EMPLOYMENT TRIBUNALS

Claimant: Miss M Y Kay

Respondent: The Laurels Family Assessment Limited

HELD AT: Manchester

ON: 4 and 5 September 2023
(by cloud video platform)

In chambers on: 25 October 2023

BEFORE: Employment Judge Porter
Mr G Pennie
Dr B Tirohl

REPRESENTATION:

Claimant: In person

Respondent: Mr Halpin, solicitor

RESERVED JUDGMENT

1. The majority decision of the tribunal is that:

    a. The claimant was automatically unfairly dismissed within the meaning of s103A Employment Rights Act 1996; and

b. The claimant was subjected to a detriment within the meaning of s47B Employment Rights Act 1996.

2. The unanimous decision of the tribunal is that the respondent failed to provide the claimant with a written statement of terms and conditions of employment within the meaning of s1 Employment Rights Act 1996.

3. A remedy hearing will take place on 20 December 2023 by CVP.

REASONS

Issues to be determined.

1. At the outset it was noted that the claims had been identified at a preliminary hearing on 24 February 2023 before EJ Yale as:

1.1 automatically unfair dismissal under s103A Employment Rights Act 1996; and

1.2 detrimental treatment under s47B Employment Rights Act 1996 relating to the dismissal and mishandling of the appeal against dismissal

2. It was noted that dismissal of an employee could not be a detriment. The allegation of detrimental treatment was therefore restricted to the allegation relating to the mishandling of the appeal.

3. It was noted that the claimant had prepared a Schedule of Loss including compensation for breach of contract (failure to provide notice of termination of employment) and for failure to provide the claimant with a written statement of the terms and conditions of employment.

4. The respondent asserted that:

4.1 the respondent acknowledged that the claimant had included in her claim form an allegation of failure to provide a contract of employment. The respondent had no objection to the claimant pursuing that claim, which was a matter of remedy and will be addressed by the respondent in witness evidence;

4.2 However, the claim of breach of contract was not included in the claim form and had not been referred to at the preliminary hearing. The respondent objected to the inclusion, at this late stage, of a new cause of action.

5. EJ Porter explained to the claimant that she had the right to make application for leave to amend the claim to include a claim for breach of contract. That application would be determined by the tribunal prior to the start of the final hearing. EJ Porter explained that the tribunal would have to consider the application under the so-called Selkent principles, under which the tribunal would consider whether the claim was presented out of time, the reason for any delay and the balance of prejudice between the parties in allowing or rejecting the application. A short break was taken to enable the claimant to take advice.

6. After the break the claimant confirmed that the did not wish to pursue the claim for breach of contract.

7. EJ Porter noted that the claimant alleged that she had made two protected disclosures:

> 7.1 on or around 22 or 23 August 2022 to her line manager Hazel Wilkinson; and
> 7.2 on or around 13 September 2022 to AC, described as a responsible individual.

8. EJ Porter sought clarity as to the status of AC. Did the respondent concede that any disclosure to AC was to the employer.

9. The respondent confirmed that any disclosure to Hazel Wilkinson was to the employer but that AC was not employed by the respondent.

10. The list of issues attached the Case Management Order was therefore amended to reflect these exchanges and was confirmed orally at the hearing. The Amended List appears at Appendix 1.

Submissions

11. The claimant made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

> 11.1 she was a litigant in person, who had never presented a claim to the tribunal before, and may have made mistakes in the preparation of the documents and her witness statement. Any inconsistency in evidence is because of lack of experience and legal knowledge. She has told the truth;
>
> 11.2 the reason for dismissal had nothing to do with the four points set out in the dismissal letter which do not amount to gross misconduct;
>
> 11.3 she complied with the instruction in the dismissal letter to pursue an appeal against dismissal. Craig Duxbury simply ignored her emails and upheld the decision to dismiss without investigation;

11.4 she has never been provided with a contract of employment

12. Solicitor for the respondent relied upon written submissions which the tribunal has considered with care but does not repeat here. In addition, solicitor for the respondent made a number of oral submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was additionally asserted that:-

13.1 in relation to the alleged disclosure to AC on 13 September 2022, the respondent does not accept that the claimant made any allegation that SW took recreational drugs or that she had witnessed him on a come down whilst at work;

13.2 the claimant was unable to provide any reason for the absence of evidence from AC. She has adduced no evidence to suggest that AC misrepresented the claimant's concerns or 'swept them under the carpet";

13.3 the claimant has been unable to show that she reasonably believed that her allegation that SW engaged in a partying lifestyle was substantially true;

13.4 the claimant has been unable to show that an allegation that a fellow worker engages in a partying lifestyle outside work was a risk or a potential risk to health and safety;

13.5 if the claimant had genuine concerns about the health and safety of residents she would have reported her allegation that she had witnessed SW on a come down from drugs immediately and would have insisted that this be addressed in the supervision notes;

13.5 the claimant had no genuine concerns about the health and safety of residents; she has expanded on her evidence throughout these proceedings to support her claim of automatically unfair dismissal which has no merit.

Evidence

13. The claimant gave evidence.

14. The respondent relied upon the evidence of Hazel Wilkinson, service manager, and Craig Duxbury, director.

15. The witnesses, provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

16. An agreed bundle of documents was presented. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Orders for and during the hearing

17. The hearing was conducted by CVP as ordered at the preliminary hearing before EJ Yale. Neither party objected to the hearing being conducted in this way.

18. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following:-

18.1 after hearing all the evidence the tribunal retired to reach its determination;

18.2 at the end of the afternoon on the second day of the hearing, the tribunal called the parties back to the hearing room to advise them that the tribunal had been unable to reach a unanimous decision and needed further time for deliberation;

18.3 it was agreed and ordered that the tribunal would meet in chambers on the 25 October 2023 to reach a decision. Neither party was required to attend on that day;

18.4 it was agreed and ordered that a provisional remedy hearing date be set. If the claimant was successful in all or part of her claim then a 1/2 day remedy hearing would be heard by CVP. If the claimant was unsuccessful in all her claims and the provisional remedy hearing date would be vacated. A provisional remedy hearing date was fixed for 20 December 2023, commencing at 10am.

18.5 EJ Porter explained that the parties would be sent a copy of the reserved judgment together with written reasons. She proposed that the identity of the independent visitor, with whom the claimant had a meeting on 13 September 2022, and the family support worker, against whom the claimant had made allegations of recreational drug use, would not be disclosed in the written reasons. EJ Porter proposed that they be identified by the use of the initials AC and SW respectively. The parties agreed to this proposal. EJ Porter inquired whether either party required any further anonymisation within the reasons. Neither party made any such application.

Facts

19. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

UNANIMOUS FINDINGS OF FACT

20. The respondent company was incorporated in 2021. The directors are Craig Duxbury and Tracy Hartland. The respondent runs the business of providing support services to vulnerable families who are subject to court directed placement orders, and is governed by OFSTED. The respondent provides 24/7 care to vulnerable parents and their children undergoing assessment with Local Authorities over a minimum of 12 weeks. Parents may be vulnerable and placements orders may have been made because the parents were drug users.

21. Hazel Wilkinson is the Registered service manager at the respondent (Laurels). She has been employed at the Laurels since July 2022, initially as Deputy Manager. She is responsible for the day-to-day management of the Laurels including recruitment and induction, managing a team of family support workers, admissions to the centre, liaising with and working alongside social workers and managing any safeguarding concerns. She reports to the Directors of the company, Tracy Hartland and Craig Duxbury, as well as to OFSTED.

22. The claimant started work with the respondent on or around 10 October 2021 as a Family Support Worker. When she first started her hours varied as she was engaged as bank staff. In March 2022 she became was employed as a permanent member of staff, working 3 days a week 9am-16:00pm. The respondent accepts that the claimant was employed from March 2022. No evidence has been adduced by the respondent as to the status of the claimant from October 2022. However, it is not in dispute that, at the time of termination of employment, the claimant had less than 2 years' service.

23. The claimant has not been provided with a Contract of Employment or written statement of terms and conditions of employment.

[On this the tribunal accepts the evidence of the claimant. The respondent has failed to provide a copy of any such contract or written statement. The evidence of the respondent on this point is unsatisfactory and unsupported by any documentary evidence – it has failed to provide a copy of the standard form of contract which, it says, all employees, including the claimant, are provided with.]

24. Tracy Hartland is designated as the responsible person to whom members of staff should report any safeguarding and any other welfare concerns. The claimant is aware that Tracy Hartland is designated as the responsible person for this purpose.

25. A family support worker is responsible for supporting residents on a day-to-day basis, including overseeing residents coming to take medication and recording the administration. This is integral to the role of a family support worker as it forms part of the report produced at the end of a placement to evidence that residents can manage their health conditions.

26. On 25 August 2022, Hazel Wilkinson held a supervision meeting with the claimant. Staff supervisions are routine and take place to provide employees and management the opportunity to discuss any issues or concerns in the workplace. During the supervision meeting Hazel Wilkinson raised a few concerns regarding the way the claimant speaks with the residents and reminded the claimant that they are not there to be friends with the residents. Hazel Wilkinson asked the claimant if she had any issues she wished to discuss. The claimant confirmed that she had no personal issues, required no additional support and had no issues with any other staff members. The notes of this meeting are set out at pages 42-46 of the bundle.

27. On 7 September 2022 when checking the balance of the medication, it came to Hazel Wilkinson's attention that the claimant had failed to accurately record the administration of medication. She held a meeting with the claimant on 7 September 2022 to discuss her concerns on the improper recording of the administration of medication. The claimant confirmed that she had not signed the medication administration record as she had been busy. Hazel Wilikinson told the claimant that medication was an integral part of her role as a family support worker, and it was expected that care be taken to record this correctly. It was agreed that the claimant would complete further medication training. Minutes of this meeting are set out at page 53 of the bundle.

28. It was arranged by the respondent that on 13 September 2022 there would be a planned activity in the afternoon involving residents going out of the premises with family support workers. The claimant was one of the family support workers going on that trip.

29. On 13 September 2022 AC, referred to by the respondent as an independent visitor, visited the respondent's premises to talk to staff and prepare a report to the respondent and OFSTED about his findings. AC conducted these visits on a regular basis. It was his duty to report any safeguarding concerns to both the respondent and OFSTED. Staff, including the claimant, were aware of this and could meet with AC to voice any concerns.

30. The claimant had a meeting with AC on 13 September 2022. AC verbally reported to Hazel Wilkinson that he had had a meeting with the claimant. Hazel Wilkinson then went to find the claimant to discuss what she had been told by AC. Hazel Wilkinson could not find the claimant, who had gone out of the building with residents. On the claimant's return to the

building she was called into a meeting with Hazel Wilkinson and Tracy Hartland. She was not told that this was a disciplinary hearing.

31. The claimant was summarily dismissed by Hazel Wilkinson at the meeting on 13 September 2022.

32. By email dated 13 September 2022 the claimant was sent a letter of dismissal (page 55) which stated as follows:

> I am writing to inform you that your employment… has been terminated, with immediate effect, as of the date of this letter.
>
> The reasons for this include:
>
> - incorrect recording of medication administration
> - failing to follow guidance regarding a planned resident activity. Putting yourself, other staff and residents at potential risk
> - leaving the Laurels Family Assessment centre, without authorisation from a manager
> - failing to obtain authorization to attend an unplanned meeting. Leaving staff and residents vulnerable
>
> If you would like to appeal this decision, please contact Craig Duxbury director (*telephone number provided which is not repeated in these reasons*)

33. Over the next couple of days the claimant did telephone both the number provided in the dismissal letter, and the respondent's office telephone, to ask for copies of documents to enable her to prepare her appeal. She was unable to speak directly with Mr Duxbury. She did speak to Hazel Wilkinson as confirmed by the claimant in an email dated 15 September 2022 (page 57), addressed to Hazel Wilkinson, in which the claimant stated:

> I am still waiting for the paperwork I have requested in regards to being able to appeal my termination within the seven days you have stated

34. By email dated 16 September 2022 sent at 16:11 to Craig Duxbury (page 60) the claimant stated:

> I have contacted the office to arrange a meeting but you wasn't there and I was give[n] you[r] e-mail address. Please can we arrange a meeting.
> That e-mail was headed "Appeal meeting"

35. By email dated 16 September 2022 at 9:28:43PM to Craig Duxbury and Hazel Wilkinson (page 59) the claimant stated:

> I am writing to confirm that I intend to appeal your decision to terminate my employment. The period of seven days referred to in your letter is insufficient for me to respond in full. I will provide a substantive response to the points raised in your letter by no later than 27th September.

36. Mr Duxbury did not reply to those emails, did not inform the claimant that her e-mail dated 16 September 2022 was not accepted as a valid appeal, did not inform the claimant that she must provide the full grounds of her appeal within the seven days stipulated, did not reply to the claimant's application for further time to present her appeal.

37. By e-mail sent to the respondent on 22 September 2022 at 16:57 (page 61) the claimant provided her appeal letter (page 63-65), in which she provided her response to each of the points raised in the dismissal letter. She denied that her conduct amounted to gross misconduct. The appeal letter states:

> You did not follow a fair procedure to dismiss me. You did not investigate the alleged incidents thoroughly and did not give me a chance to respond before deciding to dismiss me. I was essentially ambushed at an urgent meeting with information that I did not have a chance to review or respond to formally……
> The issues raised in your letter of 13th September 2022 are at most matters which would invoke the disciplinary procedure, which has not been followed in my case.
> Having been afforded the time to review matters following 13 September 2022 I believe the decision to immediately terminate my contract was a kneejerk response to my meeting with Adam that day, essentially for whistle blowing. Terminating my employment for whistleblowing is automatically unfair dismissal, and this claim is open to me even though I have not been employed for two years.

38. The appeal letter stated that the claimant did not wish to continue in employment because of the treatment she had received and put forward proposals for settlement. The claimant requested an appeal hearing.

39. The claimant obtained legal advice before sending the appeal letter.

40. By letter dated 28 September 2022 (page 66) Craig Duxbury informed the claimant:

> In relation to your recent termination of employment dated 13th September 2022.
> As stated in a letter detailing the reasoning behind this decision you were provided with 7 days as a right of response
> Unfortunately, you have not provided an adequate response to the points raised within the allotted time provided.
> Therefore, I uphold the decision relating to the termination of your employment.

41. Craig Duxbury did not call an appeal meeting, did not seek any further information from the claimant in relation to the allegation contained in her appeal letter that she had been dismissed as a knee jerk reaction to the meeting with AC, that she had been dismissed for whistle blowing.

42. The claimant presented her claim to the tribunal on 24 October 2022 (pages 2-13). In paragraph 8.2 the claimant stated:

I was unfairly dismissed with immediate effect without any warnings verbally or written with wrongful allegations on 13th September 2022. This came to termination as I spoken to (AC) on 13 September 2022 regarding a safeguarding issues (whistleblowing) of an employee. Adam spoke to Hazel Wilkinson on the same day about my concerns. I was taken into the office without warning by Hazel Wilkinson and Tracy Hartland and my employment was terminated

43. The claimant did not, in her claim form provide details of the alleged whistleblowing to AC and did not make any reference to any whistle blowing to Hazel Wilkinson on 22 August 2022.

44. On 6 January 2023 Hazel Wilkinson sent an e-mail to AC (page 71) stating:

I have attached your report from September 2022. I just wondered if you could have a read over it, and confirm that the details documented from your meeting with staff member MK are correct and that no further issues were raised with you.

Shortly after your visit, MK's employment was terminated with the Laurels and MK has stated, in an employment tribunal, that she raised concerns to you in September 2022, because there were issues that she had raised to me and that I had failed to address them

MK is the claimant

45. AC responded by e-mail dated 6 January 2022 (pages 72-73) extracts from which read as follows:

I can confirm that MK raised no significant safeguarding concerns about the safety of the residents and no had no specific evidence or detail to substantiate what concerns she was raising. I felt the severity of what she was raising was not urgent safeguarding at that time.
To be clear. What she raised was.
That her performance as a family support worker has been questioned in the few weeks prior to this particular visit I made (which also coincided with yourself becoming the acting manager). MK felt that this was unfair as she has never had the quality of her work questioned before but could not be specific or give examples. In terms of the remit of my role, this is not something I could comment on further as this needs to be addressed by a manager first. I therefore brought this to your attention.

MK also felt that a male member of staff was being given preferential treatment with regards to allocations of shifts and that in terms of her own needs for childcare and other family commitments, this is not considered. She went on to say that the same male member of staff leads a lifestyle outside of the home she deemed not appropriate for a family support worker (i.e. a late night “partying” lifestyle) but based this on what she has seen on social media and was said to me in a way that was speculation and hearsay. Again, within the remit of my role, this is something that only a manager can take action on so I brought this to you as part of our feedback at the end of my visit. This point I was maybe not too clear on in my report. MK made no allegations of him being

under the influence during shifts or that he has put the residents at any specific risk.

46. AC's report from his September visit, referred to in this e-mail exchange, has not been disclosed, is not in the bundle of documents.

47. By letter dated 8 February 2023 solicitors for the respondent made a request for further and better particulars (pages 27 -28).

48. The claimant attended a preliminary hearing before EJ Yale on 24 February 2023. At that hearing the claimant provided further information about her claim. In the record of that preliminary hearing a case summary is provided which includes the following:

> The claimant says that there was an employee working at the organisation as a family support worker. As such he would support families including mothers. He would help with bathing, feeding etc. The claimant says it came to her attention that that individual would come to work whilst on drugs. The claimant said she raised the issue with the deputy manager around 22nd / 23rd August 2022 but nothing was done. On 13 September 2022 she reported her concerns to the responsible individual. She says within two hours of doing that she was dismissed.

49. On 10 March 2023 the claimant provided the further information requested by the respondent (pages 40-41), which includes the following:

> 1.By reference to the fact set out in your ET1 what alleged protected disclosures do you contend that you made?
>
> *I was made aware that [SW], one of the family support workers, was returning to work for The Laurels Family Assessment Ltd after being dismissed. I didn't believe that management were aware of his drug use and I thought this was important information for them to be aware of prior to his reinstatement.*
> *I spoke with Hazel, the deputy manager, to report [SW] was taking recreational drugs in August 2022. No action was taken as a result of this disclosure and [SW] was re- employed as planned. I therefore spoke with [AC], Responsible Individual, to make the same disclosure when he attended to do his monthly regulation visit in September 2022*
>
> *……*
>
> *[AC] is the responsible individual who undertakes the regulation 25 visits and reports to Ofsted that the facility is operating appropriately.*

50. In her witness statement the claimant states:

> On 22nd August 2022 I had returned from annual leave and discovered that GS had given his notice and a new deputy Hazel Wilkinson (HW) has been employed. It was also known that a member of the staff (SW) who left the company whilst I was on annual leave was being reemployed. I took this opportunity to have a 1:1 word with HW regarding the staff member in question

having chaotic lifestyle which is not suitable when working with such vulnerable families. I left this information with HW to investigate further.

During my discussion with AC in the office I explained to him about how I feel I did not have a support from management now GS has left. AC explained that it was not in his job role to resolve conflict of interest and for myself to have another conversation with HW on moving forward. I then explained to him regarding the member of staff in question SW has been reemployed regardless of the information I had with HW 22 August 2022 to which mi feel was disregarded.

51. If the claimant had told Hazel Wilkinson and/or AC that SW was a recreational drug user and that she had witnessed SW being on a comedown at work, they would each have been duty bound to report this information to OFSTED.

[This is the clear evidence of each of the respondent's witnesses]

MAJORITY FINDINGS OF FACT

52. The claimant followed SW on social media and was aware from the entries from SW on social media that he had a chaotic and partying lifestyle, that he took recreational drugs.

[The majority accepts the claimant's evidence on this, even though the claimant did not include the media posts in the bundle.]

53. In July 2022 the claimant witnessed SW attending work on a "come down" from the use of recreational drugs at a festival over the weekend. She did not report that to anyone at the time.

[On this the majority accepts the evidence of the claimant as given during the course of giving her evidence. The majority notes that this evidence was given for the first time in cross-examination. The majority does not accept the respondent's assertion that the failure of the claimant to record this detail, either in the claim form, in the letter of appeal (see paragraph 37 above), in the further information provided to the respondent (see paragraph 49 above) or in her witness statement, shows that the claimant's evidence is unreliable, that she has expanded on her evidence to support her claim. In the Further Information (see paragraph 49 above) the claimant states that she told Hazel Wilkinson that SW was using recreational drugs and gave the same information to AC. The majority does not accept the respondent's assertion that the failure to detail the incident witnessed using the same language in the claim form, letter of appeal, in the further particulars and in her witness statement demonstrates that the witness is unreliable. Rather the majority accepts that the claimant used synonyms for concepts that were similar descriptions of the same processes related to recreational drug use outside of the workplace. They further observe that the use of the

term whistle blowing in her appeal letter did not specify what the PID was but attach no significance to this]

54. On 22 August 2022 the claimant returned from annual leave and discovered that Hazel Wilkinson had been employed as a new deputy manager. She also discovered that SW, who had left the respondent company whilst she was on annual leave, was going to be re-employed by the respondent. The claimant decided to have a word with Hazel Wilkinson to raise her concerns about SW. In a private meeting the claimant informed Hazel Wilkinson that SW had a "chaotic and partying lifestyle", that "he takes recreational drugs", which in the opinion of the claimant was "not suitable when working with such vulnerable families." The claimant informed Hazel Wilkinson that she had seen SW come in to work on a "comedown." She left this information with Hazel Wilkinson to investigate further.

    [On this the majority accepts the evidence of the claimant as given during the course of giving her evidence. The majority accept the claimant's explanation that, as a litigant in person, she did not understand the importance of providing the full details of this conversation prior to the hearing. The majority does not accept the respondent's assertion that the failure of the claimant to record her concerns about SW at the supervision meeting on 25 August 2022 (see paragraph 26 above) shows that the claimant had no concerns about SW and that the conversation on 22 August 2022 did not take place. The majority accepts the claimant's explanation that she did not raise the issue at the supervision meeting with Hazel Wilkinson on 25 August 2022 because she had disclosed the information about SW only a few days before the meeting and she was giving Hazel Wilkinson time to investigate.]

55. On 8 September 2022 the claimant attended work. The claimant was surprised to note that SW was also at work. The claimant was concerned that her disclosures to Hazel Wilkinson had been ignored.

56. On 13 September 2022 the claimant had a private meeting with AC. She did not need express authority to have this meeting with AC. There were other members of staff on duty who could provide the appropriate cover while the claimant had her meeting.

    [On this the majority accepts the evidence of the claimant. The respondent has failed to provide satisfactory evidence to support its assertion that express authority was needed and that the attendance of the claimant at that meeting put the safety of residents and/or staff at risk.]

57. At that meeting with AC on 13 September 2022 the claimant explained to AC that she felt that she did not have support from management after the previous manager, GS left. She explained to him that SW had been reemployed regardless of the information she had given Hazel Wilkinson about him on 22 August 2022, which made the claimant feel

disregarded. She told AC that SW had "a chaotic and partying lifestyle", that he took recreational drugs and that she had seen SW come into work on a "comedown". She told AC that she knew this because she followed SW on social media. AC told the claimant that he would report her concerns to management.

*[On this the majority accepts the evidence of the claimant, noting that AC has not been called to give evidence. The majority does not accept that AC's email dated 6 January 2023 (see above paragraph 45) is an accurate reflection of what the claimant said to him at that meeting. The point which AC wished to make in his email "*MK made no allegations of him being under the influence during shifts" *is consistent with the claimant's evidence that she did inform AC that SW used recreational drugs. It is not clear why AC should choose to make this point if he was unaware of the claimant's statement that SW was a recreational drug user. AC did not appear before the tribunal or provide a witness statement. Accordingly his actions / inactions have not been subject to cross examination.]*

58. AC did report to Hazel Wilkinson the concerns that the claimant had raised in the meeting with him, including the information about SW, that he was a recreational drug user and that the claimant had witnessed him at work on a comedown.

*[The majority rejects the evidence of Hazel Wilkinson that she was not given this information by AC. The majority accepts the evidence of the claimant that AC told her that he would report her concerns to Hazel Wilkinson, who accepts that she did have a meeting with AC after he had seen the claimant. No notes have been provided of the meeting between Hazel Wilkinson and AC. AC's report of his 13 September 2022 visit has not been disclosed. The majority again notes AC's email dated 6 January 2023 in which AC states "*MK made no allegations of him being under the influence during shifts or that he has put the residents at any specific risk." This makes it clear that the use of recreational drugs by SW was known to both, and discussed between, AC and Hazel Wilkinson before the claimant raised the allegation of recreational drug use at the preliminary hearing in February 2023 and in her Further Information in March 2023. *]*

59. Hazel Wilkinson immediately went to find the claimant, but the claimant had left the premises on a planned outing. The claimant did inform Helen Allen, shift lead that day, that she was leaving the building on the planned outing. The claimant did not sign the staff register to confirm that she had left the building. However, her leaving the building would have been recorded in the log book, which has not been adduced in evidence.

[On this the majority accepts the evidence of the claimant. The majority does not accept the evidence of Hazel Wilkinson that the claimant had left the building without authority. The majority does not accept that the notes of the meeting between Helen Allen and Hazel Wilkinson (see

page 54) accurately reflect what was said. Helen Allen has not been called to give evidence.]

60. On the claimant's return to the premises, she was called into a meeting with Hazel Wilkinson and Tracy Hartland. During that meeting Hazel Wilkinson made allegations against the claimant, who was not given the opportunity to provide a response. After a few minutes Hazel Wilkinson informed the claimant that she was summarily dismissed and was escorted from the building.

[The majority accept the claimant's evidence on this point. The majority rejects the evidence of Hazel Wilkinson that each of the allegations set out in the dismissal letter was put to the claimant, that the claimant was given opportunity to respond, that the claimant refused to answer questions. The majority notes that Tracy Hartland was in attendance at the meeting but has not been called to give evidence.]

61. Craig Duxbury was aware of the information disclosed by the claimant to Hazel Wilkinson on 22 August 2022 and to AC on 13 September 2022.

[The majority rejects the evidence of Craig Duxbury on these points. This is a very small company, with Craig Duxbury and Tracy Hartland as directors, Hazel Wilkinson as manager. It is simply not credible that the disclosures made by the claimant were not discussed between them. Tracy Hartland was present at the meeting on 13 September 2022; she clearly, as director, had a position of authority over Hazel Wilkinson. It is more likely than not that Hazel `Wilkinson discussed with Tracy Hartland the disclosures made by the claimant and the real reason for the summary dismissal of the claimant. Tracy Hartland was the responsible individual to whom safeguarding concerns were reported. It is not credible that Hazel Wilkinson would not have reported to Tracy Hartland the information received from the claimant that SW was a recreational drug user. It is not credible that Craig Duxbury was unaware of the disclosures of information made by the claimant to Hazel Wilkinson and AC.]

62. Craig Duxbury, on receipt of the claimant's appeal letter, was aware of the disclosures of information to Hazel Wilkinson on 22 August 2022 and to AC on 13 September 2022. He rejected the claimant's appeal without questioning the claimant about the alleged whistleblowing referred to in her appeal letter.

[It is not credible that Craig Duxbury, if he had been unaware of the disclosures, would have confirmed the decision to dismiss without investigating the claimant's allegation that the real reason for dismissal was a knee jerk reaction to the claimant's meeting with AC, was whistleblowing. In evidence Craig Duxbury stresses that the respondent must investigate and report safeguarding concerns to OFSTED or run the risk of losing their business. His conduct in dealing with the

claimant's appeal is consistent with him being fully aware of the disclosures, of what was said by the claimant at the meeting with AC.]

MINORITY FINDINGS OF FACT

63. The claimant did not in July 2022 witness SW having a "comedown" at work following the use of recreational drugs outside work.

[On this the minority rejects the evidence of the claimant, who raised this extremely serious allegation for the first time in cross examination. The claimant accepts that she did not report this to the respondent at the time. If, as the claimant asserts, she has genuine concerns about recreational drug users carrying out their duties with vulnerable residents, it is simply not credible that, if she had witnessed this, she would not have reported it at the time.]

64. The claimant did not have a private meeting with Hazel Wilkinson on 22 August 2022. She did not express to Hazel Wilkinson directly any concerns she may have had about SW.

[On this the minority accepts the evidence of Hazel Wilkinson. The claimant has been inconsistent in her evidence. The claimant gave a detailed response to the dismissal letter in her appeal letter but did not set out the nature of the alleged whistleblowing. She made no reference to any protected disclosure or whistleblowing being made to Hazel Wilkinson directly. The minority rejects the claimant's explanation that she did not raise any concerns about SW at the supervision meeting on 25 August 2022 because she had already told Hazel Wilkinson about this a couple of days previously. The claimant signed the supervision notes, which expressly recorded that she had no issues with any member of staff. The claimant had the opportunity to make handwritten comments on the notes - which she did. She did not in her comment section state that the notes were inaccurate, did not state that she did have concerns about SW, and made no reference to any conversation she had had with Hazel Wilkinson about SW prior to that supervision meeting. If the claimant had genuine concerns about SW, which she had expressed to Hazel Wilkinson on 22 August 2022, it is not credible that there would be no reference whatsoever to such conversation in the supervision notes. The claimant did not, in her claim form make any reference *to any whistle blowing to Hazel Wilkinson on 22 August 2022.]*

65. Any member of staff needed authorisation to attend the meeting with AC, to ensure that arrangements could be made for the care of residents. The claimant did not obtain authorisation to attend the meeting with AC on 13 September 2022.

[On this the minority accepts the evidence of Hazel Wilkinson]

66. At the meeting with AC on 13 September 2022 the claimant told AC that SW "leads a lifestyle outside of the home" which she deemed not appropriate for a family support worker; she said SW had a late night "partying" lifestyle, based on what she had seen on social media. The claimant did not say to AC that SW was "a recreational drug user" or that she had seen SW on "a comedown" from drugs while at work.

    [The minority does not accept, for the large part, the evidence of the claimant about this meeting. As previously stated, the claimant's evidence has been inconsistent and she raised her evidence about witnessing a "comedown" for the first time in cross- examination. The minority accepts that AC's e-mail dated 6 January 2023 (see paragraph 45 above) accurately records what was said to him by the claimant at the meeting on Thursday 13 September 2022. The minority accepts the respondent's assertion that AC has a duty to report safeguarding concerns to the respondent and to OFSTED and there is no reason why he would lie about what the claimant told him, no reason why he would not accurately report such safeguarding concerns.]

67. After that meeting AC verbally reported what the claimant had told him to Hazel Wilkinson. AC told Hazel Wilkinson that the claimant had said that SW led a "partying" lifestyle outside work. Hazel Wilkinson asked AC what the claimant had meant by "partying lifestyle". AC said that this was based on speculation and the claimant had not been able to give examples of what she meant.

    [On this the minority accepts the evidence of Hazel Wilkinson supported by the documentary evidence - the e-mail from AC at page 72]

68. The claimant did leave the respondent's premises on 13 September 2022 without authorisation. She did not follow the procedure set out for the planned activity with residents. Hazel Wilkinson did have genuine concerns that by doing so the claimant was in breach of established procedure and was putting the health and safety of residents and staff at risk.

    [On this the minority accepts the evidence of Hazel Wilkinson, as supported by the documentary evidence.]

    The Law

69. Under s43A Employment Rights Act 1996 (ERA 1996) a protected disclosure means a qualifying disclosure (as defined by s43B) which is made by a worker in accordance with any of sections 43C to 43B.

70. A qualifying disclosure is defined in s43B as any disclosure of information which, in the reasonable belief of the worker, is made in the public interest and tends to show that:

the health or safety of any individual had been, was being or was likely to be endangered;

71. S43(B) ERA 1996 requires a reasonable belief of the worker making the disclosure, not a genuine belief. This introduces a requirement that there should be some objective basis for the worker's belief. This was confirmed by the EAT in **Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT,** which held that reasonableness under s43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe.

72. The fact that a worker must have a 'reasonable belief' does not mean that the worker's belief must necessarily be true and accurate. The statutory provisions require only that the information disclosed 'tends to show' that the relevant failure has occurred, is occurring or is likely to occur. It follows that there can be a qualifying disclosure of information even if the worker is wrong, but reasonably mistaken, in his or her belief. In **Darnton v University of Surrey 2003 ICR 615, EAT***,* the EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as understood by the worker at the time the disclosure was made, and not on the facts as subsequently found by the tribunal.

73. For a disclosure to qualify under section 43B, the worker need only have a reasonable belief that his or her disclosure is made in the public interest.

74. Although the word 'disclosure' is not itself defined in the ERA, it is clear that the phrase 'disclosure of information' in S.43B is intended to have a wide reach and that an employee simply has to communicate the information by some effective means in order for the communication to constitute a disclosure of that information.

75. In Cave**ndish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325, EAT** the EAT stated its view, the ordinary meaning of giving 'information' is 'conveying facts'. In **Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA**, the Court of Appeal held that 'information' in the context of S43B is capable of covering statements which might also be characterised as allegations. Thus, 'information' and 'allegation' are not mutually exclusive categories of communication — rather, the key point to take away from **Cavendish Munro Professional Risks Management Ltd v Geduld** (above) was that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure. The Court of Appeal in **Kilraine** went on to stress that the word 'information' has to be read with the qualifying phrase 'tends to show' — i.e. the worker must reasonably believe that the information 'tends to show' that one of the

relevant failures has occurred, is occurring or is likely to occur. Accordingly, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in s43B(1)(a)-(f).

76. S.43L(3) ERA 1996 provides that 'any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention'. Accordingly, protection is not denied simply because the information being communicated was already known to the recipient.

77. Under s43C ERA 1996 a qualifying disclosure is made in accordance with this section if the worker makes the disclosure to his employer.

78. A qualifying disclosure to a prescribed person or body is protected under section 43F so long as the worker meets the following conditions:

- it is made to a person prescribed in an order made by the Secretary of State
- the worker reasonably believes that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
- the worker reasonably believes that the information disclosed, and any allegation contained in it, is substantially true.

79. Where a worker makes a disclosure to an external organisation, to gain protection under the Act, the worker will have to satisfy four conditions (s43G (1) ERA):

1. the worker must reasonably believe that the information disclosed, and any allegation contained in it, is substantially true
2. the worker must not have made the disclosure for the purposes of personal gain
3. one of the conditions in s 43G (2) must have been met; and
4. in all the circumstances of the case, it must be reasonable to make the disclosure.

The additional conditions under s43G(2) are that:

- at the time of the disclosure, the worker reasonably believes that he or she will be subjected to a detriment by his or her employer if he or she makes a disclosure to his or her employer in accordance with s43C or to a prescribed person in accordance with s43F

- where no person is prescribed in accordance with s43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he or she makes a disclosure to the employer — or

- the worker has previously made a disclosure of substantially the same information, either (i) to his or her employer or (ii) to a prescribed person in accordance with s43F

80. S.103A ERA 1996 renders the dismissal of an employee automatically unfair where the reason (or, if more than one reason, the principal reason) for his or her dismissal is that he or she made a protected disclosure.

81. When faced with a case in which the claimant alleges that he or she has made multiple protected disclosures, a tribunal should ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal. This was confirmed in **El-Megrisi v Azad University (IR) in Oxford EAT 0448/08,**.

82. In **Trustees of Mama East African Women's Group v Dobson EAT 0220/05** the EAT stated that establishing the reason for dismissal in a S.103A claim requires the tribunal to determine the decision-making process in the mind of the dismissing officer. This requires the tribunal to consider the employer's conscious and unconscious reason for acting as it did.

83. Where the employee lacks the requisite two years' continuous service to claim ordinary unfair dismissal, he or she will acquire the burden of showing, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason - Smith v Hayle Town Council 1978 ICR 99 and *Tedeschi v Hosiden Besson Ltd EAT 959/95*. The EAT in *Ross v Eddie Stobart Ltd EAT 0068/13* confirmed that the same approach applies in whistleblowing claims.

84. An employee will only succeed in a claim of unfair dismissal under s103A ERA 1996 if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure. The principal reason is the reason that operated on the employer's mind at the time of the dismissal — Lord Denning MR in ***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA***. If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under S.103A will not be made out.

85. Section 47B (1) ERA 1996 provides that a worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by

his or her employer on the ground that the worker has made a protected disclosure.

86. Under S.47B (1A) ERA 1996 a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done by another worker of his or her employer in the course of that other worker's employment, or by an agent acting with the employer's authority, on the ground that the worker has made a protected disclosure.

87. In ***London Borough of Harrow v Knight 2003 IRLR 140, EAT***, the Appeal Tribunal set out the requirements for a successful claim under S.47B(1):

- the claimant must have made a protected disclosure
- he or she must have suffered some identifiable detriment
- the employer, worker or agent must have subjected the claimant to that detriment by some act, or deliberate failure to act
- and
- the act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure

88. Lord Justice Elias confirmed in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA,*** that the causation test for unfair dismissal is stricter than that for unlawful detriment under S.47B — the latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas s103A requires the disclosure to be the primary motivation for a dismissal.

89. Section 47B (1) does not apply where the worker is an employee and the detriment complained of amounts to dismissal (within the meaning of the unfair dismissal provisions in — S.47B(2). Any such complaint instead falls under S.103A, which renders a dismissal automatically unfair if the sole or principal reason for it was that the employee made a protected disclosure.

90. The term 'detriment' is not defined in the ERA 1996, but it clearly has a broad ambit.. In ***Ministry of Defence v Jeremiah 1980 ICR 13, CA***, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in ***Shamoon v Chief Constable of the Royal Ulster Constabulary***

2003 ICR 337, HL, where it emphasised that it is not necessary for there to be physical or economic consequences to the employer's act or inaction for it to amount to a detriment. What matters is that, compared with other workers (hypothetical or real), the complainant is shown to have suffered a disadvantage of some kind.

91. Section 38 EA states that a tribunal must award compensation to a worker where, on a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under s1 Employment Right Act.

92. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

93. This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.

MAJORITY DECISION (of Mr G Pennie and Dr B Tirohl)

PID 1

94. On 22 August 2022 the claimant verbally told Hazel Wilkinson that a male work colleague SW had "a chaotic and partying lifestyle", that SW "takes recreational drugs", which is "not suitable when working with vulnerable families", that she had seen SW come in to work on a "comedown."

95. That was a disclosure of information.

96. The claimant believed that the disclosure of information was in the public interest. That belief was reasonable. The claimant worked with vulnerable families and the respondent was paid to take care of these vulnerable families. It is in the public interest to know whether the respondent employs people who are able to work with vulnerable families, that vulnerable families placed in their care are not at risk. Some of the vulnerable families had their own problems with drug use, it could have been one of the reasons they had to be able to demonstrate that they were capable of taking care of their children.

97. The claimant did believe that the disclosed information tended to show that the health or safety of any individual had been, was being or was likely to be endangered. That belief was reasonable. SW worked closely with vulnerable families and recreational drug use could adversely affected his ability to provide them with appropriate help and support.

98. This was a qualifying disclosure made to the claimant's employer. It is a protected disclosure.

PID 2

99. On 13 September 2022 the claimant verbally told AC that her male work colleague SW had "a chaotic and partying lifestyle" that he took recreational drugs, and that she had seen SW come into work on a "comedown".

100. That was a disclosure of information.

101. The claimant believed that the disclosure of information was in the public interest. That belief reasonable was reasonable for the reasons set out at paragraph 93 above.

102. The claimant did believe that the disclosed information tended to show that the health or safety of any individual had been, was being or was likely to be endangered. That belief reasonable. SW worked closely with vulnerable families and recreational drug use could adversely affected his ability to provide them with appropriate help and support.

103. This was a qualifying disclosure to the claimant's employer. It is not clear who employs AC but the majority accepts the evidence of the respondent that AC is not employed by them. AC visited the respondent's premises on a regular basis and prepared reports for the employer and OFSTED. It was his duty to report any safeguarding concerns. The claimant was aware of this. She therefore knew that any disclosure of information by her to AC which raised a safeguarding issue would be reported to both the employer and OFSTED. In these circumstances the majority finds that the disclosure of information to AC on 13 September 2022 was a disclosure to the employer. It is a protected disclosure.

104. In the alternative, this was a qualifying disclosure to OFSTED, a prescribed body under section 43F. As stated above, AC was under a duty to report safeguarding concerns to OSTED. The claimant was aware of that. The claimant did believe that the information provided to AC was a safeguarding issue, which fell within the matters in respect of which that person is so prescribed. That belief was reasonable. Each of the respondent's witnesses accepts that if the claimant has made the disclosure of information (which they deny) then the respondent, Hazel Wilkinson and AC would have been duty bound to report it to OFSTED.

105. The claimant did reasonably believe that the information disclosed to AC and the allegation contained in it about SW's partying and chaotic lifestyle and drug use, was substantially true. The claimant had witnessed the comedown herself at work and had seen the information placed by SW on social media. The entries made by SW on

social media showed that he took recreational drugs. The majority accepts the claimant's evidence on this.

106. The qualifying disclosure made to AC on 13 September 2022 was a protected disclosure within the meaning of s43F Employment Rights Act 1996.

107. In the further alternative, the disclosure to AC was a qualifying disclosure to an external person. It is not clear who employs AC but the majority accepts the evidence of the respondent that AC is not employed by them. For this qualifying disclosure to be protected the additional conditions under s43G (2) apply.

108. The claimant did reasonably believe that the information disclosed to AC and the allegation contained in it about SW's partying and chaotic lifestyle and drug use, is substantially true. The claimant had witnessed the comedown herself at work and had seen the information placed by SW on social media. The entries made by SW on social media showed that he took recreational drugs. The majority accepts the claimant's evidence on this.

109. The claimant did not make the disclosure for the purposes of personal gain. The claimant has nothing to gain from disclosing this information to AC.

110. The claimant had previously made a disclosure of substantially the same information, to her employer, Hazel Wilkinson.

111. In all the circumstances of the case, it was reasonable to make the disclosure to AC. The claimant had disclosed the information to Hazel Wilkinson and there was no evidence before the claimant that the information had been taken seriously or that it had been investigated. To the contrary, the claimant had witnessed SW resuming employment on 8 September 2022, after she had told Hazel Wilkinson about SW's recreational drug use, after telling Hazel Wilkinson that she had witnessed SW on a "comedown" at work.

112. The qualifying disclosure to AC on 13 September 2022 was a protected disclosure.

113. The majority has considered the reason for dismissal. The majority notes that the claimant had less than 2 years' service and the burden falls on her to prove the reason for dismissal.

114. On 13 September 2022 Hazel Wilkinson spoke to Adam Cox about his meeting with the claimant and was aware that the claimant had reported to AC her concerns about SW, the same concerns which the claimant had expressed to her at the meeting on 22 August 2022.

115. The majority does not accept the evidence of Hazel Wilkinson as to the reason for dismissal. The majority notes the letter confirming the termination of the claimant's employment (see paragraph 32 above) and in particular the reasons for dismissal said to include:

99.1 Incorrect recording of medication administration. The tribunal accepts the evidence of the claimant and finds that this problem had been dealt with prior to 13 September 2022 and had been treated as a training issue. No satisfactory evidence had been presented by the respondent that this remained an outstanding issue at the time the decision to dismiss was made;

99.2 Leaving the work premises without authority. However the respondent knew full well where the claimant was on 13 September 2022 after her meeting with AC: she was outside the work premises on a planned outing with residents that afternoon. The majority accepts the evidence of the claimant and finds that she did inform Helen Allen, shift lead that day, that she was leaving the building on the planned outing. The claimant may not have signed the staff register to confirm that she had left the building. However, her leaving the building would have been recorded in the log book, which has not been adduced in evidence;

99.3 Failing to obtain authorisation to attend an unplanned meeting. Leaving staff and patients vulnerable. This is a reference to the claimant's meeting with AC. The majority accepts the evidence of the claimant that authorisation for a meeting with the independent visitor, AC, was not necessary. The majority further accepts the evidence of the claimant that she did not leave the residents unattended during the course of her meeting with AC. There were sufficient members of staff on duty to provide cover for her temporary absence. The respondent has failed to provide satisfactory evidence in support of its assertion the claimant needed to obtain authorisation before having a meeting with AC. The respondent has failed to supply satisfactory evidence to support its assertion that staff and residents were left vulnerable. No satisfactory evidence has been provided as to the number of residents requiring care that afternoon, the number of staff on duty, and the required resident: staff ratio.

116. The evidence of Hazel Wilkinson to the reason for dismissal is unsatisfactory. The tribunal has considered all the circumstances of the case including:

100.1 the manner of dismissal. The majority accepts the evidence of the claimant that she was not given the opportunity to answer the allegations made against her in the dismissal letter;

100.2 The meeting was not called as a disciplinary hearing but by the end of that short meeting the claimant had been summarily dismissed;

100.3 The majority notes that Tracy Hartland has not been called to give evidence although she was in attendance at that meeting;

100.4 The timing of the dismissal - the claimant was dismissed without notice on the same day she made her disclosure to AC;

100.5 AC has not been called to give evidence. The majority does not accept that the e-mail dated 6 January 2023 (paragraph 45 above) is an accurate record of what was said by the claimant to AC on the 13 September;

100.6 Hazel Wilkinson has not been truthful in her evidence – she denies that the claimant made a disclosure of information to her on 22 August 2022, she denies that AC told her that the claimant had told him about her concerns about SW.

100.7 The claimant did tell AC that SW was a recreational drug user, that she had witnessed SW being on a comedown – that is from the effect of drugs – while on shift. AC reported that back to Hazel Wilkinson the same day.

117. In all circumstances the majority finds that the reason for dismissal was that the claimant had made the protected disclosures both to Hazel Wilkinson and AC. The majority finds both disclosures, taken as a whole, was the reason uppermost in Hazel Wilkinson"s mind for dismissal. Hazel Wilkinson's evidence is that she is acutely aware that she must disclose safeguarding concerns to OFSTED. The claimant had raised safeguarding concerns – the disclosure – on 22 August 2022 and Hazel Wilkinson had done nothing about it. SW had been re-employed. When she saw the claimant in the meeting with AC she took steps to discuss with AC what the claimant had said to him. As soon as she was aware that the claimant had provided AC with the same information she herself had received on 22 August 2022, Hazel Wilkinson took immediate steps to find the claimant. As soon as the claimant returned to the building from a planned outing Hazel Wilkinson called the claiant to a meeting and summarily dismissed her. The majority does not accept Hazel Wilkinson's evidence that any of the issues set out in the dismissal letter played an active part in the decision to dismiss. The reason uppermost in the mind of Hazel Wilkinson was the protected disclosures made by the claimant and the likely consequences for both Hazel Wilkinson and the respondent's business of Hazel Wilkinson's failure to address them and report them to OFSTED.

118. The claimant was automatically unfairly dismissed.

119. The respondent did mishandle the claimant's appeal. The respondent gave the claimant the right to appeal the decision to dismiss. The claimant exercised that right in accordance with the instruction given in the dismissal letter – she contacted the respondent within 7 days and informed the respondent of her intention to appeal. The respondent denied the claimant her right of appeal, did not call an appeal hearing, denied the claimant the opportunity to put forward her reply to the allegations made in the dismissal letter. Denial of the claimant's the right of appeal is a detriment , whether or not the claimant wanted to be reinstated to her job if she was successful at appeal. Denial of the claimant's right to reply to the allegations of misconduct is a detriment. The claimant was put at a disadvantage by the inability to answer the allegations of misconduct, which she genuinely believed were untrue. This is detrimental treatment within the meaning of section 47B Employment Rights Act 1996.

120. The respondent has failed to provide a satisfactory explanation for its failure to consider the claimant's appeal. The respondent's assertion that the appeal was out of time is completely without merit. The respondent has failed to provide its disciplinary procedure. There is no satisfactory evidence to support the respondent's assertion that an appeal can only be a valid appeal, can only be considered, when the full grounds of appeal are provided. The respondent can provide no satisfactory explanation as to why it did not acknowledge that the claimant had exercised her right of appeal within the seven days stipulated in the dismissal letter, but instead insisted that the claimant provide the full grounds of her appeal before it could be considered. The dismissal letter does not state that. The respondent did not reply to the claimant's e-mail dated 16 September 2022 (see paragraph 35 above) to say that this was insufficient, that she would have to provide the substantive grounds of appeal within the stipulated 7 days before the appeal could proceed.

121. Craig Duxbury was aware of the two disclosures to Hazel Wilkinson and AC.

122. In all circumstances, the majority finds that the reason for the detrimental treatment, for its refusal to allow the claimant's appeal, was because of the protected disclosures. It is simply not credible that a respondent in this line of business would not, upon receipt of an appeal letter containing allegations of whistle blowing related to a meeting with the independent visitor AC, have taken the opportunity to consider the appeal, to obtain further information about the alleged whistleblowing unless it already knew about the alleged whistle blowing and did not want to give the claimant the opportunity to make further representations, to make further disclosures.

123. The claim of detrimental treatment under section 47B Employment Rights Act is well founded.

MINORITY DECISION (EJ Porter)

124. The claimant did not make a protected disclosure to Hazel Wilkinson on 22 August 2022.

125. On 13 September 2022 the claimant told AC that a family support worker, SW, "leads a lifestyle outside of the home" which the claimant deemed not appropriate for a family support worker. She said that SW had a late night "partying" lifestyle. That statement, which is general and devoid of specific factual content, cannot be said to be a disclosure of information tending to show that the health or safety of any individual had been, was being or was likely to be endangered.

126. The claimant did not make a protected disclosure to AC on 13 September 2022.

127. The claims under s103A and s47B Employment Rights Act 1996 do not succeed.

UNANIMOUS DECISION

128. The respondent failed to provide the claimant with terms and conditions of employment.

REMEDY HEARING

129. A remedy hearing will take place by CVP on 20 December 2023. At that remedy hearing the tribunal will consider the claimant's claim for compensation taking into account the following majority finding of fact:

The claimant acted in good faith in making the protected disclosures on 22 August 2022 and 13 September 2022. The claimant had genuine concerns about the health and safety of residents and that the employment of SW as a family support worker was a potential risk to their health and safety.

Employment Judge Porter
DATE: 1 November 2023

RESERVED JUDGMENT SENT TO THE PARTIES ON
7 November 2023

FOR THE TRIBUNAL OFFICE

APPENDIX 1 AMENDED LIST OF ISSUES

Unfair dismissal

1. Was a protected disclosure made?
2. Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

Protected disclosures

3. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?

4. What did the claimant say? When? To whom?

5. Did she on 22/23 August 2022 disclose information in person to the Deputy Manager?

6. Did she on 13 September 2022 disclose information in person to a Responsible Individual AC?

7. Did she believe the disclosure of information was made in the public interest?

8. Was that belief reasonable?

9. Did she believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered?

10. Was that belief reasonable?

11. Was the qualifying disclosure made to her employer? If so, it is protected

12. Was the qualifying disclosure made to a prescribed person or body under section 43F? If so,

    1. Was it made to a person prescribed in an order made by the Secretary of State;
    2. Did the claimant reasonably believe that the relevant failure falls within any description of matters in respect of which that person is so prescribed;
    3. Did the claimant reasonably believe that the information disclosed, and any allegation contained in it, is substantially true.

13. Was the qualifying disclosure made to an external person? If so:

1. Did the claimant reasonably believe that the information disclosed, and any allegation contained in it, is substantially true;
2. Did the claimant make the disclosure for the purposes of personal gain
3. Has one of the conditions in s 43G (2) been met (see below);
4. in all the circumstances of the case, was it reasonable to make the disclosure.

The additional conditions under s43G(2) are that:

- at the time of the disclosure, the worker reasonably believes that he or she will be subjected to a detriment by his or her employer if he or she makes a disclosure to his or her employer in accordance with s43C or to a prescribed person in accordance with s43F

- where no person is prescribed in accordance with s43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he or she makes a disclosure to the employer — or

- the worker has previously made a disclosure of substantially the same information, either (i) to his or her employer or (ii) to a prescribed person in accordance with s43F

. Detriment (Employment Rights Act 1996 section 48)

14. Did the respondent mishandle the claimant's appeal against her dismissal?

15. By doing so, did it subject the claimant to detriment?

16. If so, was it done on the ground that she made a protected disclosure?

Failure to provide terms and conditions of employment

17. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

18. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002?

If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

19. Would it be just and equitable to award four weeks' pay?