RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant:	Mr W Odell
Respondent:	North Yorkshire Council
Heard at:	Leeds Employment Tribunal
Before:	Employment Judge Deeley, Mr Elwen and Mr Webb
On:	14, 15 and 16 November 2023 (in public) and 17 November 2023 (in private)
Representation:	
Claimant:	Mr F Clarke (Counsel)
Respondent:	Mr D Bayne (Counsel)

RESERVED JUDGMENT

1. The claimant's complaint of detriment on the grounds of raising a protected disclosure (namely his email to Miss Lyth of 9.23am on 11 October 2023) under s43B of the Employment Rights Act 1996 fails and is dismissed.
2. The claimant's complaint of detriment on the grounds of raising a protected disclosure (namely his email to Mr Webb of 2.30pm on 11 October 2023) under s43B of the Employment Rights Act 1996 is dismissed on withdrawal by the claimant at the start of the final hearing on 14 November 2023.
3. The claimant's complaint of detriment on the grounds that he refused to return to work in circumstances of serious and imminent danger under s44(1)(d) of the Employment Rights Act 1996 fails and is dismissed.

RESERVED JUDGMENT

REASONS

INTRODUCTION

Tribunal proceedings

1. This claim was case managed at a preliminary hearing on 25 May 2023 by Employment Judge Bunting.
2. We considered the following evidence during the hearing:
   2.1 a joint file of documents and the additional documents referred to below;
   2.2 witness statements and oral evidence from:
      2.2.1 the claimant;
      2.2.2 the respondent's witnesses:

Name	Role at the relevant time
1) Miss Emma Lyth	Team Manager and the claimant's line manager
2) Miss Elaine Hewitt	Service Manager

   2.3 screen sharing via Microsoft Teams of the respondent's "Liquid Logic" case management IT system by Miss Lyth, as part of Miss Lyth's supplementary evidence at the Tribunal's request. (The claimant's representative had the opportunity to cross-examine Miss Lyth on the system).
3. The claimant and the respondent provided additional disclosure documents during the hearing. Neither objected to the inclusion of these documents in the hearing file.
4. We also considered the helpful oral and written submissions made by both representatives.

Adjustments

5. We asked both parties if they wished us to consider any adjustments to these proceedings and they confirmed that no such adjustments were required. We reminded both parties that they could request additional breaks at any time if needed.

Claimant's application to amend his claim

6. The respondent's representative raised an issue regarding the claimant's worker status on the first day of the hearing. The respondent's representative stated that they did not dispute that the claimant was a 'worker' within the extended definition of s43K of the Employment Rights Act 1996 ("**ERA**"), which applies to whistleblowing detriments. However, they disputed that the claimant was a 'worker' within the definition of s230(3)(b) of the ERA, which applies to health and safety detriments. The respondent's submission was that there was no 'implied contract' between the claimant and the respondent.

7. This point had not been pleaded expressly in the claimant's claim form. The claimant applied on the first day of the hearing to amend his claim to state that he was a 'worker' for the purposes of s203 of the Employment Rights Act 1996. The respondent did not object to that application to amend and the Tribunal accepted the amendment wording set out below:

"The Claimant worked for the 2nd Respondent pursuant to an implied contract through which he undertook to perform work personally for them. The 2nd Respondent was not, by virtue of that contract, a client or customer of any profession or business undertaking carried on by the Claimant."

CLAIMS AND ISSUES

8. Employment Judge Bunting summarised the claimant's complaints in his Preliminary Hearing Summary on 25 May 2023. We discussed the issues (or questions) that the claim raised in detail at the start of the hearing and the Tribunal provided an agreed updated list of liability issues to both parties which is set out below.

9. The claimant withdrew his complaint that he was subject to a detriment (namely the termination of his placement with the respondent) because of an alleged protected disclosure set out in his email to Mr Webb of 2.30pm on 11 October 2023. This is because the email was sent after the decision to terminate his placement had been made and communicated to him. That complaint is dismissed on withdrawal (with the respondent's consent).

Alleged disclosure

The respondent accepts that the claimant raised the matters set out in Table A.

TABLE A		
Date	***Name(s) of the people involved***	***Disclosures alleged***
9.23am 11.10.22 *[p134, Ep211]* *[p18 PoC 7(g), p83 AGoR6]*	*Emma Lyth (Scarborough, Whitby, Ryedale and Selby Approved Mental Health Professional Team Manager)*	*C emailed EL stating:* *"I write to inform you that I do not feel safe at work and that I am withdrawing from the workplace under section 44 of the Employment Rights Act 1996.* *My safety concerns relate to no risk assessment taking place, when mental health act assessments are planned for me and the assessing team."*

Protected Disclosures

The respondent accepts that the claimant was a 'worker' within the extended definition set out in s43K of the ERA.

4. *Did the claimant make one or more qualifying disclosures as defined in section 43B of the ERA?*

5. *The Tribunal will decide:*

   5.1 *What did the claimant say or write? When? To whom? The claimant says he made disclosures on the occasions set out in Table A.*

   5.2 *Did he disclose information?*

   5.3 *Did he believe the disclosure of information was made in the public interest?*

   5.4 *Was that belief reasonable?*

   5.5 *Did he believe it tended to show that the health or safety of any individual (namely the assessment team, including the claimant as the AMHP, and the patient) had been, was being or was likely to be endangered under s43B(1)(d) of the ERA?*

   5.6 *Was that belief reasonable?*

6. *If the claimant made a qualifying disclosure, the respondent accepts that it was a protected disclosure because it was made to the respondent as a 'responsible person' for the purposes of s43 of the ERA.*

Health and safety – serious and imminent danger (s44(1)A ERA)

7. *Was the claimant a 'worker' within the meaning of s230(3)(b) of the ERA? In particular, did the claimant work under an implied contract, whereby the claimant undertook to do or perform personally any work or services for the respondent?*

   (The parties agree that:

   7.1 *there was no express contract between the claimant and the respondent; and*

   7.2 *the respondent was not a client or customer of any profession or business undertaking carried on by the claimant.)*

8. *Was the claimant in circumstances of danger on 11 October 2022 which the claimant:*

   8.1 *reasonably believed to be serious and imminent; and*

   8.2 *could not reasonably have been expected to avert?*

9. *If so, refuse (while the danger persisted) to return to his place of work?*

Detriments

10. *The respondent accepts that Emma Lyth contacted Matrix at 9.57am on 11 October 2022 and instructed them to terminate the claimant's placement with the respondent and that this may amount to a detriment.*

TABLE B - DETRIMENT		
Date	***People involved***	***Detriments alleged***
11.10.22 *[p137]*	*Emma Lyth* *Elaine Hewitt*	*EL contacted Matrix at 9.57am and instructed them to terminate the claimant's placement with North Yorkshire.*

11. If so, was such detriment done on the ground that:

11.1 the claimant was in circumstances of serious and imminent danger for the purposes of s44(1)(d) ERA; and/or

11.2 he made a protected disclosure for the purposes of s47B ERA?

FINDINGS OF FACT

Context

10. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

11. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:

> *"Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

12. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

13. The respondent contracted with Matrix SCM Limited ("**Matrix**") to provide outsourced recruitment assistance for the respondent's vacant roles.

14. The respondent asked Matrix to place an advertisement for an Approved Mental Health Professional ("**AMHP**") placement starting in September 2022 on Matrix's portal. Several employment agencies had access to Matrix's portal, including Randstad Solutions Limited ("**Randstad**").

15. The claimant qualified as a social worker in 2018. He completed his AMHP diploma in 2018. The claimant had completed AMHP placements for other local authorities previously, including a 6 month placement with Cumbria County Council finishing in March 2022 and a placement with Wakefield Council in 2018.

16. The claimant and the respondent's witnesses agreed that the AMHP role involved an inherent level of risk when carrying out assessments. This was because AMHPs were required to assess whether or not an individual had capacity for the purposes of the Mental Health Act. That level of risk had to be assessed by the AMHP on an ongoing basis (in conjunction with healthcare professionals and others attending the assessment (e.g. the police).

17. We note that the respondent's case work systems contain flags for certain additional risks, known as 'hazard markers'. These included:

    17.1 a risk to self and others;

    17.2 threats of violence;

    17.3 potentially dangerous animals present at the individual's home; and

    17.4 Covid-19 risks.

Claimant's agency worker arrangements

18. The claimant was 'on the books' of around ten employment agencies, including Randstad. The claimant had previously been placed by various agencies on placements, including his AMHP placement in Cumbria and a social work placement on the Isle of Man.

19. The claimant had previously signed an agency worker contract with Randstad on 13 August 2021, a copy of which was included in the hearing file (the "**Randstad Contract**"). Randstad had previously supplied the claimant's services to Cumbria County Council during his AMHP placement with Cumbria.

20. The Randstad Contract was headed "Contract for Services for Temporary Workers". The claimant accepted that he was engaged by Randstad as an agency worker. The key terms of the Randstad Contract included:

    20.1 **Clause 4.2 (Temporary Worker's Obligations)**: that the claimant was not obliged to accept any assignment offered by Randstad, but if he did accept an assignment he would:

    "4.2.1 co-operate with the Client's reasonable instructions and accept the direction, supervision and control of any responsible person in the Client's organisation;

4.2.2 use reasonable care and skill in supplying Services at all times taking responsibility for the way in which the Services are performed;

4.2.3 observe any relevant rules and regulations of the Client's establishment (including normal hours of work) to which attention has been drawn or which you might reasonably be expected to ascertain;

4.2.4 take all reasonable steps to safeguard your own health and safety and that of any other person who may be present or be affected by your actions on the Assignment and comply with the Health and Safety policies and procedures of the Client."

20.2 **Clause 4.4 2 (Temporary Worker's Obligations)**:

"If you are unable for any reason to attend work during the course of an Assignment you should inform the Company at least one hour prior to commencement of the Assignment or shift.

In the event that it is not possible to inform the Company within these timescales, you should alternatively inform the Client and then the Company as soon as possible."

20.3 Clause 5 (Timesheets):

"5.1. At the end of each week of an Assignment (or at the end of the Assignment where it is for a period of 1 week or less or is completed before the end of a week) you shall deliver to the Company a timesheet duly completed to indicate the number of hours worked during the preceding week (or such lesser period) and signed or approved by an authorised representative of the Client. You agree to use an on-line timesheet system or other system in order to do so.

5.2. Subject to clause 5.3 the Company shall pay you for all hours worked regardless of whether the Company has received payment from the Client for those hours."

20.4 **Clause 6 (Remuneration)**:

"6.3. Subject to any statutory entitlement under the relevant legislation referred to in clauses 7 and 8 below and any other statutory entitlement, you are not entitled to receive payment from the Company or the Client for time not spent on Assignment, whether in respect of holidays, illness or absence for any other reason unless otherwise agreed."

20.5 **Clause 7 (Annual Leave)**:

"7.5. If you wish to take paid leave during the course of an Assignment you should notify the Company of the dates of your intended absence giving notice of at least 2 weeks. In certain circumstances the Company may require you to take paid annual leave at specific times or notify you of periods when paid annual leave cannot be taken."

20.6 **Clause 9 (Sickness absence)**:

"9.2. You are required to provide the Company with evidence of incapacity to work which may be by way of a self- certificate for the first 7 days of incapacity and a doctor's certificate thereafter."

20.7 **Clause 10 (Termination)**:

"10.1. Any of the Company, you or the Client may terminate your Assignment at any time without prior notice or liability."

21. Randstad contacted the claimant in Summer 2022 to ask if he would be interested in the AMHP placement with the respondent. The claimant stated that he would be interested and Randstad arranged for the claimant to have a Teams meeting with the respondent.

Respondent's staffing arrangements – September 2022

22. The respondent's staff at the relevant time included:

Name	Role at the relevant time
1) Miss Emma Lyth	Team Manager and AMHP
2) Miss Elaine Hewitt	Service Manager and Miss Lyth's line manager
3) Mr Richard Webb	Corporate Director of Health and Adult Services
4) Ms Rebecca Osbourne	Respondent's recruitment team
5) Ms Christina Cheney	Service Manager
6) Ms Victoria Haigh	Service Manager and AMHP
7) Ms Ann Dawson	AMHP

23. Miss Lyth's team included around 8-10 AMHPs and three other social workers at that time. The team structure included:

23.1 duty AMHPs covering a 9am to 5pm rota; and

23.2 an out of hours rota, staffed by the emergency duty team.

24. One of the reasons why the respondent advertised for the placement which the claimant filled was to provide a 'bridge' between the team working from 9am to 5pm and the emergency duty team. The placement was in Miss Lyth's team's region at that time, which covered Scarborough, Whitby, Ryedale and Selby. That region covered a large rural area and involved significant travel distances.

25. Miss Lyth and Miss Hewitt arranged a Teams call with the claimant before his placement started. During that call they discussed matters including:

25.1 the working hours and days for the placement; and

25.2 the region across which the claimant would be working and the travel distance from his home to the region.

26. Miss Lyth and Miss Hewitt agreed with the claimant that his working pattern would involve working four days per week from 10am to 9pm on each working day:

    26.1 Week 1 – Monday to Thursday;

    26.2 Week 2 – Tuesday to Friday.

27. However, the claimant did not in fact work those hours during the first couple of weeks of the placement. This is because the claimant's assessments were observed by other AMHPs until he had completed the respondent's 'warrant process' (set out in more detail below under the heading "**AMHP warrant process**").

28. We note that Miss Lyth's email of 27 September 2023 to her team (and to senior managers) copied to the claimant, set out his working arrangements after he had been 'warranted' by the respondent. Miss Lyth's email stated:

    "Our new agency AMHP Bill Odell has now been warranted by us. Bill will start responding to MHA assessments independently from tomorrow, therefore if you were down as 1st responder from tomorrow, you are no longer required. Whilst Bill is now warranted, he still requires support from yourselves in settling into the team and understanding the service area. Therefore please continue to support Bill as you have been doing.

    Bill will be attending resilience [the team's video calls] *each morning at 10am. He will be acting as a first responding AMHP only from the hours of 12pm-9pm 4 days a week. He will be available to respond to any MHA from 12pm in the SWRS locality. Triage-please liaise with Bill and ensure ample time is given for Bill to have a handover from yourselves and enough time travel is given to arrive to assessments. Bill is aware that post MHA he will contact the triage AMHP in normal working hours for safety purposes, and EDT TM's outside of normal working hours via either MST or mobile phone numbers. He is also aware that post MHA he may be required on busier days to respond to further assessments. On these occasions, as always, please ensure an adequate break is factored into this, and again information is handed over and sufficient travel time is given.*

    Bill will of course be available through MST primarily. His mobile number is as follows: 07816 251210

    Thanks all, and welcome Bill"

Claimant's assignment arrangements

29. Randstad emailed a letter to the claimant on 5 September 2022 regarding his assignment to the respondent. The key terms of the letter included those set out below.

your assignment details.

Your contract is with:	Randstad Public Services
Working on assignment at:	Matrix SCM ltd - North Yorkshire County Council, Adults's QSW
Name of contact to report to on arrival:	Accounts Payable Accounts Payable
Nature of the client's business	
Location of work:	, Adult & Community Services, Norths Herten, No? Yorkshire, DL7 8AD,
Start date:	05/09/2022
Likely duration of the assignment:	28/02/2023
Anticipated hours (number of):	As per rota, with actual hours and dates of work agreed with the client as they require
Position:	Approved Mental Health Practitioner
Description:	AMHP - North Yorkshire

Health & Safety	Our clients are responsible for making sure that \ you work is safe, so please ensure you are aware and comply with, their health, safety, welfare anc environmental policies and procedures whilst on assignment. You may be liable for anything you c not do that results in others being harmed, so yc should act safely and with due regard to the hea safety of yourself and others around you, We ask clients to let us know of any specific risks or heal hazards that you may face when on assignment < extra controls that may be necessary to control t risks. If we have been informed of any for your assignment, these are confirmed In the declaratk below. In the event of any incident injury' or accident th Involves you, report this to your assignment man supervisor or other relevant specified individual a as notifying us without delay. For further health & safety information and Infon about our client's responsibilities to you whilst w< on assignment please click here.

health and safety declarations (see additional important information above).	
Particular risks or health hazards specific to the assignment that the worker needs to be made aware of;	TBC with Emrna/Manager
PPF required for the role:	TBC with Emma/Manager
Specific health requirements that the worker needs to meet (e.g Immunisations, etc.):	TBC with Emma/Manager
Any hazardous substances the worker is likely to come into contact with:	TBC with Emma/Manager

30. The reference to ‘Emma’ was a reference to Miss Lyth.

31. There was some confusion regarding claimant's start date. Randstad's letter to the claimant stated that his placement would start on 5 September 2022. Ms Osbourne emailed Matrix on 7 September 2022 and stated:

    "We are having some difficulties with Bill [Odell] *and his start date. He says he has been given a contract starting from the 5.9.2022. However he has not started with ourselves yet, and doesn't start until 12.9.2022. He hasn't done any work for us yet, and hasn't had any equipment. He is now telling us he wants paying for work this week - however he has not completed any work, the earliest we may be able to get him doing some work is tomorrow. Where do stand with this re paying him if his contract has been incorrectly issued? – We have no idea why this date has been set up this way. He also apparently has a contract saying he will work with us for 6 months ? But again, this is not anything anyone I know has authorised or created.*

    It doesn't appear that his contract has been setup correctly He has also told us that he got a notification that his job had been cancelled, and this is too is not accurate. Can you please help us in explaining what has happened here, as we are all totally clueless what is going on."

32. These matters were eventually resolved by the respondent agreeing that the claimant would undertake online training on the respondent's systems (including Liquid Logic) from home on 8 and 9 September 2023. It was agreed that the claimant would then start his role on 12 September 2023.

33. The claimant provided timesheets or logged on to Randstad's portal to submit his working hours for each day and mileage. The respondent supplied him with a laptop, mobile telephone, ID card and door pass, warrant card (which he obtained after the AMHP warrant process set out below), access to its case work systems and stationary.

34. The claimant was regulated by Social Work England, which is the body regulating all social workers and AMHPs. The claimant had to inform Social Work England of the dates of any placements that he undertook, together with his line manager's contact details (i.e. Miss Lyth when working for the respondent).

AMHP warrant process

35. The claimant, along with all other AMHPs, had to be 'warranted' by the respondent before he was permitted to undertake Mental Health Act assessments ("**MHA Assessments**") on his own. The warrant process involved:

    35.1 the claimant completing three MHA Assessments under the observation of the respondent's AMHPs;

    35.2 the claimant providing 'reflections' on those assessments;

    35.3 the observing AMHPs' written testimonials on those assessments; and

    35.4 Mr Webb's approval of the claimant's portfolio (which included all of the documents above plus the claimant's qualifications and related documents).

36. The claimant submitted his portfolio to Miss Lyth and to Ms Cheney on 22 September 2022. They reviewed his portfolio and marked whether or not the evidence required was present. The written feedback from Miss Lyth and Ms Cheney was that the claimant met all competencies required and stated:

    "Feedback from your previous approving authority and testimonies from NYCC AMHPS who have observed your practice provides us with a picture of your practice being grounded in the social perspective and human rights values so important to the AMHP role. Its is good to see that you are commitment to following legal processes and guidance diligently and are keen to keep abreast of developments in research and academic papers also.

    Once approved we would like to you continue these reflections with a further 2 being completed within the first 3 months of your approval, one each with your AMHP manager and the AMHP lead.

    It may support your development to aim to deepen your reflections each time, moving from a place of observation and consideration of the assessment, to one of critical consideration of your and others' role within it. The reflection tool contains reference to gardener's model of critical reflection but you are welcome to consider other models of reflection if this is more accessible to you."

37. Mr Webb wrote to the claimant on 26 September 2022, confirming that he was approved to work as an AMHP by the respondent for a period of 5 years commencing on 23 September 2022. The letter stated:

    "Although I recognise that you undertake this role as an independent agent, as an appointee of the authority we recognise our responsibilities to provide you with the appropriate legal advice and assistance, and also confirm that you will be covered by our legal indemnity insurance whilst carrying out your role. On an interim basis, this letter should be seen as sufficient evidence of your approved status. However, within the next two weeks, you will be issued with your warrant card."

Respondent's system for dealing with MHA assessment requests

38. The respondent receives requests for MHA assessments from heath professionals and other parties. The respondent operates a triage system for dealing with MHA assessments, which is summarised below:

    38.1 an office-based Triage AMHP will consider the request, collate the information in a 'consideration report' and book the MHA assessment. The Triage AMHP would not normally have met the patient, unless they did so as part of a previous MHA assessment;

    38.2 a first responder AMHP will be assigned to the MHA assessment;

    38.3 a second responder AMHP will be available, in case the first responder is unable to attend the MHA assessment.

39. The claimant's placement with the respondent involved acting as a 'first responder' at all times. The claimant started his working day from home at 10am each day. He joined Ms Lyth's 'resilience' teams call which took place by Microsoft Teams at 10am daily, during which the team's workload was discussed and allocated. The claimant would then travel to the MHA assessments that he was assigned to do during the day. The claimant might also receive calls during the day, asking him to attend further assessments.

40. By way of contrast, the claimant had previously worked at other local authorities (including Cumbria) where he both triaged the MHA assessment request and carried out the MHA assessment itself. The claimant regarded this as a better system, because he stated:

    "When you triage it yourself – you know the background and the case details and you would set up your own plan e.g. call the doctor and tell them to bring a mask if the house was dirty or to park around the corner on the street."

41. However, as a matter of policy, the respondent had taken the decision a few years earlier to set up their systems with separate individuals triaging and responding to MHA assessments. Miss Lyth explained the reason for the respondent's system during her oral evidence:

    "*We have this model in place at NY – it was adopted 3-5 years ago to enable us to triage assessments in a more thorough way because of reports from staff back then that having to triage and respond to same assessment is incredibly difficult when you are out in the field. We adopted this model to promote safety.*

    Mr Odell was reporting that he did not really like that model, he did not like the way we work in North Yorkshire – at that point, I chose not to argue that point. I understand that he is an experienced AMHP working in different local authorities – he may have his opinion and view about our ways of working."

42. We note that it is not the role of this Tribunal to decide which system amounted to 'best practice'. The Tribunal's role is to consider the questions raised by the claim in the list of issues set out at the start of this Judgment.

Respondent's IT systems

43. The respondent's AMHP case workload was managed via an IT system called 'Liquid Logic', which contains all of the respondent's patient records. All AMHPs, Team Leaders and Service Managers had access to the system and cases for their region. The claimant stated that he had used Liquid Logic when working for other organisations for over a decade.

44. At the Tribunal's request, Miss Lyth demonstrated the Liquid Logic system to the Tribunal as part of her supplementary evidence, using the scree share facility on Microsoft Teams. The claimant's representative had the opportunity as part of cross-examination to question Miss Lyth on the Liquid Logic system.

45. We noted that the Liquid Logic system:

45.1 is accessed via a web based browser and therefore can be accessed by users working remotely so long as they have internet access;

45.2 allows full access to all users to any patient's information for whom a 'case' is open;

45.3 permits users to search for cases is several ways, including by the patient's details and by their region;

45.4 permits users to read the latest saved version of any document that a colleague is currently working on (documents are automatically saved every few minutes), by opening it as a 'ready only' document;

45.5 has a series of work 'trays', including their personal work tray and all MHA assessment trays for their assigned area.

46. We accepted Ms Lyth's evidence that the only time a user would be restricted from access to patient records on Liquid Logic would be if the respondent was aware of a conflict of interest relating to that individual (e.g. if the patient was a relative of the user).

47. The documents which might be available on each case in the Liquid Logic system included:

47.1 the 'consideration report' (or triage report) prepared by the office based AMHP who triaged the request for a MHA assessment;

47.2 a system of 'hazard' flags, indicating certain risks relating to each case;

47.3 the MHA assessment.

48. We therefore do not accept the claimant's evidence that he could only access the information for patients whose cases in his tray and that he could not read documents that his colleagues were working on.

49. The claimant also stated that he was unable to access the Liquid Logic system when he was 'on the road' because the respondent did not provide him with a 4G dongle. However, we do not accept that evidence because the claimant was provided with a mobile phone and could have used the wifi connection with his phone to access the Liquid Logic system via his laptop. In addition, we note that the claimant did access patient records whilst away from home using other external wifi sources (such as hospital and Council wifi systems), including those of Patient B (as discussed in more detail later in this Judgment).

Claimant's induction, Teams calls with Miss Lyth and supervision plan

50. As noted earlier in this judgment:

50.1 the first two days of the claimant's placement consisted of online training;

50.2 the claimant was then observed by managers and other existing AMHPS until he obtained his 'warrant' from the respondent (as set out earlier in this judgment).

51. The claimant also had access to the respondent's policies and procedures, which were available on their intranet.

52. Miss Lyth and her team worked remotely throughout the claimant's placement with the respondent. The vast majority of their communication with the claimant therefore took place via Microsoft Teams, except for the occasions when the claimant was being observed prior to obtaining his warrant from the respondent.

53. Miss Lyth arranged regular 1:1 Teams calls with the claimant. The first of those calls took place Monday 12 September 2022 (i.e the first working day after the claimant finished his online training).These calls were scheduled to take up to an hour each time. We accept Miss Lyth's evidence that lengthy discussions took place, as evidenced by the notes that she produced for their later calls (e.g. for 27 September 2023). The issues that they discussed during the calls included:

    53.1 the claimant's portfolio for the respondent's warrant process and his subsequent approval;

    53.2 the claimant's working hours and arrangements;

    53.3 the claimant's IT position – Miss Lyth recorded: *"Bill reports IT wise he is set up, knows how to contact IT department for support if required"*.

54. Miss Lyth emailed the claimant on 27 September 2023 to attach her note of their discussions and set out arrangements for the first few weeks of his placement. She stated:

    "Please find attached 1-1 notes. I will briefly capture our induction discussions as attached over the next 4-6 weeks, as agreed we will meet weekly for 1 hour throughout this period. We will move to a more formal supervision document post this induction period to incorporate reflective and practice discussions."

55. Miss Lyth's notes of the meeting on 27 September 2023 stated:

    "Supervisions/1-1's- agreed for 4-6 weeks Emma and Bill will meet for 60 minutes to cover induction planning, i.e- Bill can bring service and set up queries. Following this, formal supervision will be arranged every 4-6 weeks where practice and case discussions etc can take place."

56. The claimant did not sign a copy of Miss Lyth's notes of their discussion on 27 September 2022, but he confirmed in his evidence that he had received and read them. He did not raise any issues regarding the accuracy of the notes.

57. We do not accept the claimant's evidence that he would only have been able to raise concerns regarding health and safety with Miss Lyth once his formal supervisions started in mid-October 2022. We concluded that if the claimant believed that there were particular issues regarding health and safety (whether his own, those of any assessing team and/or patients), then he could have raised them with Miss Lyth at any time. For example, the claimant felt able to raise certain issues with Miss Lyth including on 4 October 2023 where

Miss Lyth's notes of that meeting (which she sent to the claimant) record discussions including:

*"**Supervision**- Emma has shared NYCC supervision guidance and template at Bills request, Emma and Bill will meet for formal supervision from 24/10, every 4-6 weeks.*

***Contact/Communication**-If out on a MHA after 5pm Mon-Thurs, and 4:30 Fri, Bill to liaise with EDT TL. EDT TL announces themselves in Countywide AMHP colab space each day. Bill has access to this, and access to TL's contact details. Bill has evidence on these on assessments last week, Bill reports communication went well. MST is our remote office, all communication with AMHPS to go through SWR AMHP chat. AMHP resilience is at 10am each morning- Bill to attend. Reports doesn't feel in control of assessment due to triage role, feels it can be 'frantic' and that there is 'too much' communication. Triage model is one we have adopted and think works well, triage is a supportive role to the responding AMHP.*

***Accommodation**-Bill can work from any social care building, Bill needs to use desk booking system to book desks, although can present at receptions and ask if any desk are free. Bill cannot work from a health building as no accommodation agreement in place currently. Bill voiced he feels the relationship with our health colleagues is 'damaged', and that we are absent from the trust.*

***Conveyance**- agreement to be made between health practitioner and AMHP on assessment by assessment basis, re who is arranging/booking a private ambulance if one is needed, agreed NHS ambulance is default/first conveyance method. Crisis teams do book secure when able to, discussed older age adults AMHP would usually be expected to arrange/book as no health rep is often present in assessment. Funding must be sought from health regardless of who is booking. Triage and responder to agree on who is booking- triage AMHP often does this to support responding AMHP. Directed Bill back to AMHP service information file where info on conveyance is stored."*

58. In addition, the claimant could have raised his concerns regarding health and safety with other managers, including Miss Hewitt (as Miss Lyth's line manager), Ms Haigh (another Service Manager who observed the claimant's assessment of Patient A), via the respondent's health and safety procedure or via his union representative. For example, we note that:

    58.1 Miss Hewitt and the claimant exchanged emails on 27 September 2023, after Miss Lyth emailed her team and managers to inform them that the claimant had been 'warranted' by the respondent;

    58.2 the claimant copied his emails on 11 October 2023 to his Unison representative.

MHA assessments undertaken by the claimant

59. The claimant initially shadowed colleagues undertaking MHA assessments. He then undertook (or attempted to undertake) at least eight Mental Health Act assessments ("**MHA assessments**") during his placement with the respondent. All of the claimant's MHA assessments up to and including 26 September 2023 were observed by another AMHP (who was either a colleague or a manger, employed by the respondent).

Date claimant recorded MHA assessment on respondent's systems	Observed by a colleague?	Patients referred to in email of 11 October 2023?
Tuesday 13.09.2022	With AK	No
Wednesday14.09.2022	With JW	No
Friday 16.09.2022	With Ms Haigh	Patient A
Saturday 17.09.2022	With LLS	No
Monday 26.09.2022	With Ms Dawson	Patient B *[NB this assessment did not go ahead – Patient B was not at home or did not answer the door]*
Wednesday 28.09.2022	No	Patient B
Thursday 29.09.2022	No	No
Sunday 09.10.2022	No	Patient C
Sunday 09.10.2022	No	Patient X

60. Our findings of fact relating to Patients A, B, C and X are set out later in this judgment.

Events on Tuesday 11 October 2022 and claimant's emails re health and safety concerns

61. We accept Miss Lyth's evidence spoke with a member of the respondent's recruitment team on Monday 10 October 2023 to discuss how she could terminate the claimant's placement. This was in response to concerns that Miss Hewitt and others had raised with Miss Lyth regarding the claimant, including concerns relating to the events on Friday 7 October 2023 relating to Patients C and X (which are set out in more detail later in this judgment). The recruitment team asked Miss Lyth to summarise her concerns, which she did in an email at 11.04am on 11 October 2022 (i.e. after she had instructed Matrix that the claimant's placement should be terminated):

"Further to our telephone conversation yesterday, please see the concerns discussed:

-Performance- challenges with risk assessing and prioritising (example from Friday where SM [Service Manager – i.e. Miss Hewitt] *had to intervene)*

-Conduct- raising concerns with myself re NYCC supervision policy not being followed in his opinion and forwarding thread of e-mail between ourselves to author of supervision policy.

Difficult conversations between him and his colleagues, and also directly with myself".

62. Miss Lyth stated during cross-examination that the concerns raised by colleagues included:

"Informal feedback from peers regarding Mr Odell's communications with them.

In numerous resilience calls – I received information from peers that Mr Odell was using resilience call as an opportunity to talk about him not favouring the triage model, talking about how he's done things in different local authorities and how NYC should adopt these ways of working.

Also he was using the time to discuss things not associated with resilience call – eg not having access to systems, to a 4G dongle (I disagree with both of these points).

Mr Odell also discussed the distance he had to travel – something which was part of the suitability conversation [prior to the start of the placement].

Mr Odell also wanting to share how he thinks MHA assessments should be done – this might be helpful and relevant, but the forum to do this would be a peer supervision setting rather than resilience calls.

Regarding the assessment on Patient C – a peer [a triage AMHP] *tried to contact Mr Odell to establish the end time to arrange the following assessment* [with Patient X]. *Mr Odell was rather rude to the triage AMHP at the time. The peer felt the need to speak to Miss Hewitt at the time (I was not in work) – so Miss Hewitt spoke to Mr Odell about this."*

63. The claimant emailed Miss Lyth at 9.23am on Tuesday 11 October 2022 stating:

"I write to inform you that I do not feel safe at work and that I am withdrawing from the workplace under section 44 of the Employment Rights Act 1996.

My safety concerns relate to no risk assessment taking place, when mental health act assessments are planned for me and the assessing team.

Could you please forward your health and safety policy and the name of the health and safety officer?

I will liaise with the health and safety officer and my Union rep, and then formally submit a number of near misses and why I do not feel safe at work.

I hope that these issues can be addressed, safely and in a small number of days."

64. Miss Lyth was cross-examined on her reaction to this email and the claimant's representative asked if the email was 'frustrating'. She stated:

"I wouldn't use word frustrated – by virtue of having to recruit an agency worker, we had to do this because our service pressures require additional staff.

I'm responsible for the wellbeing of my current staff on rota – I'm very aware that the impact of this role has on people's personal and professional time. I need to fill the needs of the service; the rota needs to be robust.

So when I received this email, I was concerned about how I would run my service for the day. I had a responding AMHP on the rota working from 10am-9pm and I was being told that I no longer had that at 9.30am. It's incredibly difficult for me as a manager to fulfil my rotas and amend tasks in the day.

I'm responsible for a large amount of staff and workflow – I have to ensure professional time is covered plus not go into staff's personal time – there's a lot of impact of putting someone else on the rota."

65. Miss Lyth and Miss Hewitt discussed the claimant's email and agreed to terminate the claimant's placement. However, Miss Lyth and Miss Hewitt stated that it was ultimately Miss Lyth's decision. We asked Miss Lyth why the decision was taken so quickly. She stated: *"I don't know why I acted so quickly".* She referred to the need to mobilise other staff quickly to fill the gap in the rota, but accepted that she did not need to end the claimant's placement in order to do so.

66. Miss Lyth emailed and sent a Teams Message to Matrix at around 9.57am stating that they would like to terminate the claimant's placement with immediate effect. The email and the Teams message both stated:

"Good morning matrix,

I have received an e-mail from William Odell this morning stating he wishes to withdraw from the workplace today.

With immediate effect we would like to end his current placement with our service."

67. A Matrix member of staff ("**TC**") responded at 10.18am stating:

"Thank you for your email.

I have ended this placement on your behalf today."

68. Miss Lyth replied to TC at 10.24am asking:

"Has he been informed please by yourselves? Just to clarify."

69. TC replied at 10.34am, stating:

"Apologies, I thought you advised that you received an email from the worker himself? I don't speak with the worker only the supplier. However, the supplier have been emailed."

70. Miss Lyth then emailed TC stating:

"Can I confirm, should I be informing him direct of the ending of placement?

Apologises for any confusion [TC]*, he did e-mail me this morning, stating he was withdrawing from work, but wasn't clear if this was permanent, and since we have decided to end his placement."*

71. TC responded at 12.21pm, stating:

" Apologies I had left the office for a hospital appointment. I will inform the supplier of the below so that William can hand his equipment back."

72. The claimant emailed Mr Webb at 12.33pm, enclosing a copy of his email to Miss Lyth of 9.23am that morning, and stating:

"Further to my email below; I have received a call from my agent at Randstad expressing that my placement has been ended.

This is shock and is most serious, and is not congruent with ensuing the heath and safety of your workers.

I would be grateful if you could confirm the position?

73. Mr Webb responded at 1.20pm and stated:

"Thank you for copying me in. I am very concerned to read your email and want to make clear that I would expect risk assessments and health and safety always to be given due and proper consideration, by all of us as employees as well as by managers. Thank you for copying me in.

It's difficult for me to comment without having more information and, I would suggest, that in the first instance, these issues are considered by your Head of Service (…), as well as Assistant Director (..) and by our HR team .. and … or one of their colleagues)

I am copying them into this email so they can link with you and local managers and also advise me/keep me posted."

74. The claimant responded to Mr Webb at 2.30pm by email, attaching "1-1 notes" prepared by Miss Lyth. The claimant's email stated is set out below. We have inserted the patients' anonymised details in bold and square brackets and underlined text for emphasis in the claimant's original email:

"Thank you very much for your response, which I have found to be reassuring.

It initially appears to me that the reporting of my concerns has tried to be thwarted, by the ending my agency contract. I sincerely hope that this is not true and I that I am not correct, as it would be most serious. I would offer than this in its self, may require investigation.

In order to be helpful, I shall offer a brief summary of my Health and Safety Concerns.

1. *I have not been provided with an induction or an induction plan. A supervision contract is normally discussed and signed during an induction. I started my post on 05/09/2022.*

2. *My manager Emma Lyth sent me the supervision policy on 05/10/2022, but is not following the policy. Formal supervision is the normal mechanism for raising such concerns and to develop practice in a safe manner. Please see attached.*

3. **[PATIENT A]** *On 19/09/2022, there was a near miss. A community mental health act assessment was planned for me. There was no risk assessment for me and the assessing team. The patient was known to carry knives and an assessment in a health based place of safety, rather than the patients home, was not considered.*

The use of a rendezvous point or pre assessment meeting in the field, was also not considered in order to fully formulate and communicate an assessment plan to reduce risk.

4. **[PATIENT B]** *On 26/09/2022, there was near miss. A community mental health act assessment was planned for me and the assessing team. There was no risk assessment for me and the assessing team. The home was known to be unfit for human habitation. We had no PPE; me and the assessing team were exposed to germs and cigarette smoke for up to 2.5 hours.*

5. **[PATIENTS C AND X]** *On 06/10/20225, there was a near miss. A mental health act assessment was planned in an acute hospital. There was no risk assessment for me or the assessing team. It had not been initially identified that the patient had previously assaulted an AMHP and Police officer when mentally unwell and during conveyance to hospital. Moreover, I received pressure from my managers to leave the patient on the acute ward who was in my custody, and to not manage the conveyance in order to start another assessment in the same hospital. Ignoring my own risk assessment and my responsibility to the patient.*

I have other concerns that relate to patients not being represented on the ward by a Nearest Relative and that there appears to be no mechanism for actioning a Nearest Relative investigation. The policy Breathing Space is not being used or appears to not be understood; during a cost of living crisis. There also appears to be a lot of confusion in the warrant application process, and a lot of communication I am observing is very frantic, and is not conducive to good decision making. I acknowledge that these concerns would not be considered a health and safety issue, but need addressing.

Could I please ask that I am informed of what my employment position is, as soon as possible?"

75. The respondent stated that they would look into the concerns raised by the claimant in his email to Mr Webb. The claimant later emailed Mr Webb again on 19 October 2022 stating (with our reference to the patients identified in this Judgment in bold and square brackets):

"Further, to my last email sent on 11 October 2022, I have received an email from Head of Service Karen Siennicki, below, and a letter from Manager Emma Lyth attached.

I find myself to be shocked as to what has occurred and that I am unsatisfied and concerned, if not worried about your workers or service. I offer the following web link in order to show how dangerous the work of social workers and AMHPs can be, and a short chronology of what has occurred. I will then ask a number questions, as a number of issues look to have ben left "hanging".

https://www.communitycare.co.uk/2021/08/13/social-worker-stabbing-council-brings-psychotherapist-support-staff-reviews-lone-working-policy/

05/09/2022:

Provided with contract through Randstad.

[Patient A] *19/09/2022:*

A near miss. I undertook an AMHP assessment. There was no staff risk assessment completed by the planning/duty AMHP, with reference to risk of injury by knife attack. This was discussed with Emma Lyth and Service Manager Vicky Haigh. I assumed that this would not reoccur,

05-23/09/2022:

Undertook and planned AMHP observations in order to become warranted. Submitted AMHP portfolio.

26/09/2022:

Provided with warrant approval letter from yourself and warranted for 5 years, as well as a portfolio marking sheet.

[Patient B] *26/09/2022:*

A near miss. A community mental health act assessment was planned for me and the assessing team. There was no risk assessment for me and the assessing team, completed by the duty/planning AMHP.

The home was unfit for human habitation. We had no PPE; me and the assessing team were exposed to germs and cigarette smoke for up to 2.5 hours.

05/10/2022:

I received the supervision policy, further, to my repeat requests to Manager Emma Lyth.

06/10/2022, AM:

The supervision policy was refused to be applied by Manager Emma Lyth. The supervision policy contains a supervision contract, and an area to discuss and resolve health and safety concerns.

[Patients C and X] *06/10/2022, PM:*

A near miss. A mental health act assessment was planned for me in an acute hospital. There was no risk assessment for me and the assessing team. It had not been initially identified that the patient had previously assaulted an AMHP and Police Officer when mentally unwell and during conveyance to hospital. Moreover, I received pressure from Service Manager Elaine and from the duty AMHP to leave the patient who was in my care and who had not been conveyed, in order to start another assessment in A&E. Ignoring my own risk assessment and my responsibility to the patient.

11/10/2022:

I withdrew from work by email at 09:23 due to not feeling safe, due to no risk assessment taking place when MHA assessments are planned for me. I asked for the Health and Safety policy and for this to be addressed in a small number of days.

11/10/2022:

I received a call from Randstad expressing that my contract had ended.

11/10/2022: I notified you of what had occurred and provided a brief outline of the near misses.

14/10/2022: I received an email from Karen Siennicki stating that my contract had been in fact terminated at lunchtime on Tuesday 11 October and that she will look into the matters raised.

14/10/2022: I received an emailed letter from Emma Lyth asking that I return my warrant card.

It is also worth noting that as the AMHP who is making the application; I have responsibility for the assessment and co-ordinating the process of assessment. I also act independently as you have stated in your letter. The Mental Health Act CoP (14.41) makes this clear, unless different local arrangements have been agreed locally.

I understand that field AMHPs are not able to plan assessments in the field as the AMHP hubs have all closed, and that the County is vast in size thus making returning to your home or office to plan and make calls, not practical or even impossible. Local authority office locations are available, but only during office hours. So I understand that the duty AMHP has to plan the assessment for the field AMHP. A protocol of risk assessing the field AMHP, and the assessing team needs to be agreed with me and any other field AMHP."

"Near miss"

76. The claimant clarified during cross-examination that when he stated that there were "no risk assessments" carried out:

"There should be two risk assessments:

1) *The patient's risk assessment and need for a MHA assessment – the Triage assessment; and*
2) *The risk assessment for the actual plan* [i.e. the plan of the visit for the MHA assessment] – *for the AMHP's own personal safety and the patient's safety.*

77. For example, in relation to Patient A the claimant stated:

"In triage – the AMHP picked up fire risk and knives risk. But when assessment is planned, you have to assess risk to the patient and the assessment team – to make sure the actual act of carrying out assessment is safe.

…

so I had to create a plan which I talk about in my reflective piece. It's very time pressured, not the optimum."

78. The Tribunal noted that the claimant used the term *"a near miss"* three times in his second email to Mr Webb on 11 October 2023 and in his email to Mr Webb on 19 October 2023,

for each of Patients A, B and C. We asked the claimant what he defined as a 'near miss'. The claimant stated:

"I can remember googling around looking for the H&S policy or something – the definition of a 'near miss' came, so I thought it would be helpful to write a 'near miss' and then explain the context of a 'near miss'

I got the definition somewhere online – I wouldn't have got the definition direct from the H&S policy… It would have been a website or something – it may have taken me to the HSE website."

Patient A – 16 September 2022

79. The claimant was scheduled to assess Patient A at their home on 16 September 2022. The triage AMHP had obtained a police warrant to access the home and escort Patient A, in case Patient A refused entry to the AMHPs and other healthcare professional. Healthcare professionals (including two doctors and a private ambulance attended the MHA assessment. The claimant was also accompanied by Ms Victoria Haigh (Service Manager and AMHP), who was observing him as part of the warrant process.

80. We accept the respondent's evidence that there were delays in carrying out Patient A's MHA assessment because:

    80.1 the triage AMHP first had to apply for a police warrant from the magistrates' court;

    80.2 there were delays relating to the booking of a private secure ambulance to transport Patient A to hospital following the assessment.

    The claimant was not aware of the reasons for the delay at that time.

81. The claimant said that due to time constraints, he had not read the consideration report before attending the MHA assessment. However, he said that he had a detailed conversation with the triage AMHP and Ms Haigh before setting off. The Tribunal asked the claimant what additional information he would have been able to obtain from the consideration report and he stated:

"Probably none on this occasion because I had a really good chat beforehand with the triage AMHP and with Victoria over Teams – there was no need for me to access information on that case. I had a good understanding of what the position was when I went out.

Yes – it was time pressured, but I'd had a good conversation – so that was helpful."

82. During cross-examination, the respondent's representative asked the claimant what additional planning the claimant was saying should have taken place regarding the MHA assessment for Patient A. The claimant responded:

"When myself and Victoria and the triage AMHP were on a Teams meeting and we detected that the assessment was booked for 2pm and no health based place of safety, there was a discussion regarding should we re-book it but they were already setting off.

So we came up with a Plan B – I said I needed to go right now and arrive first. So when ambulance, police, doctors etc. turn up they would not gather outside Patient A's house in case they decide to run away or set a fire."

83. Ms Victoria Haigh (Service Manager) was the AMHP observing the claimant's MHA Assessment of Patient A. She provided the following feedback as part of the claimant's warrant process in response to the question *"What comments can you make on the skills of the AMHP?"*:

"Bill was professional with the police, [others] *and the service and managed the situation well give the amount of professionals involved in the assessment due to the perceived risk and the granting of a* [police] *warrant, all of whom entered the process with differing agendas. Bill coordinated all of the elements within the assessment in a calm and professional manner."*

84. The claimant accepted that he had a debrief discussion with Ms Haigh after Patient A's assessment on 16 September 2022. However, the claimant stated that he did not regard his discussion with Ms Haigh as the correct forum to raise any health and safety concerns. The claimant stated that he thought the correct manner to raise these issues would have been during formal supervisions with Miss Lyth.

85. Miss Lyth was cross-examined on the "reflections document" that the claimant prepared regarding his assessment of Patient A. She stated:

"I've seen the reflective piece – but that's a matter of opinion. I don't read that and see "near misses" – I read that and see somebody completing a MHA assessment, which has risks associated with it. All MHA assessments do.

I also see someone reflecting on how perhaps things could been done differently – this is something which is very important. We do this as practitioners on daily, weekly, monthly basis."

86. The Tribunal asked the claimant what concerns he would have raised with Miss Lyth during a formal supervision with Miss Lyth, that he did not think were appropriate to raise with Ms Haigh. The Tribunal gave the claimant the opportunity to re-read his reflection document (which he submitted as part of his warrant approval portfolio). The claimant read this and stated:

"I would have raised:

- *why the police appear to be refusing to execute the warrant;*
- *the limited notice of assessment plan;*
- *the fact that Patient A's risk of flight not part of triage plan – this was a danger to the Patient and the community;*
- *the fact that Patient A is Polish but no interpreter or app was booked or available;*
- *a secluded rendezvous point was not arranged* [for the police and professionals attending the assessment];
- *a health based place of safety had not been booked;*
- *the warrant was not actioned for a number of days; and*

- *the amount of time allowed for me to get to assessment – there was limited time to manage assessment, I had to set off immediately because it had been booked for 2pm – when I got there could not access information on laptop because not got 4G dongle."*

87. The claimant was questioned during cross-examination as to why he did not raise these matters with Ms Haigh at the time, given that Ms Haigh was a Service Manager and therefore the equivalent level to Miss Hewitt (Miss Lyth's line manager). The claimant stated:

"We did do right at the very start when had a Teams meeting – we both noted knives risk and fire setting risk. We both asked if booked health based place of safety – the triage AMHP said no. That's why we had to come up with a plan quickly to try and manage the situation."

88. The respondent's representative noted that none of the other professionals reported the assessment as a 'near miss' and suggested to the claimant that this was not in fact the case. The claimant stated:

"We were lucky because the referral and triage info was up there on the risk – but when I got there his presentation was not at that level – so they would not have noted it then to be a near miss."

89. In relation to 'health based place of safety', we accept Miss Lyth's evidence (which was not challenged during cross-examination) that:

"My understanding from my experience of being practising AMHP and manager of AMHP team is that there is no requirement to book a health based place of safety.

We work jointly with health colleagues who are responsible for booking the place of safety – they are present at assessments where we execute s135 warrants, so they would arrange place of safety by calling back to their bases.

If for whatever reason the two identified places [i.e. the two designated hospital suites in the region] *were not free – they would use other spaces e.g. rooms on wards.*
…
I've been practising AMHP for 8 years – in all the time that I've executed s135 warrants, I've taken someone to health based place of safety once."

Patient B - 26 and 28 September 2022

90. The claimant first attended Patient B's home with Ann Dawson (AMHP) on 26 September 2022. The claimant had not yet received confirmation of his warrant from Mr Webb, therefore Ms Dawson attended in order to observe the claimant's assessment of Patient B.

91. The claimant stated that he had not read Patient B's consideration report or other documents in advance of attending Patient B's home. He stated during cross-examination:

"I think by the time it was assigned to me I only had half a conversation, I had to set off – I sensed that Ann knew patient very well, thought would have meeting with Ann outside the house so we could discuss the patient."

92. The claimant also stated in response to the Tribunal's questions as to whether he had access to Patient B's consideration report that:

"If I did – I didn't have time to read it. I got there really early so I could have a disc with Ann.

93. The claimant said that he did discuss Patient B's case with Ms Dawson. However, when the claimant and Ms Dawson knocked on Patient B's door, there was no response. The claimant also listened to Ms Dawson's discussion with the doctor who were also attending that day.

94. The claimant attended Patient B's home again for an assessment scheduled to take place at 1.20pm on 28 September 2022. Healthcare professionals also attended Patient B's home. The claimant stated that:

    94.1 it was a 'complete surprise' to him when he entered Patient B's home and saw that it "so dirty" and contained cigarette smoke;

    94.2 one of the crisis team healthcare professionals put some gloves on and sat away from the smoke;

    94.3 the claimant had not brought PPE with him. He stated that he could not leave Patient B's home to collect PPE from a local healthcare facility because that might upset Patient B;

    94.4 he was at Patient B's house for around 2 hours. However, the other professionals attending the MHA assessment were present for a shorter period of time.

95. The Tribunal asked the claimant whether he had read Patient B's consideration report (and any other relevant documents) on the respondent's Liquid Logic system before he attended Patient B's home again on 28 September 2022. The claimant stated:

"I can't recall."

96. The Tribunal also asked the claimant if he had discussed Patient B's case with Ms Dawson before he returned on 28 September 2022. The claimant stated:

"*I can't recall – it's maybe 50/50 – she was on shift or duty – I just don't know, I can't recall that."*

97. We have concluded that the claimant did read Patient B's consideration report before he attended Patient B's home again on 28 September 2022. It is simply not credible for the claimant to suggest that he might have attended a second time at Patient B's home in three days without first reading the relevant documents on the respondent's systems. We also note that if the claimant had not had time to read the documents, he could have refused to carry out the assessment until he had time to read them.

Patients C and X – Friday 7 October 2022 (MHA assessments recorded on respondent's systems on Sunday 9 October 2022)

98. The claimant attended a local hospital to assess Patient C. Patient C had been admitted to a hospital ward and the assessment was booked to take place at her hospital bed. The claimant stated that:

    98.1 he noticed that Patient C's previous MHA assessment was missing and raised this during his call with the triage AMHP. The claimant stated that he did not obtain a copy until he had arrived at the hospital. The claimant then realised that Patient C had previously 'struck out' at a police officer and the AMHP who was assessing her;

    98.2 the risk posed by Patient C did not stem from the assessment itself, but when he had to tell her that she would be detained under the Mental Health Act;

    98.3 the hospital security staff were downstairs in the Accident and Emergency Ward, but were not present on Patient C's ward.

99. The respondent stated that the previous MHA assessment had been undertaken by a different local authority and that it often took some time for other authorities to send across previous assessments. Miss Lyth stated that:

    99.1 the claimant was not attending Patient C's home to assess her – rather the assessment was due to take place on a ward with other professionals around who could support him if needed;

    99.2 Patient C's consideration report stated that she might become "aggressive when unwell";

    99.3 in any event, the claimant had read Patient C's assessment when he arrived at the hospital and therefore had sufficient information to decide whether or not he believed it was safe to complete her MHA assessment.

100. A Triage AMHP called the claimant whilst he was still with Patient C and asked him to assess Patient X. Patient X was in the Accident and Emergency department of the same hospital. The Triage AMHP stated that Patient X had been waiting for a considerable time and was becoming distressed.

101. The claimant stated that he did not wish to leave Patient C on the hospital ward. He instead wanted to remain with Patient C until she had been 'conveyed' to another hospital. The claimant said that this was because Patient C was his responsibility once the MHA assessment was complete, until she had been conveyed to the second hospital.

102. The respondent's witnesses disagreed with this analysis. Miss Lyth note that Patient C was on a hospital ward and that the ward staff had a duty of care towards her. Miss Lyth stated that if Patient C posed a threat to staff or other patients on the ward, then the claimant would alert other professionals who would be qualified to intervene. This could include hospital security staff (for matters taking place within the hospital) or the police (if Patient C left the hospital).

103. The claimant refused to confirm what time he would be able to leave Patient C and therefore whether or not he would have time to assess Patient X. The Triage AMHP complained to Miss Hewitt (in Miss Lyth's absence) that the claimant would not provide her with a clear answer regarding whether or not he was able to assess Patient C and was 'rather rude' to her. Miss Hewitt then called the claimant. During their phone call they discussed:

    103.1 managing and prioritising the risks involved for both patients;

    103.2 whether or not Miss Hewitt needed to arrange for another AMHP to assess Patient X.

104. We note for the sake of completeness that the claimant did in fact attend Patient X and carried out their MHA assessment later on 7 October 2022.

RELEVANT LAW

105. The Tribunal has considered the legislation and caselaw referred to in the **Annex to this document**, together with any additional legal principles referred to in the parties' helpful written and oral submissions. We have not reproduced the submissions in full in this Judgment in the interests of brevity.

APPLICATION OF THE LAW TO THE FACTS

106. We applied the law to our findings of fact and reached the conclusions set out below.

HEALTH AND SAFETY

Was the claimant a 'worker' within the definition of s230 of the ERA? *In particular, did the claimant work under an implied contract, whereby the claimant undertook to do or perform personally any work or services for the respondent?*

107. The parties agreed that:

    107.1 there was no express contract between the claimant and the respondent;

    107.2 the claimant provided personal services to the respondent;

    107.3 the respondent was not a client or customer of any profession or business undertaking carried on by the claimant; and

    107.4 the claimant had entered into a written contract with the Randstad agency, who in turn entered into a contract with Matrix, who in turn provided agency worker recruitment services to the respondent. We were not provided with copies of the contracts between Randstad and Matrix or between Matrix and the respondent as part of these proceedings. However, the claimant did not dispute that these contracts existed.

108. The claimant submitted that the Tribunal should imply a contract between himself and the respondent as a matter of necessity (see *James*, cited in the Annex to this Judgment). We note the law set out in the Annex, including the Court of Appeal's decision in *Tilson* (cited in the Annex to this Judgment) which stated:

"The degree of integration may arguably be material to the issue whether, if there is a contract, it is a contract of service. But it is a factor of little, if any, weight when considering whether there is a contract in place at all. This argument repeats the error of asserting that because someone looks and acts like an employee, it follows that in law he must be an employee."

109. The claimant's representative referred us to the case *of Harlow District Council v O'Mahony and anor* EAT 0144/07. However, we distinguish *Harlow* from this claim because of factors including that Mr O'Mahony:

109.1 negotiated pay increases with the Council, rather than through his agent;

109.2 required Harlow's permission to take holidays and notified Harlow if he was absent due to sick leave;

109.3 was subject to disciplinary proceedings by Harlow and raised a grievance with Harlow regarding his working conditions.

110. We concluded that there was no necessity in the circumstances of this claim to imply a contract between the claimant and the respondent because:

110.1 the claimant had an express written contract with his agency, Randstad. Randstad were responsible for paying the claimant (who submitted his working hours and expenses to Randstad), approving his holidays and dealing with HR matters such as sick leave;

110.2 the claimant had previously worked for other local authorities via agencies, including via Randstad during his placement with Cumbria;

110.3 when the respondent wished to terminate the claimant's placement on 11 October 2022, they informed Matrix, who in turn told Randstad. Randstad then contacted the claimant to inform him that his placement was terminated;

110.4 the claimant was not subject to the respondent's disciplinary or grievance procedures.

111. We note that:

111.1 the claimant was subject to a degree of control by the respondent, in line with the regulatory requirements for his role as AMHP; and

111.2 the claimant was provided with IT equipment and a mobile phone, plus access to the respondent's systems in order that he could carry out the placement.

112. However, none of these factors are sufficient to require a contract to be implied between the claimant and the respondent as a matter of necessity.

113. The claimant's claim for health and safety detriment under s44(1A) of the ERA therefore fails and is dismissed.

Was the claimant in circumstances of danger on 11 October 2022 which the claimant:

(a) reasonably believed to be serious and imminent; and
(b) could not reasonably have been expected to avert?

114. In the case of *Rodgers v Leeds Laser Cutting Ltd* [2023] IRLR 222, the EAT identified at paragraph 21 the questions that need to answered in relation to the parallel provisions of s100(1)(d) of the ERA (automatically unfair dismissal):

"(1) Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:

(2) Was that belief reasonable? If so:

(3) Could they reasonably have averted that danger? If not:

(4) Did they leave, or propose to leave or refuse to return to, the workplace, or the relevant part, because of the (perceived) serious and imminent danger?"

115. If our finding that there was no implied contract between the claimant and the respondent is incorrect, then we conclude that we would have dismissed the claimant's health and safety detriment complaint in any event. This is because we concluded that the claimant did not reasonably believe that he was in circumstances of 'serious and imminent' danger at the time that he sent his email to Ms Lyth at 9.23am on Tuesday 11 October 2022 for the following key reasons:

115.1 the claimant had not worked since the previous Friday (7 October 2022), when he carried out MHA assessments on Patients C and X, both of which took place in a hospital setting with support available from hospital staff if needed;

115.2 the claimant was due to start work from home as normal on the morning of Tuesday 11 October 2022 at 10am. The first thing that he would have done if he had continued working that day was to join Ms Lyth's team 'resilience' call by video at 10am;

115.3 the claimant had not been allocated any MHA assessments as yet for that day and any MHA assessments that were allocated to him would not take place until 12pm. He therefore could not have known at 9.23am that day whether or not any of the patients that he would be assessing that day would pose a 'serious and imminent risk' to him;

115.4 we note that the claimant did not agree with the respondent's process of triaging MHA assessments using an office-based Triage AMHP and then allocating them to another AMHP to conduct in the field. The claimant's view was that using the same AMHP to triage and conduct the assessment would have been better because the AMHP would have full details of that patient. We note the respondent had chosen to implement this process in response to their AMHP's concerns that it was difficult to triage cases whilst travelling between

assessments. However, concerns about whether or not a process is 'best practice' are not sufficient (without more) to amount to 'serious and imminent danger';

115.5 the claimant had worked under the respondent's triage process since the start of his placement and had carried out MHA assessment based on this process since at least 16 September 2022 (when he assessed Patient A);

115.6 the claimant did not provide any evidence of any concerns similar to his own raised by other AMHPs within the respondent or other healthcare professionals who were involved in MHA assessment in the same region;

115.7 the claimant had access to sufficient information to conduct his own assessment of risks. He could access the triage report for all patients and, if he believed there was insufficient information, he could ultimately refuse to carry out or postpone the MHA assessment;

115.8 the claimant had the support of healthcare professionals and (on certain occasions) the police) when assessing patients, some of whom had previous contact with the patients. He could have sought their guidance at any time, regarding the level of risk posed by a patient;

115.9 in addition, if the patient's presentation changed during the assessment, the claimant could postpone the assessment at any time.

116. We also considered whether or not the claimant could 'reasonably have been expected to avert' any dangers. We concluded that he could have done so because the claimant could at any point refuse to carry out the assessment or postpone the assessment.

117. For example, in relation to Patient A:

117.1 the claimant stated that he had not read the consideration report because he needed to leave immediately for the patient's house after the phone call with the Triage AMHP. However, when the Tribunal asked the claimant whether there was any further information that he would have gained form reading the report, the claimant stated:

"Probably none on this occasion because I had a really good chat beforehand with the triage AMHP and with Victoria [Haigh, Service Manager who observed the claimant's MHA assessment of Patient A] *over Teams – there was no need for me to access information on that case. I had a good understanding of what the position was when I went out."*

117.2 the claimant also stated during cross-examination that he and Ms Haigh came up with a plan of how to manage risks related to the assessment before he set off to Patient A's house:

"When myself and Victoria and the triage AMHP were on a Teams meeting and we detected that the assessment was booked for 2pm and no health based

place of safety, there was a discussion regarding should we re-book it but they were already setting off. So we came up with a Plan B – I said I needed to go right now and arrive first. So when ambulance, police, doctors etc. turn up they would not gather outside Patient A's house in case they decide to run away or set a fire."

We concluded that the ability to plan during that telephone call mitigated any significant risks involved in the MHA assessment, along with the police presence at Patient A's home;

117.3 we concluded that there was no 'serious and imminent' danger posed to the claimant, the assessment team or to Patient A as a result of this MHA assessment. We note that the police were attending this assessment, along with two doctors. If Patient A had presented in such a manner that they would have required moving to a health based place of safety, then that risk could have been managed with assistance from the police and doctors without any 'serious and imminent' danger to the claimant.

118. The claimant's claim for health and safety detriment under s44(1A) of the ERA therefore fails and is dismissed.

PROTECTED DISCLOSURE

Did the claimant make a qualifying disclosure?

119. The sole disclosure that the claimant relies on in support of his claim is his email of 9.23am on 11 October 2022 to Ms Lyth (the "**Disclosure Email**"). The claimant was represented throughout these proceedings and could have sought to rely on other potential disclosures, whether oral or written, but has chosen not to do so.

120. The respondent disputes that:

120.1 the claimant disclosed information in the Disclosure Email; and/or

120.2 he believed this tended to show that the health and safety of the assessment team (including the claimant as AMHP and the patient being assessed) had been, was being or was likely to be endangered.

121. If the Tribunal finds that the claimant did hold those beliefs, the respondent also disputes that the reasonableness of the claimant's beliefs. They state that the claimant did not reasonably believe that:

121.1 the disclosure was made in the public interest; and/or

121.2 that it tended to show that the health or safety of the assessment team (including the claimant as AMHP and the patient being assessed) had been, was being or was likely to be endangered.

Did the Disclosure Email disclose 'information'?

122. We concluded that the first sentence of the Disclosure Email would not be sufficient to amount to 'information' for the purposes of s43B of the ERA because it contains a general statement from the claimant:

"I write to inform you that I do not feel safe at work and that I am withdrawing from the workplace under section 44 of the Employment Rights Act 1996".

123. The first sentence of the Disclosure Email does not state specifically what concerns that claimant wishes to raise.

124. However, we concluded that the second sentence of the Disclosure Email did amount to a disclosure 'information', rather than a mere 'allegation'. The claimant stated:

"My safety concerns relate to no risk assessment taking place, when mental health act assessments are planned for me and the assessing team."

125. We concluded that this amounted to sufficient 'information' because the claimant's email should be considered in the context of concerns regarding the respondent's practice that he had previously raised with Ms Lyth during their 1:1 video discussions. Whilst those concerns were not recorded as referring to a lack of formal risk assessments as such, Ms Lyth summarised their disagreement during her notes of their 1:1 discussion on 4 October 2023 as follows:

*"**Contact/communication…**Reports doesn't feel in control of assessment due to triage role, feels it can be 'frantic' and that there is 'too much' communication. Triage model is one we have adopted and think works well, triage is a supportive role to the responding AMHP."*

126. We note that the claimant's emails sent later that day (i.e. his emails to Mr Webb) cannot form part of the disclosure of information for the purposes of this claim. The claimant sent those emails to Mr Webb after the only detriment that the claimant complained of, i.e. the termination of his placement with the respondent.

Did the claimant believe that the disclosure of information was made in the public interest? Was that belief reasonable?

127. We have concluded that the claimant did believe that the disclosure of information was made in the public interest. The reason for our conclusion is that the claimant was concerned regarding the safety of the assessing team attending the MHA assessment (which included healthcare professionals) and the patient, as well as himself.

128. We concluded that the claimant's belief that this information was disclosed in the public interest was reasonable. If, as the claimant believed, no formal risk assessments were undertaken before MHA assessments were carried out, then that was a matter that could affect the whole assessing team and the patient.

Did the claimant believe that the disclosure of information tended to show that the health or safety of any individual (namely the assessment team, including the claimant

as the AMHP, and the patient) had been, was being or was likely to be endangered under s43B(1)(d) of the ERA?

129. As set out in the Annex (Relevant Law), we note that the term 'likely' was considered in *Kraus v Penna* Plc [2004] IRLR 260 to mean 'probable or more probable than not'. The Court of Appeal held that this was a higher standard than simply 'a possibility or a risk'.

130. We concluded that the claimant did not believe that the disclosure of information tended to show that the health and safety of any individual had been, was being or was likely to be endangered. The key reasons for our conclusion are:

130.1 the claimant's email related to his concerns regarding MHA assessments that had been carried out since at least 16 September 2023 (i.e. the date when he was observed assessing Patient A). This took place during the first week when he was attending MHA assessments on behalf of the respondent;

130.2 the claimant stated in his email later that day to Mr Webb that his concerns had led to 'near misses', involving Patients A, B and C. However, he found it difficult to explain what he meant by 'near miss' when asked by the Tribunal. He stated that he had found the term by using the Google search engine on the internet;

130.3 if the claimant believed that the health and safety of any individual was being endangered to such an extent that he regarded it as a 'near miss', then he could have raised his concerns at any time with Miss Lyth, Miss Hewitt, the respondent's other staff and managers or his union representative;

130.4 the claimant said that he had not previously raised his concerns because he was waiting for a 'formal supervision' meeting. However, we do not accept that waiting over a month is credible if the claimant genuinely believed that these concerns posed a potential danger to himself and others;

130.5 the claimant did discuss some of his concerns in the reflections part of his portfolio, but this was part of the process for him to obtain a 'warrant' rather than an avenue to raise concerns. We accept Miss Lyth's evidence that all AMHPs (and any other social workers) are encouraged to reflect on their practice and consider whether improvements could be made. We note that Ms Lyth stated in her written feedback to the claimant regarding his portfolio in late September 2022 stated that:

"Once approved we would like to you continue these reflections with a further 2 being completed within the first 3 months of your approval, one each with your AMHP manager and the AMHP lead.

It may support your development to aim to deepen your reflections each time, moving from a place of observation and consideration of the assessment, to one of critical consideration of your and others' role within it. The reflection tool contains reference to gardener's model of critical reflection but you are welcome to consider other models of reflection if this is more accessible to you."

Was that belief (health and safety endangered) reasonable?

131. However, if we are incorrect in our conclusion that the claimant did not believe that the health and safety of any individual had been, was being or was likely to be endangered, then we have concluded that the claimant's belief was not reasonable. The key reasons for our conclusion are:

131.1 the claimant had many years of experience as a social worker and, latterly, a qualified AMHP. He had worked for different organisations throughout that period;

131.2 the claimant was responsible for making independent decisions as to whether or not a MHA assessment should start or proceed;

131.3 the claimant accepted that he was required to conduct his own assessment of risks on an ongoing basis during an MHA assessment because the patient's presentation could change or deteriorate at any time. For example, the claimant stated that Patient A's presentation was different when he arrived at her house to that stated in the consideration report and that the police did not need to use their warrant to enter Patient A's house;

131.4 the claimant's own evidence is that he did not read (or could not recall reading) the detailed information on the patients available on the respondent's system available to him from any location before attending each of Patients A, B and C. If he had done so, then many of the concerns that the claimant raised during these proceedings could have been avoided;

131.5 for example, the claimant stated that he should have been advised to take PPE to Patient B's house. The claimant stated that he could not recall reading Patient B's consideration report at any time, despite attending Patient B's home on two separate dates. If the claimant had done so, then he would have read the detailed information regarding the state of her house and could have decided that PPE was required. Patient's B's consideration report included the following information:

"When they visited earlier today they were shocked at her appearance and the state of the property was covered in what looked to be soot all over her face, lips blackened, hands black, and clothes were dirty, she was absolutely in a dishevelled state…

Her home environment was cluttered and dirty with food and food boxes everywhere, smashed up biscuits, hundreds of cigarette ends all over the floor and table. [Patient B] *was unable to explain why her home was like it was and presented confused about this.*

…It was believed [Patient B] *did not have capacity around her care and treatment needs and there were significant risk around vulnerabilities, self-neglect and further deterioration."*

131.6 the claimant had full access to the respondent's policies and procedures on their intranet. He could have read the respondent's health and safety policy, but did not do so during his placement with the respondent;

131.7 the claimant was unfamiliar with the respondent's processes and believed that the way that the respondent worked was not best practice. He raised the respondent's triage process with Miss Lyth during their 1:1 discussions and she explained the respondent's rationale for their process. The claimant was clearly unhappy with the process, but we do not accept that it was reasonable for the claimant to believe that this process had, was or was likely to endanger the assessment team or the patient. We do not accept that the claimant would have waited for a 'formal supervision' to take place to raise these concerns if he held a reasonable belief that the health and safety of the individuals involved had been, was being or was likely to be endangered.

132. For example, in relation to Patient C:

132.1 we note that the claimant did have time to read Patient C's consideration report when he arrived at the hospital to assess Patient C (who was a hospital in-patient situated in a bed on a ward);

132.2 the consideration report stated that Patient C had previously hit a police officer. This would have been enough information to establish that Patient C posed a risk of violence to professionals, even without Patient C's previous MHA assessment from another local authority;

132.3 Patient C's previous MHA assessment was not provided by Patient C's previous local authority until the claimant arrived at the hospital – this could not therefore have formed part of any risk assessment caried out by the Triage AMHP;

132.4 the claimant assessed Patient C on the hospital ward, in the presence of hospital staff and with the hospital security staff available if needed;

132.5 the claimant could have refused to assess Patient C and/or refused to proceed with Patient C's assessment at any time, if he considered it unsafe to do so; and

132.6 the respondent did not require the claimant to leave Patient C in order to assess Patient X – this was a matter for the claimant's judgment. Rather, the respondent's Triage AMHP and Miss Hewitt were attempting to establish whether the claimant would be able to assess Patient X that day or whether they would need to find another AMHP to assess Patient X.

133. The claimant's claim for protected disclosure detriment under 47B of the ERA therefore fails and is dismissed.

CONCLUSIONS

134. The claimant's complaints of detriment on the grounds of:

134.1 making a protected disclosure; and

134.2 refusing to return to work in circumstances of serious and imminent danger;

fail and are dismissed.

_____

Employment Judge Deeley
Date: 17 December 2023

JUDGMENT SENT TO THE PARTIES ON

Date: 18th December 2023

……

……

FOR EMPLOYMENT TRIBUNALS

All judgments (apart from those under rule 52) and any written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.

ANNEX – RELEVANT LAW

1. Complaints relating to health and safety detriments and whistleblowing detriments are dealt with in the Employment Rights Act 1996 (the "**ERA**").

Qualifying disclosure - whistleblowing

2. The definition of 'worker' for the purposes of s43K of the ERA is wider than the normal definition of 'worker' for the purposes of the majority of the ERA's provisions. The respondent accepted that the claimant was covered by the wider definition of 'worker' under s43K which states:

   43K Extension of meaning of "worker" etc. for Part IVA.

   (1) For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(3) but who—

   (a) works or worked for a person in circumstances in which—

   (i) he is or was introduced or supplied to do that work by a third person, and
   (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

3. A protected disclosure is defined by s43A ERA as a 'qualifying disclosure' under s43B ERA:

   43B Disclosures qualifying for protection

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

   (a) that a criminal offence has been committed, is being committed or is likely to be committed,
   (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
   (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
   (d) that the health or safety of any individual has been, is being or is likely to be endangered,
   (e) that the environment has been, is being or is likely to be damaged, or
   (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

4. S47B of the ERA sets out a worker's right not to be subjected to a detriment on the ground that they have made a protected disclosure.

> **47B Protected disclosures**
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
> …
> (2) …this section does not apply where –
> …
> (b) the detriment in question amounts to dismissal…
> ….

Disclosure of information

5. In order to amount to a disclosure of information, that disclosure must "convey facts": it is not sufficient merely to make an "allegation" (see paragraph 20 of *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] I.C.R. 325).

6. The EAT held in *Cavendish Munro Professional Risks Management Ltd v Geduld* UKEAT/0195/09 at paragraph 24:

"The ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information."

7. The Court of Appeal in *Kilraine v London Borough of Wandsworth* [2018] IRLR 846, held that a disclosure must "*sufficient factual content and specificity*" if it is to form a 'qualifying disclosure' for the purposes of s43B of the ERA. The 'facts conveyed' can include facts that have already been referred to in previous communications between the parties. For example, at paragraph 41 of *Kilraine*, Sales LJ stated:

"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 the Cavendish Munro case [2010] ICR 325, para 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".

8. The expressing of an opinion does not amount to the disclosure of information (see, for example, *McDermott v Sellafield Ltd* [2023] EAT 60).

Public interest

9. The purpose of the public interest test in the legislation was to reverse the effect of the decision in *Parkins v Sodexho* UKEAT/1239/00, which held that a complaint about a

worker's own contract may constitute a protected disclosure. Private workplace disputes should not attract protection (see *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed* [2017] EWCA Civ 979).

10. The claimant must establish that:

    10.1 he subjectively believed at the time that the disclosure was in the public interest; and

    10.2 his belief was objectively reasonable.

11. In *Chesterton*, the Court of Appeal held that the following might be useful tool when considering whether a disclosure was in the public interest:

"(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."

Reasonable belief – endangerment of health and safety

12. The claimant must also reasonably believe that the disclosure tends to show one or more of the categories set out under s43B(1). The Tribunal must consider:

    12.1 whether the claimant genuinely believed that the disclosure tended to show one of the categories listed in s43B (*Darnton v University of Surrey* [2003] IRLR 133); and

    12.2 whether such belief was objectively reasonable in the circumstances (see, for example, *Phoenix House Ltd v Stockman* [2017] ICR 84 EAT).

13. The term 'likely' (eg in 'likely to be endangered' under s43B(1)(d)) was considered in *Kraus v Penna* Plc [2004] IRLR 260 to mean 'probable or more probable than not'. The Court of Appeal held that this was a higher standard than simply *'a possibility or a risk'.*

Health and safety concerns and "serious and imminent danger"

14. The definition of 'worker' that applies to s44 of the ERA is more restricted than that which applies to the protected disclosure provisions of the ERA. Section 230 of the ERA states:

> **230 Employees, workers etc.**
>
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly.
>
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
>
> (5) In this Act "employment"—
> (a) in relation to an employee, means…employment under a contract of employment, and
> (b) in relation to a worker, means employment under his contract;
>
> and "employed" shall be construed accordingly.

15. Workers who leave and/or refuse to return to their place of work in circumstances which (in their reasonable belief) amount to serious and imminent danger are protected from detriments under the ERA if their concerns fall within one of the categories set out in s44 of the ERA.

16. The definition of 'worker' is narrower than that set out under the protected disclosure provisions of the ERA. Section 230(3) of the ERA requires a worker to have a contract (express or implied) between the individual and the end user.

17. In *James v Greenwich LBC* [2007] I.C.R. 577, the Court of Appeal stated at paragraph 57:

'When the arrangements are genuine and when implemented accurately represent the actual relationship between the parties as is likely to be the case where there was no pre-existing contract between worker and end-user then we suspect that it will be a rare case where there will be evidence entitling the tribunal to imply a contract between the worker and the end-user.

If any such a contract is to be inferred, there must subsequent to the relationship commencing be some words or conduct which entitle the tribunal to conclude that the agency arrangements no longer dictate or adequately react how the work is actually being performed, and that the reality of the relationship is only consistent with the implication of the contract.

It will be necessary to show that the worker is working not pursuant to the agency arrangements but because of mutual obligations binding worker and end-user which are incompatible with those arrangements."

18. The Court of Appeal in *Tilson v Alstom Transport* [2010] EWCA Civ 1308, [2011] IRLR 169 considered a situation where the Tribunal applied the 'necessity' test to imply a contract between a senior manager and an end user where:

    18.1 the senior manager's services were provided to the end user through two intermediaries;

    18.2 the senior manager had refused an offer of permanent employment because he could earn more as an agency worker.

19. The Court of Appeal in *Tilson* held that it was <u>not</u> open to a tribunal to find employment status on the basis either that:

    19.1 the individual looks like an 'ordinary employee'; or

    19.2 that it is against public policy for agency arrangements to be entered into to avoid contractual status and therefore employer exposure to statutory rights.

20. The Court of Appeal stated at paragraph 44 of *Tilson* (with our underlining):

'the mere fact that there is a significant degree of integration of the worker into the organisation is not at all inconsistent with the existence of an agency relationship in which there is no contract between worker and end user. Indeed, in most cases it is quite unrealistic for the worker to provide any satisfactory service to the employer without being integrated into the mainstream business, at least to some degree, and this will inevitably involve control over what is done and, to some extent, the manner in which it is done. <u>The degree of integration may arguably be material to the issue whether, if there is a contract, it is a contract of service. But it is a factor of little, if any, weight when considering whether there is a contract in place at all. This argument repeats the error of asserting that because someone looks and acts like an employee, it follows that in law he must be an employee."</u>

21. In *Smith v Carillon (JM) Ltd* [2015] EWCA Civ 209, [2015] IRLR 467, Elias LJ restated this point at paragraph 22:

"…it is not against public policy for a contractor to obtain services this way, even where the purpose is to avoid legal obligations which would otherwise arise were the workers directly employed. … A contract cannot be implied merely because a court disapproves of the employer's conduct."

Health and Safety - serious and imminent danger

22. The claimant has brought claims under s44(1A) of the ERA regarding detriment related to health and safety.

s44 Health and Safety cases

…

(1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—

(a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work…

135. In *Rodgers v Leeds Laser Cutting Ltd* [2023] IRLR 222, the EAT identified at paragraph 21 the questions that need to answered in relation to the parallel provisions at s100(1)(d) of the ERA (automatically unfair dismissal – health and safety):

"(1) Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:

(2) Was that belief reasonable? If so:

(3) Could they reasonably have averted that danger? If not:

(4) Did they leave, or propose to leave or refuse to return to, the workplace, or the relevant part, because of the (perceived) serious and imminent danger?"

23. The EAT concluded at paragraphs 25 to 30 that it is only necessary that the claimant reasonably believes that there are circumstances of danger that are serious and imminent. The claimant does not need to prove that such circumstances actually exist.

24. Underhill LJ agreed with this analysis in the Court of Appeal's judgment in *Rodgers* [2022] EWCA Civ 1659, [2023] I.C.R. 356, and held at paragraph 17 that the provisions:

"…should indeed be construed purposively rather than literally and that it is sufficient that the employee has a (reasonable) belief in the existence of the danger as well as in its seriousness and imminence."

25. The EAT considered the question of what amounts to reasonable grounds for believing that there were circumstances harmful to health and safety in *Kerr v Nathan's Wastesavers Ltd* EAT 91/95. The EAT noted that the purpose of the legislation is to protect staff who raise matters of health and safety and held that the duty of enquiry placed on the individual should not be too onerous. For example, in *Joao v Jurys Hotel Management Ltd* EAT 0210/11, the EAT held that the fact that working arrangements proposed by an employer are not unlawful does not mean that an employee cannot reasonably believe that they were.

26. In relation to 'serious and imminent danger', the EAT in *Harvest Press Ltd v McCaffrey* 1999 IRLR 778 stated that the word 'danger' was not limited to dangers generated by the workplace itself. The EAT gave examples of cases, including:

    26.1 premises becoming unsafe as a result of an unskilled and untrained employee working on dangerous processes in the workplace, where the potential danger of a mistake affects others;

    26.2 the absence of a person with specific safety responsibilities where dangerous processes were being carried out; and

    26.3 a foolhardy employee adopting dangerous practices in the workplace (eg 'horseplay').

27. However, if an employer has put in place measures to minimise risk, a worker may not have a reasonable belief that there is serious and imminent danger *(Miles v Driver and Vehicle Standards Agency* [2023] EAT 62).

28. For example, the Court of Appeal in *Akintola v Capita Symonds Ltd* 2010 EWCA Civ 405 held that an employment tribunal was entitled to find that the claimant did not have a reasonable belief that he was in circumstances of serious and imminent danger. In that case, the employer had prepared a method statement of engineering work and a specialist team had undertaken monitoring of the situation.

Detriments

What amounts to a detriment?

29. The test of whether an act or omission could amount to a 'detriment' is the same as for a detriment in a discrimination complaint. The House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 held that whether an act amounts to a detriment requires the Tribunal to consider:

    29.1 would a reasonable worker take the view that he was disadvantaged in terms of the circumstances in which he had to work by reason of the act or acts complained of?

    29.2 if so, was the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?

30. We note that the Court of Appeal in *Deer v University of Oxford* [2015] IRLR 481, held the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

31. However, the House of Lords in *Shamoon* also approved the decision in *Barclays Bank plc v Kapur & others (No.2)* [1995] IRLR 87 that an unjustified sense of grievance cannot amount to a 'detriment'.

32. We also note that in the context of whistleblowing, a detriment for the purposes of the legislation can occur even *after* the relevant relationship with the employer has been ended or terminated (see *Woodward v Abbey National plc* [2006] EWCA Civ 822, [2006] IRLR 677, [2006] ICR 1436).

Burden of proof and drawing of inferences – detriment claims generally

33. In *International Petroleum Ltd and others v Ospiov and others* EAT 0058/17, the EAT set out the correct approach to whistleblowing detriment complaints as follows:

    33.1 the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he is subject is either his health and safety complaint and/or his protected disclosure;

    33.2 s48(2) ERA then requires the employer to show why the detrimental treatment was done. If the employer fails to do so, inferences may be drawn against the employer. However, these inferences must be justified by the Tribunal's findings of fact.

Reason for the detriment (protected disclosures)

34. The key question is whether the making of a protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the individual (*Fecitt v NHS Manchester* [2012] IRLR 64). This requires the Tribunal to consider the mental processes (conscious and unconscious) of the person who either acted or deliberately failed to act in respect of the detriment.

35. In certain cases, the courts have drawn a distinction between the making of a disclosure and the manner in which the complaint was made or pursued. For example, in *Panayiotou v Chief Constable of Hampshire Police* [2014] IRLR 500, the EAT upheld a decision by a tribunal that a police officer's dismissal was because of his long-term sickness absence and his obsessive pursuit of complaints. The EAT said that his dismissal 'in no sense whatsoever' connected with the public interest disclosures that he had certainly made earlier. The judgment of Lewis J stresses that such a finding is entirely logical and is not confined to 'exceptional cases':

    "There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosing of information by using racist or otherwise abusive language. Depending on

the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed."