claimant's sex formed part of the motivation of the alleged discriminator.

170. In *Raj v Capita Business Services Ltd* [2019] IRLR 1057 at [53] Judge Heather Williams QC held that, in relation to the question of whether the conduct related to the protected characteristic, the burden of proof provisions in s.136 EqA require the Tribunal to consider whether the facts were such that, absent any other explanation for it, the ET could conclude that it did (stage 1); if so, it must go on to consider whether the Respondent shown that, in fact, it was not (stage two). The Judge observed at [58]:

> **'I am doubtful that establishing unwanted conduct that had a prohibited effect could ever of itself give rise to a *prima facie* case that the conduct was related to a protected characteristic.'**

<u>Victimisation</u>

171. S.27 Equality Act 2010 ('EqA') provides as follows:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**

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

172. Ss.2(d) covers allegations made by the claimant that the employer or another person has contravened the EqA, whether or not they are express. It is not necessary that the EqA be mentioned, but the asserted facts must, if verified, be capable of amounting to a breach of the EqA.

173. The EAT in *Chalmers v Airpoint Ltd* UKEATS/0031/19/SS (unreported 2020) upheld the Tribunal's decision that a reference to actions which 'may be discriminatory' in a grievance was not sufficient to amount to a protected act.

174. In *Durrani v London Borough of Ealing EAT 0454/12* the EAT upheld the Tribunal's decision that references to 'being discriminated against' referred to general unfairness rather than detrimental action based on the Claimant's race, although the EAT emphasised that the case should not be taken as 'any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of s.27 EqA'. All will depend on the circumstances of the particular case.

175. The Tribunal must determine whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as s/he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

<u>The burden of proof in discrimination cases</u>

176. The burden of proof provisions are contained in s.136 EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

177. The operation of the burden of proof provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:**

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
> >
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

178. In *Madarassy v Nomura International plc* [2007] IRLR 246 at [57] Mummery LJ considered what evidence should be considered at the first stage.

> **'This would include evidence adduced by the complainant in support of the allegations of [in that case] sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the Respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.'**

179. Mummery LJ continued at [58]:

> **'The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.'**

180. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court confirmed that a claimant is still required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an act of unlawful discrimination. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the

case before them using their common sense. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.

181. The burden of proof provisions should not be applied by the Tribunal in an overly mechanistic manner: see *Khan v The Home Office* [2008] EWCA Civ 578 *per* Maurice Kay LJ at [12]. The approach laid down by s.136 EqA will require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but where the Tribunal is able to make positive findings on the evidence one way or another, the provisions of s.136 will be of little assistance: see *Martin v Devonshires Solicitors* [2011] ICR 352 at [39], approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 at [32].

Time limits in discrimination cases

182. S.123(1)(a) Equality Act 2020 ('EqA') provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.

183. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated and ending with the day of the early conciliation certificate does not count (s.140B(3) EqA). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (s.140B(4) EqA).

184. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

185. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so.

186. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse (*Robertson v Bexley Community Centre* [2003] IRLR 434 at [23-24].

187. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. There are statutory time limits, which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 *per* Sedley LJ at [31-32]).

Protected disclosures in whistleblowing cases

188. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. A qualifying disclosure is defined by section 43B, as follows:

> **(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—**
>
> **[…]**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **[…]**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered**
>
> **[…]**
>
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.**

189. In *Williams v Michelle Brown AM*, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> **'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'**

What was the disclosure of information?

190. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> **'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other […]**
>
> **31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.**
>
> **[…]**
>
> **35. In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).**

> **[…]**
>
> **36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case.**
>
> **[…]**
>
> **41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the *Cavendish Munro* case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.'**

191. Where a disclosure is vague and lacks specificity, it will not provide sufficient information: *Leclerc v Amtac Certification Ltd* UKEAT/0244/19 at [26-31].

192. Where the link to the subject matter of any of ERA s.43B(1) is not stated or referred to, or is not obvious, a Tribunal may regard this as evidence pointing to the conclusion that the information is not specific enough to be capable of qualifying as a protected disclosure (*Twist DX Ltd v Armes* UKEAT/0030/20 at [86] and [87]).

Did the worker believe that the disclosure tended to show one or more of the matters listed in sub-paragraphs (a) to (f)? If he did hold that belief, it must be reasonably held.

193. The issues arising in relation to the Claimant's beliefs about the information disclosed were comprehensively reviewed by Linden J. in *Twist DX Ltd*, from which the following principles emerge.

193.1. Whether the Claimant held the belief that the disclosed information tended to show one or more of the matters specified in s.43B(1)(a)-(f) ('the specified matters') and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant's beliefs (at [64]).

193.2. It is important for the ET to identify which of the specified matters are relevant, as this will affect the reasonableness question (at [65]).

193.3. The belief must be as to what the information 'tends to show', which is a lower hurdle than having to believe that it 'does show' one of more of the specified matters. The fact that the whistleblower may be wrong is not relevant, provided his belief is reasonable (at [66]).

193.4. There is no rule that there must be a reference to a specific legal obligation and/or a statement of the relevant obligations or,

alternatively, that the implied reference to legal obligations must be obvious, if the disclosure is to be capable of falling within section 43B(1)(b). Indeed, the cases establish that such a belief may be reasonable despite the fact that it falls so far short of being obvious as to be wrong (at [95]).

Disclosure in the public interest

194. The Court of Appeal considered the 'public interest' test in *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731. The following principles emerge.

194.1. The Tribunal must ask: did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest (at [27])? That is the subjective element.

194.2. There is then an objective element: was that belief reasonable? That exercise requires that the Tribunal recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest (at [28]).

194.3. 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 (at [30]).

194.4. 'Public interest' involves a distinction between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest (at [31]).

194.5. It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest (at [36]).

<u>PIDA detriment claims</u>

195. S.47B(1) ERA provides:

> **A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.**

196. Care must be taken to establish the 'reason why' the employer acted as it did. The 'reason why' is the set of facts operating on the mind of the relevant decision-maker, it is not a 'but for' test. The correct test is whether 'the protected disclosure materially influences (in the sense of being more than a trivial influence on) the employer's treatment of the whistleblower (*Fecitt v NHS* Manchester [2012] IRLR 64 at [45]).

197. S.48 ERA provides:

> **(1A) A worker may present a complaint to an employment Tribunal that he has been subjected to a detriment in contravention of section 47B.**
>
> **[…]**
>
> **(2) On a complaint under subsection […](1A)[…] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.**

198. If an employment tribunal can find no evidence to indicate the ground on which a Respondent subjected a Claimant to a detriment, it does not follow that the claim succeeds by default. In *Ibekwe v Sussex Partnership NHS Foundation Trust*, UKEAT/0072/14/MC EAT adopted the same approach as that taken by the Court of Appeal in *Kuzel* (see below). In *Ibekwe*, the EAT concluded that there were no grounds for interfering with the tribunal's unequivocal finding that there was no evidence that an unexplained managerial failure to deal with an employee's grievance was on the ground that the grievance contained a protected disclosure.

Time limits in PIDA detriment claims

199. With regard to time limits, s.48(3) and (4) ERA 1996 provide (as relevant):

> **(3) An employment Tribunal shall not consider a complaint under this section unless it is presented–**
>
> **(a) before the end of the period of three months, beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or**
>
> **(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.**
>
> **(4) For the purposes of subsection (3)**
>
> **(a) where an act extends over a period, the "date of the act" means the last day of that period**

Automatically unfair dismissal

200. There is an important distinction between whistleblowing detriment cases, where it is sufficient that the disclosure is a material factor in the treatment, and dismissal cases, where it must be the sole or principal reason.

201. S.103A ERA provides:

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

202. The approach to the burden of proof in section 103A claims was summarised by Mummery LJ in *Kuzel v Roche Products* [2008] ICR 799 as follows:

> **'[…]**
>
> **[52] Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.**
>
> **[53] Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.**
>
> **[…]**
>
> **[57] I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean,**

> **however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
>
> **[58] Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
>
> **[59] The ET must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, it is not necessarily so.**
>
> **[60] As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence, in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.'**

203. The Court of Appeal in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at [34] held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

204. In *Walls Meat Co Ltd v Khan* [1979] ICR 52 at p.56, Denning LJ held that the following general test should be applied in determining the question of reasonable practicability.

> **'Had the man just cause or excuse for not presenting his complaint within the prescribed time limit? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.'**

205. In the same case (at p.61), Brandon LJ drew a distinction between a Claimant who is ignorant of the right to claim, and a Claimant who knows of the right to claim but is ignorant of the time limit:

> **'While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to**

satisfy an industrial Tribunal that he behaved reasonably in not making such enquiries.'

Unfair dismissal

206. S.94 Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

207. S.98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it— ...**
>
> **(c) relates to the conduct of the employee ...**
>
> **(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

208. In *Orr v Milton Keynes Council* [2011] ICR 704 at [78], Aikens LJ summarised the correct approach to the application of s.98 in misconduct cases:

> **'(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.**
>
> **(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.**
>
> **(3) Once the employer has established before an employment Tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the Tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).**
>
> **(4) In applying that subsection, the employment Tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the**

> **employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief."**
>
> **If the answer to each of those questions is 'yes', the employment Tribunal must then decide on the reasonableness of the response of the employer.**
>
> **(5) In doing the exercise set out at (4), the employment Tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.**
>
> **(6) The employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.**
>
> **(7) A particular application of (5) and (6) is that an employment Tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.**
>
> **(8) An employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.'**

209. At (4) above, Aikens LJ was summarising the well-known test in *British Homes Stores Ltd v Burchell* [1980] ICR 303 at p.304.

210. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) cited paragraphs (4) to (8) from that extract in Aikens LJ's judgment in *Orr* and added:

> **'As that extract makes clear, the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111.**

211. It is impermissible for a Tribunal to substitute its own findings of fact for those of the decision-maker (*London Ambulance Service NHS Trust v Small* [2009] IRLR 563 at [40-43]). Nor is it for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it (*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518). The relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did.

212. Even if the dismissal decision falls within the band of reasonable responses, it may still be unfair, if the Respondent has not followed a fair procedure. The Tribunal must evaluate the significance of the procedural failing, because 'it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process' (*Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at [26]).

213. In *Sainsbury v Hitt* [2003] IRLR 23 at paras 30-34, the Court of Appeal held that:

> **'The investigation carried out by Sainsbury's was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades. The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part, to which a reasonable response was a decision to dismiss him. … In my judgment, Sainsbury's were reasonably entitled to conclude, on the basis of such an investigation, that Mr Hitt's explanation was improbable. The objective standard of the reasonable employer did not require them to carry out yet further investigations of the kind which the majority in the employment Tribunal in their view considered ought to have been carried out.**
>
> **In suggesting further investigations of the kind set out in paragraph 6 of the extended reasons, the majority of the employment Tribunal were, in my judgment, substituting their own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer. On the decision of this Court in Madden, that is not the correct approach to the question of the reasonableness of an investigation.'**

214. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

<u>Contribution</u>

215. S. 123(6) ERA provides, in relation to the compensatory award:

> **Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding**

216. In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110.

217. S.122(2) ERA provides, in relation to the basic award:

> **Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce that amount accordingly.**

218. The EAT in *Langston v Department for Business, Enterprise and Regulatory Reform*, EAT 0534/09 confirmed that the same criteria ('culpable or blameworthy') apply to deductions from the basic award.

Conclusion: time limits in the discrimination and whistleblowing detriment claims up to and including issue 20

219. The following claims would fail on their facts because the Claimant has not shown that the detriments occurred as alleged, alternatively the conduct alleged could not amount to a detriment: Issues 1-5, 7-11 and 20.

220. The remaining issues are: Issues 6, 12-13 and 17-18 (Issues 14,15,16 and 19 are not detriments; they relate to protected acts/public interest disclosures).

221. We have recorded (para 83) that there is a gap of some nine months in the chronology of alleged detriments after Issue 20 (between April 2020 and January 2021). There is no basis on which we could conclude that there was conduct extending over a period so as to bridge that gap, linking with in-time complaints, in light of our conclusions below that there are no such complaints.

222. We have concluded that, in relation to the whistleblowing detriment claims under Issues 1 and 13, there is no sound basis on which we could conclude that it was not reasonably practicable for the Claimant to present the claims in time, and we decline jurisdiction in relation to them. We do not accept that he was ignorant of his right to bring a claim; if he was, in our judgment that ignorance was not reasonable, given our finding that he was aware of the existence of Tribunals and could have taken advice or done his own research. The same conclusions apply to Issues 23 and 24 which post-date the long gap but are still out of time.

223. The delay in bringing the discrimination and victimisation claims up to and including Issue 20 is very substantial and there is no good explanation for it. Technically there is prejudice to the Claimant, if time is not extended, in that he will be deprived of a final determination in respect of the claims. However, we also regard to their underlying merits: we consider they would be bound to fail, given our conclusions (below at 230-231) that there was no protected act for the purposes of the victimisation claim, and the Claimant has provided no cogent evidence that his sexual orientation was a factor in the Respondent's treatment of him for the purposes of the direct discrimination and harassment claims (below at para 224 onwards). By contrast, the prejudice to the Respondent if we extend time would be substantial: it would be deprived of the benefit of the strict time limits in discrimination claims; moreover, Ms King (against whom some of the allegations are made) left the Respondent's employment before the claim form was issued. For all these reasons we have concluded that it is not just and equitable to extend time in relation to the discrimination claims up to and including Issue 20 and we decline jurisdiction.

Conclusions: direct sexual orientation discrimination/harassment related to sexual orientation

224. The initial burden is on the Claimant to prove facts from which the Tribunal could reasonably conclude that his sexual orientation was the reason for the alleged detriment treatment (direct discrimination), alternatively that the treatment was related to sexual orientation (harassment). We considered whether he had done so.

225. The Tribunal was careful to give the Claimant every opportunity to articulate why he held the belief he did, but he was not able to do so to our satisfaction.

226. In relation to Ms Thomason, the only evidence he relied on that she treated him adversely because of his sexual orientation was the supposed interaction

between her and his partner at a party. We have found (para 24) that there is no evidence that anything untoward happened.

227. The Claimant did not point to any evidence at all which might show that the other alleged discriminators were influenced by his sexual orientation. He stated in terms that he did not believe that Ms Braithwaite was influenced by his sexual orientation when she decided to dismiss him. His case was that, insofar as they may have acted on information provided to them by Ms Thomason, their actions were tainted by her supposed prejudice. It was recently confirmed by the EAT (*Alcedo Orange Ltd v Ferridge-Gunn* [2023] EAT 78, above at para 162) that this is not a permissible basis for a finding of unlawful discrimination; the focus must be on the motivation of the alleged discriminator. In any event, we have rejected the contention that Ms Thomason treated the Claimant adversely because he is gay.

228. We record also at this point that in the list of issues the Claimant sought to articulate his case by saying that he was treated the way he was because he was the only openly gay person at the care home in a same-sex relationship. We reminded him that, for the purposes of the direct discrimination claim, it was his sexual orientation alone which was the protected characteristic, not other factors such as his relationship status. The fact that he was open about his same-sex partnership might be a factor 'related to sexual orientation' for the purposes of the harassment claim. Even so, we were not satisfied that the Claimant has shown facts from which we could conclude that his relationship status influenced any of the treatment. In any event, it is an allegation made only against Ms Thomason, not any of the other alleged discriminators.

229. For these reasons, we have concluded that, in relation to the remaining claims of direct sexual orientation discrimination and harassment related to sexual orientation, the Claimant has failed to discharge the initial burden on him to show that sexual orientation was a factor in any of the treatment of which he complains, and the claims must fail.

Conclusions: victimisation

230. We have found as a fact (para 71) that the Claimant did not complain of discrimination to Ms King orally on 16 April 2020 or by email on 20 April 2020 (Issue 14).

231. Consequently, there was no protected act and the victimisation claims must fail.

Conclusions: public interest disclosures

232. We have reached the following conclusions in relation to the alleged public interest disclosures.

    232.1. Issue 15: the generalised reference to Ms Thomason 'banging doors and shouting' is not sufficiently specific to amount to a disclosure of information. Nor are we satisfied that the Claimant subjectively believed that it tended to show a likely breach of a legal obligation or health and safety breach. We reminded ourselves that the first time he referred to any concerns raised by any resident was in his oral evidence; even then it was unspecific (para 43). We think

this was a simple complaint of Ms Thomason being inconsiderate, it was not a public interest disclosure.

232.2. Issue 16: as for the alleged failure to report his collapse, we accept that he did tell Ms King that he had collapsed and that it had not been reported. We accept that, subjectively, he believed that it was a health and safety risk to himself, but also to others, if he were allowed to continue working in the circumstances. That belief was objectively reasonable. We accept that he reasonably believed that it was in the public interest to disclose the information. This was a public interest disclosure.

232.3. Issue 19: we consider that the Claimant has not discharged the burden on him to show with sufficient specificity that he made a qualifying disclosure of information on this date, or what likely breaches of legal obligations and/or safety concerns they related to The most we could find was that that he raised concerns of some sort about the Respondent's approach to furlough and to shielding. There is insufficient evidence from which we could conclude that he made a public interest disclosure.

232.4. Issue 21: this is another example of shifting sands in the Claimant's case and a lack of cogent, consistent evidence. In his oral evidence he said the disclosure related to broken extractor fans; that is different from the pleaded disclosure. There is no contemporaneous record of the Claimant making a disclosure about broken extractor fans. We are not satisfied that he has proved that he made a disclosure of information in those terms.

232.5. Issue 22: we are satisfied that the Claimant told Ms Cruz and Ms King that it was wrong to require employees to come into the care home in their own time to be tested for Covid. He subjectively believed that the information tended to show a breach of legal obligations and a health and safety breach. In our judgement, that belief was reasonable. We are satisfied that he reasonably believed that the disclosure was in the public interest, because it affected a significant number of his colleagues.

232.6. Issue 26: we cannot find that the Claimant made a public interest disclosure without knowing what the information disclosed is said to be.

232.7. Issue 27: We have concluded that the Claimant made a disclosure of specific information. He subjectively believed that his disclosure tended to show a breach of a legal obligation on the part of the Respondent to pay SSP in respect of periods of self-isolation; he also believed that it tended to show that the health and safety of individuals (workers and residents) was likely to be endangered if such payments were not made. We consider that these beliefs were reasonable. He had a personal interest in the issue, but we accept that he also believed that it was in the public interest to disclose the information for the benefit of other employees and patients who

were likely to be affected; that belief was reasonable. This was a public interest disclosure.

Conclusions: whistleblowing detriment

233. We make the following conclusions in relation to the remaining alleged whistleblowing detriments.

233.1. Issue 28: we have concluded that the sole reason why Ms King instructed the Claimant to stop using his personal motion sensor was because he was using it for an improper purpose (to warn him of the approach of a manager).

233.2. Issue 29: the detriment did not occur as alleged; Ms Thomason did not excessively monitor the Claimant (para 106).

233.3. Issue 30: the detriment did not occur as alleged; Ms Thomason did not put pressure on Mr Wa-ay to stop giving the Claimant left to work (para 111).

233.4. Issue 31: we have concluded that the sole reason why Ms King commenced disciplinary action against the Claimant was because allegations which would amount to gross misconduct had been made, which were supported by photographic evidence. It would have been unusual not to recommend that the matter be progressed to a disciplinary hearing. There is no evidence that the fact that the Claimant had made public interest disclosures played any part in her decision.

233.5. Issue 32: the detriment did not occur as alleged. The Claimant did have sufficient time to prepare. His complaint is effectively that he would not have had sufficient time, if the meeting had not been postponed and that he might have further elaborated his defence statement if he had known when he submitted it that it was going to be postponed. There was nothing to prevent him elaborating on the matters set out in his defence statement at the hearing or even asking to resubmit the defence in a different form. There was no detriment. If we are wrong about that, there is no evidence that the original or amended timetable for process was in anyway influenced by the fact that the Claimant had made public interest disclosures.

233.6. Issue 33: there was no detriment. The Claimant had read the disciplinary policy during his induction, and it was freely available at all times.

233.7. Issues 34 and 35: Ms Braithwaite's conduct of the hearing and decision to dismiss the Claimant cannot have been influenced by the public interest disclosures; we have found that she did not know about them (para 134).

Conclusions: unfair dismissal, including automatically unfair dismissal

234. The Claimant asserts the reason for the dismissal was an automatically unfair reason: because he made protected disclosures. In light of our conclusions

above, we are satisfied that the fact that the Claimant had made protected disclosures played no part in his dismissal.

235. We have concluded that the sole reason for the dismissal was conduct: the Respondent concluded that the Claimant fell asleep on three occasions while on duty during night shifts.

236. We accept that Ms Braithwaite genuinely believed that the Claimant had been asleep on duty on three occasions. She had ample evidence to support her belief: the photographs themselves were, in our view, evidence enough; they were supported by the Claimant's own admissions (paras 121, 125, 130, 132) as well as his evasive and contradictory answers (para 135).

237. As for the investigation, Ms King interviewed Ms Thomason and took a statement from Ms Aspinall. She also interviewed the Claimant and recorded his answers in notes which we have found were accurate. In that interview his main point was that 'no harm had been done yet' (para 122), which appears to us be an admission of sorts. Ms King then prepared an investigation report. The Claimant made further admissions at the disciplinary hearing (see above). He also made admissions at the appeal hearing (paras 141-143).

238. The Claimant objects that other witness statements should or could have been obtained from workers who were on duty with the Claimant in the same unit or same floor at the times in question. We have concluded that the Respondent acted reasonably in not interviewing others. This was a situation of the sort described in the *Hitt* case, in which further investigations were unnecessary because the evidence as it stood, both from the Claimant himself and from others, was sufficient for the decision-makers to reach a reasonable conclusion. Further steps could have been taken, but in our judgement, they were not required, in circumstances where the core evidence (the photographs and the Claimant's own admissions) was so clear.

239. The Claimant criticises the brevity of some of the notes of meetings, which he says omits things he said at the hearing. Even if this is right, we do not consider it renders the dismissal unfair. We are satisfied that the Respondent had regard to the points made by the Claimant, insofar as they were relevant to the essential enquiry they had to undertake.

240. The Respondent had clear rules identifying that sleeping while on duty may merit summary dismissal. The Claimant was aware of those rules (paras 17-22). Their importance is self-evident: night staff were responsible for the safety of vulnerable residents; they could not discharge that responsibility if they were not awake and alert.

241. There was clear evidence (para 147) that the Respondent had applied the sanction of summary dismissal in other cases of sleeping while on duty. The only specific example (i.e. by reference to name and date) the Claimant gave of another employee sleeping while on duty, and not being disciplined, was Ms Thomason on 1 March 2021. We have found (para 103) that the circumstances were different.

242. In all the circumstances we are satisfied, by the objective standards of the reasonable employer, that the Respondent's decision to dismiss the Claimant

fell within the band of reasonable responses which a reasonable employer might have adopted in response to his misconduct.

243. The dismissal was fair.

244. If we are wrong about that, and there was any procedural unfairness, we have concluded that the Claimant contributed to his dismissal by sleeping while on duty (paras 149-155).

Employment Judge Massarella
Date: 3 November 2023