Case No: 6001020/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr Dullaghan

Respondent: Audley Court Limited

Heard at: Bristol **On: 10, 11, 12, 13 and 14 June 2024**

Before: Employment Judge Halliday
Mr Ghoti-Ravandi
Mr Sutton

REPRESENTATION:

Claimant: In person
Respondent: Ms Thomas (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

Detriment for making protected disclosures

1. The complaint of being subjected to detriment for making a protected disclosure is not well-founded and is dismissed.

Unfair Dismissal

2. The complaint of automatic unfair dismissal for making a protected disclosure is not well-founded and is dismissed.

Direct discrimination

3. The complaint of direct sex discrimination is not well-founded and is dismissed.

Victimisation

4. The following complaint of victimisation is well-founded and succeeds:

    a. suspending the claimant from work on 30 March 2023.

5. The remaining complaints of victimisation are not well-founded and are dismissed.

REASONS

Introduction

1. The claimant, Mr Dullaghan, was employed by the respondent from 20 September 2022 until he was dismissed from his employment on 5 June 2023 for gross misconduct.

Claims and Issues

2. By a claim form presented on 10 June 2023 the claimant brought the following complaints:

    2.1. Unfair dismissal;
    2.2. Discrimination on the grounds of sex;
    2.3. Unlawful detriment on the grounds of making a protected disclosure;
    2.4. Victimisation.

3. By a response presented on 25 July 2023 the respondent resisted the claims. Undated further particulars (hand annotated as dated 6 December 2022) were provided by the claimant in response to a request from the respondent dated 29 November 2022

4. At a Case Management hearing on 7 December 2023 before Employment Judge Midgley (Case Management Hearing) the issues were discussed with the parties and the matters between the parties which would fall to be determined by the Tribunal were agreed. Following the hearing, some corrections to the dates were agreed and recorded and an updated list of issues was agreed. At the beginning of this hearing the list of issues was discussed, and the claimant was reminded that these were the issues that would be considered by the Tribunal. It was agreed that dismissal was not relied on as a detriment for the purposes of the whistle-blowing claim (as it was separate complaint) and the list of issues was updated accordingly and is as follows,

1. Protected disclosure ('whistle blowing')

a. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

i. What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

(i) 23 March 2023 in a written grievance about Simon Williams complaining of a breach of s.13 EqA 2010 (breach of legal obligation);

(ii) 25 May 2023 verbally to Mrs Michelle Forbes complaining that the respondent was acting in breach of its obligations under section 9(1) and 9(3)(b) of the Social Care Act to provide person centred care.

ii. Were the discloses of 'information'?

iii. Did the claimant believe the disclosure of information was made in the public interest?

iv. Was that belief reasonable?

v. Did the claimant believe it tended to show that:

1. a person had failed, was failing or was likely to fail to comply with any legal obligation;
2. the health or safety of any individual had been, was being or was likely to be endangered;

vi. Was that belief reasonable?

b. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

2. **Detriment (Employment Rights Act 1996 section 47B)**

a. Did the respondent do the following things:

i. Suspend the claimant on 30 March 2023;
ii. Breaches of confidentiality as detailed in paragraphs 16, 17 and 21, 22 of the Particulars of Claim;
iii. Attempting to prevent the claimant from attending the respondent's site on 17 April 2023 as detailed in paragraph 16 of the Particulars of Claim;
iv. At the investigation meeting, Mrs Hayley Scarborough told the claimant that she had no knowledge of the disciplinary allegations when that was not true because she had been involved in the Care Quality Commission referral and had been involved in the drafting the questions for the meeting;
v. The respondent delayed the response to the claimant's DSAR so as to prevent him having relevant information to defend himself.;

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

c. If so, was it done on the ground that the claimant had made the protected disclosures set out above?

3. **Dismissal (Employment Rights Act s. 103A)**

a. Was the making of any proven protected disclosure the principal reason for the claimant's dismissal?
b. The claimant did not have at least two years' continuous employment and the burden is therefore on him to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosures.

4. **Direct sex discrimination (Equality Act 2010 section 13)**

a. Did the respondent do the following things:

i. Conducting the 'investigation' meeting on 2 March 2023 in a room visible to the public, adjoining a public area and lacking in soundproofing;

ii. On 7 March 2023 Mr Williams sent an email to the claimant purporting unilaterally to change the terms of his contract relating to provide private sessions of personal training to residents of the respondent's premises.

b. Was that less favourable treatment?

i. The Tribunal will have to decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the claimant. The claimant says he was treated worse than Mia Sanchez. The respondent denies that is she an appropriate comparator, asserting that she did not offer private personal training sessions.

c. If so, was it because of the claimant's sex?

d. Is the respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to the protected characteristic?

5. **Victimisation (Equality Act 2010 s. 27)**

a. Did the claimant do a protected act as follows:

i. On 23 March 2023, the claimant presented a grievance against Mr Williams complaining of sex discrimination.

b. Did the respondent do the following things:

i. Suspend the claimant on 30 March 2023
ii. Breaches of confidentiality as detailed in paragraphs 16, 17 and 21, 22 of the particulars of claim;
iii. Attempting to prevent the claimant from attending the respondent's site on 17 April 2023 as detailed in paragraph 16 of the Particulars of claim;
iv. At the investigation meeting, Mrs Hayley Scarborough told the claimant that she had no knowledge of the disciplinary allegations when that was not true because she had been involved in the CQC referral and had been involved in the drafting the questions for the meeting;
v. The respondent delayed the response to the claimant's DSAR so as to prevent him having relevant information to defend himself;
vi. Dismissing the claimant on 5 June 2023.

c. By doing so, did the respondent subject the claimant to detriment?

d. If so, was it because the claimant had done the protected acts?

5. At the start of this hearing an application to strike out the response that had previously been raised at a private case management hearing was discussed. After a brief discussion about whether a fair trial was possible and the impact pursuing such an application would have on the indicative timetable, the claimant confirmed he did not wish to pursue the application.

Proceedings

6. The claimant gave oral evidence on his own behalf and Mia Sanchez, Anita

Dullaghan and Lieutenant Colonel Paul Oddie also gave evidence on his behalf. Michelle Forbes, who chaired the disciplinary hearing and Sian Hammer who heard the appeal, gave evidence on behalf of the respondent.

7. The respondent presented only limited evidence about the incidents relied on to support their defence of the sex discrimination claim, the detriment claim, and the victimisation claim and the Tribunal did not hear evidence from Mr Williams about his involvement in any of the matters in dispute or from another witness who had been involved in key conversations. As a consequence, there were some issues relevant to these proceedings about which the respondent did not present any (or only limited) direct oral or documentary evidence, and/or on which the claimant's evidence was undisputed and this was taken into account by the Tribunal in reaching conclusions on some of the facts set out below.

8. The claimant and his witnesses were credible and consistent but some of the claimant's assertions were not based on his direct knowledge. In the main Ms Forbes gave credible answers to the best of her ability given she could only provide first-hand evidence as to the disciplinary hearing, except where recorded in this judgment, and even at times where it did not support the respondent's case. Ms Hammer's evidence was limited to the appeal hearing but was not persuasive on all counts.

9. The Tribunal also reviewed the documents referred to in the witness statements and drawn to their attention during the course of the hearing contained in the bundle (305 pages). The fact that the bundle was not chronological was unhelpful. During the course of the hearing two additional documents, (an unredacted timeline and a further email from Simon Williams to Kathryn Butt dated 30 March 2023, (forwarding an earlier email of 30 March 2023 from Jessica Rourke to Simon Williams and Michelle Forbes)) were added to the bundle at pages 306-309. The Tribunal also reviewed a cast list, two chronologies, (one prepared by the respondent and one by the claimant), and written submissions made by the claimant and on behalf of the respondent.

Findings of fact

10. There was a degree of conflict in the evidence and as noted above only limited evidence as to some elements of their pleaded case was presented by the respondent and the claimant made some assertions that were not within his direct knowledge. The Tribunal has heard the witnesses give their evidence and found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary and after having read the factual and legal submissions made by and on behalf of the respective parties.

11. The respondent provides retirement living accommodation for residents, who own their own property and have the benefit of shared facilities including a restaurant, sauna and gym run by the respondent. These residents are known as owners.

12. Care services are also provided to owners by an associated Audley company, if requested by the owners. Such care is regulated under various statutory provisions and is referred to as Regulated Care. The Tribunal was referred specifically to Regulation 9 of the Health and Social Care Act 2008 (Regulated Activities), the guidance to which sets out that one key aspect of the obligations placed on providers of care services is that providers must ensure that "each person receives appropriate person-centred care and treatment that is based on an assessment of their needs and preferences". Care is not regulated when it is not provided by a care provider but by a private individual.

13. The claimant was employed by the respondent as a leisure club manager at one of

the respondent's retirement villages, Redwood, from 20 September 2022 on a part-time basis (20 hours a week). He had previously worked in this role full-time until December 2021 when he left his employment with the respondent to focus on his personal fitness business. He re-joined the respondent on a job-share basis following a discussion with the then General Manager Luke Millikin. His job share partner was Mia Sanchez.

14. The claimant was issued with a contract of employment dated 21 August 2022 which stated that he would work 20 hours worked flexibly over 5 days out of 7 as rostered between Monday at 8.00 am and Sunday at 10.00 pm.

15. The Tribunal accepts the claimant's and Ms Sanchez's evidence that an additional verbal agreement was reached with Luke Millikin that the claimant would be able to continue to undertake personal training (PT) under the auspices of his personal fitness business alongside his duties as Leisure club manager but outside his working hours.

16. The claimant had previously worked full-time for the respondent, and had undertaken personal training sessions, which were not part of his core duties, on the basis that he received 50% of the fees and 50% were retained by the respondent. The Tribunal finds that this was the usual arrangement in place across the respondent's retirement villages but was not documented or part of a formal scheme.

17. The claimant had continued to work with personal training clients who were residents at Redwood when he left his employment with the respondent in December 2021. He left to focus on and continue to grow his personal training business. In August 2022 when discussing re-joining the respondent, the claimant was informed by Mr Millikin that Susan Mclean (Regional Director) had said that these PT clients would have to be transferred to the respondent. The claimant refused unless some additional payment was made to him on the basis that it was his personal business, and he would be transferring the "goodwill" in his business to the respondent if he did this. He suggested that the compensation could be by way of an increased salary, but this was not agreed. The claimant therefore accepted employment and returned to work for the respondent on the basis that he could retain 100% of the PT fees; there was no agreement that fees would be split as they were before.

18. After his return to the part-time role the claimant continued to provide Redwood owners with PT services as an independent contractor from September 2022 and retained 100% of the fees. He fitted the sessions around his duties as Leisure Club Manager. He did not offer PT training to leisure club members who were not owners but there was no express restriction on him doing so.

19. Ms Sanchez also understood that the agreement reached with Mr Millikin applied to her on the same terms, but throughout the claimant's employment she only gave complimentary introductory sessions which the Tribunal accepts were a useful tool in seeking to develop her own a personal training business and did not have private paying PT clients.

20. In or around late October 2022 Simon Williams took over as Interim General manager.

21. On 1 November 2022, Mr Williams sent an email to the claimant and Ms Sanchez asking for clarity on how things were organised. The claimant sent a detailed response back on 8 November and during email exchanges that day it was clarified that the claimant held sessions with 7 owners – all whom he had worked with before he returned to his employment with the respondent. The final email from Mr Williams sent at 3.36 pm stated: "we need to make sure there is clarity and no conflict of interest on this". The claimant's last email setting out the names of the owners who

had PT sessions was sent at 3.41 pm.

22. Mr Williams forwarded this email to Susan McLean, Regional Manager for the respondent, that evening. No further action was taken by Mr Williams or Ms McLean following receipt of the confirmation from the claimant.

23. On 8 November 2022 the claimant made a request for leave over the Christmas period. Simon William responded by saying that Ms Sanchez had already requested leave and so he would need to review this. It was subsequently not responded to for several weeks.

Investigatory meeting 2 March 2023

24. On 17 January 2023, the claimant started providing personal training services to a new client, referred to as Mr CD in this judgment, who was an owner at Redwood.

25. On 9 February 2023, the claimant started providing personal training services to another owner at Redwood, referred to as Mrs AB in this judgment, who had previously been a client of the claimant. Mrs AB had a terminal cancer diagnosis and was on pain medication. The Tribunal finds that the claimant assisted Mrs AB by preparing a syringe with her medication at her request in or around late February on at least one occasion as due to her physical frailty she was not able to do this herself.

26. On 2 March 2023 Mr Williams arranged an investigatory meeting with the claimant. No evidence was adduced by the respondent as to how this arose.

27. Before the meeting, at 11.06, Kathryn Butt, Human Resources Employee Relations Advisor for the respondent sent an email to Mr Williams which confirmed that “PT Commission is not mentioned as its non-contractual”.

28. The investigatory meeting was held in a room with a glass door adjacent to the restaurant which was public. The room was not sound-proofed. The claimant was invited into the room and Mr Williams then went and asked Ms Karen Davies, receptionist, to attend as notetaker, which she did. The Tribunal accepts that the claimant was visible from the restaurant, and that this was not an appropriate place for an investigatory meeting to be held.

29. In the meeting, the claimant was asked whether he had taken on new owner clients, and he confirmed that there were two new clients and provided their details. The claimant confirmed that Mrs AB’s first session was on 9 February 2023 and Mr CD’s first session was on 17 January 2023.

30. The claimant further asserts that Mr Williams knew that the claimant had drawn up morphine for Mrs AB prior to this meeting, on the basis that the introductory paragraph of the prepared questions, refers to one of the concerns being investigated as including: “a concern that the owners are receiving a regulated service and have a lack of capacity which therefore could pose a risk”. In support of this assertion, the claimant highlights the reference to a regulated service in the script. He also relies on the fact that three out of the seven questions related specifically to Mrs AB (and none to Mr CD). Ms Forbes offered an alternative explanation in her evidence that this related to financial issues. The Tribunal does not accept Ms Forbe’s speculative explanation as credible as financial issues are referred to separately in the introductory paragraph. Specifically, the introduction paragraph in the typed, pre-pared script says, “Other issues raised are carrying out personal PT sessions with owners during working hours, taking cash payments from an owner and not declaring the work”. This would make no sense if the regulated services referred to are finance related.

31. The Tribunal finds that in the meeting Mr Williams asked for details of sessions provided, fees charged, and then asked a specific question about how long the claimant had been delivering PT sessions to Mrs AB. The Tribunal therefore concludes that Mr Williams already knew that the claimant had provided PT services to Mrs AB before the interview, as her name was typed into the questions.

32. As to whether Mr Williams was aware that the claimant had drawn up morphine by this time, on balance and noting that the claimant is drawing an inference from the wording of the script but also attended the meeting and had the benefit of seeing Mr William's demeanor in that meeting, and that Ms Forbes had no direct knowledge of what Mr Williams did or did not know but that the respondent has not produced any evidence from Mr Williams, the Tribunal finds there is sufficient evidence to conclude that Mr Williams was aware at that time that the claimant had drawn up medication into syringes as the claimant asserts. The Tribunal therefore finds on the balance of probability that Mr Williams did know about the fact that the claimant was drawing up medication (which would be within the definition of Regulated Care if carried out by a care provider) at that time.

33. In that meeting the claimant also confirmed that none of his clients had capacity issues as far as he was aware, and that he had public liability insurance and would forward a copy to Mr Williams. The claimant also stated that taking on new clients did not interfere with his 20 hours contracted time and that this was agreed by Luke Millikin. The Tribunal is satisfied that there is no evidence that Mrs AB did not have capacity at any point during the period from September 2022 to April 2023, notwithstanding some physical frailty.

34. The claimant sent an email on 2 March 2023 following that meeting asking for the notes and correspondence with other employees about the matter; asking for 7 days' notice of any further meeting; and giving the names of some further occasional PT clients.

35. On 7 March 2023 Mr Williams sent an email to the claimant confirming that the meeting was an investigatory meeting only, raising concerns about tax liabilities, asking the claimant to work continuous hours and take his PT sessions outside his contracted hours, asking for a copy of his public liability insurance, and stating that no further owners were to be taken on.

36. On 7 March 2023 the claimant submitted a holiday request to Mr Williams. There was a delay in authorising this request until 30 March 2023.

37. On 9 March 2023 the claimant sent an email to Mr Williams stating that working as a self-employed trainer was quite common in the fitness industry, and confirming he would contact HMRC in relation to Mr William's concerns about tax liabilities. He said he would respond to the other issues asap. Mr Williams responded by repeating that PT sessions should be held outside normal working hours, which should be continuous. Mr Williams forwarded this email to Kathryn Butt and Susan McLean asking: "Have we reached a conclusion on this?"

38. On 13 March 2023, the claimant emailed Mr Williams having spoken to HMRC and confirmed the advice given to him that there were no tax implications for either side in relation to providing PT services on an independent basis. He set out the agreement reached with Mr Millikin that he could retain his existing clients and the fees and take on new clients and that the sessions could be undertaken flexibly across the day as long as he delivered his agreed contractual hours. He expressly stated that he did not agree not to take on new clients. He agreed to provide some information to Mr Williams about total time on site and total hours spent delivering PT sessions. The claimant provided a copy of his public liability insurance.

39. On 17 March 2023, Mr Williams sent a copy of the 8 November 2022 email chain between him and the claimant to Ms Butt (but excluding the last email from the claimant timed at 3:41pm providing the list of clients).

40. In the notes of the interview with Rob Diaper as part of the later grievance investigation, it is recorded that Mr Williams was asked "What was the outcome into the PT investigation?" He responded, "I submitted my findings to HR and we felt that there was nothing to answer due to grey areas contractually".

First disciplinary issue

41. Notwithstanding this statement, on 17 March 2023, the clamant was sent an email by Ms Butt attaching a letter from Thomas Garlich inviting the claimant to a formal disciplinary meeting on 21 March 2023 for "refusing to comply with a reasonable management instruction namely that he had taken on new clients when instructed not to do so and further had stated that he intended to continue to do so." The meeting was to be chaired by Thomas Garlich, who was a General Manager at another Audley Village. This invitation conflicts with the statement given by Mr Williams to Mr Diaper. The Tribunal concludes that Mr Williams misled Mr Diaper by suggesting no action was taken when a disciplinary invite was sent and that the respondent pursued disciplinary action against the claimant knowing that there was, as Mr Williams said, no case to answer.

42. On 19 March 2023, Ms Butt sent an email to Mr Garlich stating:

> "This is a very short one. He is a short service and has failed to follow a simple management instruction by stopping taking on private PT packages with owners. I suspect he will argue that it was agreed with Luke (previous GM), but the Interim GM made a reasonable request to stop this, there are also concerns that the owners he is taking on board have a lack of capacity and he is taking cash from them. He has stated that he will continue doing it which goes against the instruction and shows a lack of respect for his manager and the company. I'm sure if your LCM found out about this (and others in the company) there would be uproar as he is taking 100% of the PT fees whereas the rest take 50%."

43. The Tribunal did not hear evidence from Ms Butt although she was observing the hearing, but this email refers to matters which were not set out in the disciplinary invite letter and the Tribunal finds in the absence of any other explanation that Ms Butt was inappropriately seeking to influence Mr Garlich's decision.

44. On 20 March 2023 the claimant sent an email to Ms Butt and Mr Garlich asking that the disciplinary meeting be rescheduled to 27 March 2023; for any further evidence; for the meeting to be recorded; and asking for an explanation of what was meant by "working hours for Audley". The postponement was agreed to the same day.

45. The same day the claimant also sent an email to Mr Williams setting out the hours he had worked that week.

46. On 22 March 2023, the claimant met with Mia Sanchez at 1.00 pm and asked her a number of questions about her interaction with Mr Williams. The discussion was confirmed in an email sent by the claimant to her that day which she confirmed, by an email sent at 8:07pm in response, as well as in her evidence before the Tribunal, was an accurate record of their discussion. Ms Sanchez confirmed that Mr Williams had not communicated with her in relation to the agreement on fees for personal training, in either November 2022, or in the past two weeks, or following an email sent to her in error on 2 March 2024. She confirmed that she had sought a meeting with Mr Williams accompanied by a colleague, Sofia Vestrini, to confirm what was in her contract following receipt in error of the email dated 2 March 2023. She stated

that the meeting was held in Mr William's office as that was where she and Ms Vestrini located Mr Williams. She confirmed that at that meeting she had been instructed not to undertake any paid training work "until this was resolved" but was told she could do unpaid sessions. She also confirmed that she had booked leave at Easter "ages ago" and that Mr Williams had never indicated he might not approve a leave request.

47. On 23 March 2023 the claimant emailed Kathryn Butt, about making a Subject Access Request. His request was forwarded to Mark Sadler, whom the Tribunal understands to be the respondent's legal counsel and data protection officer.

Grievance

48. On 23 March 2023 the claimant also submitted a formal grievance against Simon Williams. He made it clear that he was not trying to delay the impending disciplinary hearing and by separate email he notified Ms Butt that he would be accompanied by a named colleague to the hearing. However, Ms Butt cancelled the disciplinary meeting, she said because the claimant had raised a grievance.

49. The grievance set out the background to the dispute about providing PT services including the investigatory meeting held on 2 March 2023 and the claimant stated that:

"My concerns relating to the above issue is that Simon Williams has treated me completely differently to how he has treated my colleague, Mia Sanchez, who I share the leisure club manager position at Redwood with. I have discussed this with Mia, and have written confirmation of what we discussed, and the completely different approach Simon Williams has taken to dealing with us both"

50. He then set out two instances of a difference in treatment which he alleged were discriminatory due to his gender as he and Ms Sanchez had the same contractual terms (including in relation to personal training), salary, and length of service and that they both worked hard for the company.

51. The first issue was that Mr Williams had not contacted Ms Sanchez about her personal training, but she had to request a meeting with him, and the meeting took place in the general manager's office behind a solid glazed door and not in a room adjacent to a public area behind a glazed door. The claimant says in his grievance that Ms Sanchez was told she could continue the personal training she was undertaking for free, that the email of 2 March 2023 (which she received in error) said it was nothing for her to worry about and in response to her raising the issue of a new potential personal training client that they should have a meeting next week "once the situation was resolved".

52. The second issue relate to the claimant's request for leave over the Christmas period submitted on 8 November 2022 and which was approved on 20 November 2022 and a request for leave over the Easter period, submitted on 7 March 2023 which had not been approved at the time the grievance was raised. The Tribunal finds that it was in fact approved on 30 March 2023, the claimant's last working day before his holiday. This was referred to in the evidence but is not a matter relied on as a complaint in this claim.

53. On 28 March 2023, the claimant had a PT session with MS AB in her home. She was in pain which was no longer being managed by the oxycodone she had been taking and which was left for her already drawn up into measured syringes by her son on his weekly visits. Mrs AB had been prescribed morphine in addition to oxycodone. The Tribunal finds that on this visit the claimant drew up two syringes of 2ml of morphine (as noted on the record of his PT session and confirmed in his

evidence) after checking and in accordance with the prescription.

54. On 30 March 2023, at 8.00 am, a care worker, Louise Summers-Player undertook a morning care visit to Mrs AB. Her statement, which the Tribunal accepts as a materially accurate account, records:

> "We were in the kitchen, and I was preparing her breakfast. Mrs AB disclosed to me that she had terrible dreams last night and she's not sure if it was because Sean had put morphine in the syringe instead of Oxycodone. There were several syringes of medication inside on the kitchen table inside a small beaker. Mrs Murden disclosed that Sean had drawn them up for her as the care staff are unable to do it. From looking at the syringes it was unclear what medication was in the syringes."

55. There is no evidence before the Tribunal that Ms Summers-Player was aware that the claimant had raised a grievance, or knew the contents of the grievance, and the Tribunal concludes that she did not know about it.

56. Ms Summer-Player notified her concerns to her manager Jessica Rooke, Redwood branch manager, at 11.30 am. The Tribunal concludes that Ms Summers-Player saw no immediate safeguarding issues as she took three and a half hours to report the concern to Ms Rooke. Ms Rooke in turn reported the conversation to Mr Williams at 11.39 but Ms Rooke took no action in relation to Mrs AB. The Tribunal concludes that she too saw no immediate safeguarding issues as she took no action in relation to Mrs AB at that time.

57. An undated timeline about the events on 30 March 2023 prepared by Mr Williams, which the Tribunal accepts as substantially accurate, records that Ms Rooke then emailed Mr Williams and Ms Forbes, Head of Care at 11:46 am. This email stated:

> "Along with previous concerns I have had regard Sean and his cash in hand PT to my regulated customers even with concerns of capacity I have just been informed that Sean is now drawing up liquid morphine for a client we provide care for, so she is able to take it later. We have already spoken to the son and explained we as a care team aren't able to draw up and leave a controlled drug out as we aren't monitoring this and offered an evening call to which they refused due to price, the son then explained he would do this for her weekly and she will take as and when needed". Ms Rooke then summarised Ms Summers-Player's account and referred to previous concerns raised about the claimant and her concerns about him "crossing the line", "professional boundaries" and the "safety of our clients".

58. Mr Williams notified Ms Butt at 11.52 of the issue who advised a further call with Ms Forbes and Ms Mclean. Mr Williams confirms in the timeline that he conducted the call, and it was "agreed that the actions highlighted could be deemed as gross misconduct". Mr Williams then drove to Bristol to suspend the claimant.

59. We accept Ms Forbes' evidence that she did not reach the decision to suspend but provided advice in her role as Head of Care to Mr Williams who was conducting the meeting. In the absence of any evidence from the respondent as to who reached this decision, the Tribunal concludes that the decision to suspend was taken by Mr Williams who was conducting the meeting, in conjunction with Ms McLean, and in reliance on HR advice from Ms Butt. Ms Butt then prepared the suspension letter and a script.

60. Mr Williams met with the claimant and suspended the claimant by reading out the script and confirmed the suspension in the suspension letter dated 30th March 2023. Ms Vestrini also attended the suspension meeting. The letter stated the suspension was "to give the Company an opportunity to investigate allegations of potential gross misconduct in relation to administering medication (morphine) to an owner in a

dosage that is potentially fatal". The respondent submitted no evidence as to who had formulated the allegation in this manner but as the letter was prepared by Ms Butt after the discussion with Ms McLean and Mr Williams the Tribunal concludes that they were all involved in agreeing the phrasing of the allegation. The Tribunal concludes that there was never at any time any basis for suggesting that the claimant had administered the morphine, nor at any stage that that there was any sound basis for concluding that the dosage was potentially fatal. Mrs AB was very clear as recorded in Ms Rooke's statement (discussed below) that her only concern was whether there was 1 ml of oxycodone or 2ml of morphine in two of the syringes.

61. Following his suspension, the claimant was escorted off the Redwood premises by Nigel Jones (Head Chef), a personal friend. The respondent has not provided evidence as to why suspension was considered necessary when the claimant was about to go on annual leave or about alternatives considered and despite the standard sentence confirming that there had been consideration of alternatives in the suspension letter, the Tribunal therefore concludes that no alternative to suspension was seriously considered. The claimant was humiliated by being publicly escorted from the site by a colleague and friend.

62. Despite the claimant having raised a grievance against him, Mr Williams was appointed as the claimant's point of contact during his suspension. This left the claimant effectively entirely isolated and without support from his employer during his suspension.

63. Ms Rooke visited Mrs AB's apartment at 3.30 pm, the owner having agreed to a visit to check what had been done. Ms Rooke records in a statement prepared after that visit and dated 30 March 2023, that: "There were three blue top and two clear top syringes each with 1ml of fluid in and two white top syringes with 2ml of fluid in. All syringes were in one glass together. Mrs AB was unsure if the two white topped syringes had morphine or oxycodone in them but appeared confident that there was oxycodone in the 3 syringes with blue tops and 2 clear tops." The statement goes on to record that Mrs AB "explained Sean [the claimant] did this for her and she was happy to take them as he read the instructions and made it clear to her – however upon checking it was unclear and [she] did doubt herself a few times but then felt she was confident to take them."

64. Mrs AB was advised by Ms Rooke to seek further medical advice around support to draw up the medication. Ms Rooke's statement does not state that the white-topped syringes which the Tribunal concludes each contained 2 ml of morphine, were removed by her as asserted by Ms Forbes in her evidence, although the undated Internal investigation form (referred to at paragraph 65 below) states that "JR managed to convince her to remove the 2ml syringes, but she refused to remove the 1ml as she was confident they were oxycodone" and the Tribunal finds that they were not removed from the owner's premises by Ms Rooke but were removed from the beaker by Mrs AB so she could check with her son, and so that she did not take them before she had.

65. On 30 March 2023 Ms Rooke submitted a CQC notification of abuse or allegations of abuse concerning a person using the service in substantially the same terms as she included in her internal safeguarding investigation report (see paragraph 66 below).

66. On or after 31 March 2023, Jessica Rooke completed an internal safeguarding investigation form into the claimant's actions on the 28 March 2023. The statement made by Ms Summer-Player about her discussion with Mrs AB was set out and Ms Rooke also stated: "No harm has been caused to Mrs AB however there is a huge risk that there could be". No basis for the assertion that there was a huge risk of harm was set out in the report. Ms Rooke then records that the claimant was not

employed by Audley Care but by the respondent and summarised the current care arrangements which the Tribunal accepts are materially correct. These were that Audley Care provided care services in the morning. They did not draw up medication for Mrs AB to take at night-time because it is against their policy to draw medication in advance. They had offered a paid-for night-time visit to Mrs AB, but Mrs AB's son had refused this on grounds of cost, and it had been his practice to leave a weeks' worth of medication for his mother when he visited. This arrangement was known to Audley Care as care providers and did not give rise to any safe-guarding concerns. The Tribunal does not accept the claimant's assertion that the refusal to draw up and leave out medication was a breach of Audley Care's obligations as a care provider although accept that the claimant genuinely thought it was. Although Audley Care are legally able to leave medication to be taken later, the Tribunal accepts Ms Forbe's evidence that this policy was intended to protect staff and their clients and see nothing untoward in having such a policy.

67. Early conciliation through ACAS commenced on 31 March 2023.

68. On 31 March 2023, Hayley Scarborough, Regional Quality and Compliance Lead contacted Ms Butt and asked for assistance with questions for Ms Rooke to ask the claimant in the investigation meeting into the disciplinary allegations.

69. On 3 April 2023 Ms Butt emailed a draft script to Ms Scarborough and Ms Rooke. After some introductory questions including questions about providing other types of support, including assistance in going to the bathroom, the script suggested Ms Rooke asked "Do you understand that a full syringe if injected would be lethal", and referred to the consequences for Audley and the claimant if Mrs AB had injected the full syringe and passed away. The respondent submitted no evidence to explain how or why the concern raised about the potential mixing up of a syringe with either the prescribed doses of 1 ml of oxycodone or 2ml of morphine had evolved into an allegation that a full syringe had been drawn up by the claimant.

70. On 6 April 2023 the claimant was sent an email by Ms Butt attaching a letter from Ms Rooke inviting him to an investigatory meeting on 12 April 2023 to investigate the "allegation of administering medication (morphine) to an owner in a dosage that is potentially fatal" and advising him that following this meeting a decision would be made whether to proceed to a formal disciplinary hearing.

71. On 11 April 2023 the claimant emailed Ms Butt to say that he felt he needed to take legal advice and could not attend the meeting on 12 April 2023 until he had done so.

72. On 12 April 2023 the claimant was sent an email by Ms Butt attaching a letter inviting him to attend a grievance hearing to be chaired by Robert Diaper on 19 April 2023. The Claimant responded by email on the same day referring to the fact that he had raised the grievance three weeks ago and having heard nothing had contacted ACAS, and saying he would have to decline the invitation until he had discussed the matter with ACAS.

73. On 17 April 2023 the claimant was visiting a client in their home on the Redwood site. He was approached by Ms Rooke who said: "Don't shoot the messenger but I've been asked to tell you that you're not allowed on site". The Tribunal finds that she had been asked to do this by Mr Williams.

74. On 18 April 2023 the Tribunal finds that one of the claimant's private PT clients was informed at reception that the claimant had been banned from the site.

75. On 23 April 2023 the claimant emailed Ms Butt to say that he had not yet received the information requested in his Subject Access Request from 23 March 2023 and needed this information before he could proceed with the grievance.

76. On 25 April 2023 the claimant was sent a letter from Nikisha Patel, Care Branch Manager, inviting him to an investigation hearing under the company's disciplinary procedure, to be held on 27 April 2023 to investigate the "allegation of administering medication (morphine) to an owner in a dosage that is potentially fatal" and to decide whether to proceed to a formal disciplinary hearing. No evidence has been submitted or an explanation provided by the respondent as to why Ms Rooke was no longer chairing the investigation hearing.

77. On 25 April 2023 the claimant emailed Ms Butt and asked for the investigation hearing to be postponed until the following week. Ms Butt refused this request on 26 April 2023. The claimant confirmed by email that he would attend the hearing under protest as he had yet to receive the data subject access information he had requested.

78. On 26 April 2023, an email was sent by Adult Social Services at North Somerset Council in response to Ms Rooke's safeguarding concern raised on 30 March 2023, confirming that the case was closed and no s42 enquiry was required. The social worker confirmed she had spoken to Mrs AB who had no concerns about the claimant supporting with drawing up the syringes on that occasion and requested the concern was closed. The social worker advised Ms Rooke that she had been told that her medication was now in tablet form which would prevent a recurrence. It was confirmed that there were no concerns about Mrs AB's capacity.

79. The investigation hearing took place on 27 April 2023 and was chaired by Hayley Scarborough (and not Mr Patel), with Ms Butt in attendance to take as a note-taker. Both Ms Butt and the claimant took notes of the meeting which were in the bundle. The two sets of notes are broadly consistent but to the extent they differ, the Tribunal accepts the claimant's verbatim notes as being more accurate than the respondent's summary notes.

80. Ms Scarborough opened the meeting by stating that the investigation was into allegations in relation to [the claimant's] conduct whilst at work in relation to [him] filling up a syringe with morphine for an owner. The claimant stated that he wanted to share some information about what had been going on over the last few months. Ms Scarborough refused to let him explain and stated according to the respondent's notes, that she "did not need to know what had gone on previously but was only investigating this incident". When the claimant attempted to explain that he had previously been invited to a disciplinary hearing after scrutiny of his private business Ms Scarborough stated that she "had no knowledge of what's gone on in the past and "really haven't been involved at all". The Tribunal notes that it is an unusual approach to prevent an employee from explaining the background to a situation in an investigation meeting. Ms Scarborough did not attend the Tribunal hearing to give evidence as to why she refused to let the claimant explain the background (as he saw it) to the allegations made against him, nor has any explanation been provided by the respondent for this refusal. The Tribunal concludes that either she had been expressly told not to explore wider issues, or she already knew about the grievance and had decided or been told not to stray into discussing it.

81. In the meeting, Ms Scarborough used the questions set out in the script originally prepared by Ms Butt for Ms Rooke. The claimant made it clear towards the start of the meeting that he did not believe that the respondent had the right to scrutinise his private business and said explicitly that he would not be answering any questions about his private business. In response to the question about whether he would assist a homeowner to get changed or go to the bathroom, he responded that as an employee he rarely went into their homes but if asked he would probably not do it and contact the care manager for help.

82. In response to the allegation that the claimant had "filled up a syringe full of morphine for an owner", the claimant responded that he did not do this and further confirmed that he had never administered medication as an employee. When asked the specific question about Mrs AB, he said he could not recall being on her property as an employee. He confirmed that he had a private business and did go into owners' homes in that capacity and also confirmed that this included Mrs AB. Ms Scarborough summarised that he had denied filling a syringe and made reference to the fact that if he had filled it, it could be lethal.

83. The Tribunal concludes that whether or not it was intentional, the fact that the claimant answered the questions literally (i.e. he was correct that he had not "filled up" a syringe as the respondent was implying and had not "administered" medication, "as an employee") resulted in him sounding evasive. In conjunction with the exaggeration by the respondent of the concern mentioned by Mrs AB from the initial conversation that she was not sure whether the 1 ml of medication she had taken was morphine and not oxycodone to the unfounded allegation that either the claimant had "administered medication (morphine) to an owner in a dosage that is potentially fatal" as set out in the suspension and invite letter, and/or the statement made at the start of the hearing that Ms Scarborough was investigating an allegation that the claimant had "filled a syringe with morphine" this resulted in a lack of clarity as to what had actually occurred. The Tribunal finds that had the claimant been allowed to explain the background as he requested, then Ms Scarborough would have understood the context and could have taken that into account in her assessment of the facts.

84. The claimant was then questioned about his presence on the Redwood site since his suspension, which Ms Scarborough alleged was a breach of the terms of his suspension. The claimant denied that it was a breach on the basis that he was entitled to continue to visit his clients in their own homes as an independent PT provider.

85. From the claimant's notes of this meeting which are accepted as materially accurate, the Tribunal concludes that Ms Scarborough appeared unclear about the basis of the allegation that was being made against the claimant, including the date of the alleged incident, and that the syringes were measured (not unmarked). She stated that she had only stepped in that day and had not previously been involved. Whilst she may have taken over the investigation at short notice, the Tribunal finds that this was not an accurate statement, as she had previously been involved in the issue to the extent that she had contacted Ms Butt and asked for assistance with questions for Ms Rooke to ask the claimant in the investigation meeting into the disciplinary allegations on 31 March 2023.

86. On 28 April 2023 Ms Scarborough sent some further questions to the claimant relating specifically to the claimant's conduct in his PT session with the claimant on 28 March 2023 which the claimant responded to by referring again to the fact that he was not prepared to answer questions about his private (PT) business and referring to the fact that previous information provided to Mr Williams had been used against him and led to him facing formal disciplinary action.

87. The Tribunal heard no evidence about why the earlier disciplinary matter was not concluded but given the pursuit of the earlier disciplinary action when there was no apparent basis to do so, the Tribunal finds the claimant's concern to be both relevant and understandable.

88. On 3 May 2023 The claimant submitted a further Subject Access Request.

89. On 10 May 2023, a receptionist sent an email to Mr Williams reporting on "sightings" of the claimant on 9 May 2023. The Tribunal accepts that this information was

provided at the request of Mr Williams.

90. The conciliation period ended on 12 May 2023.

91. We accept the claimant's and Ms Sanchez' evidence that on 17 May 2023, they met in the supermarket, and she reported that Ms Vestrini had told her that the reason the claimant was suspended was because he had injected an owner with morphine (which the Tribunal accepts was said). Ms Snachez told him that everyone (by which she meant the staff) at Redwood knew that he had been suspended for giving Mrs AB morphine.

92. On 22 May 2023, Ms Butt sent by email a letter from Michelle Forbes, Head of Care inviting the claimant to attend a disciplinary hearing on 25 May 2023. The allegation was: "On 28 March 2023, you filled a syringe with a lethal dose of Morphine for an owner, Mrs AB to administer themselves at a later time". The Tribunal finds that there were no reasonable or valid grounds for considering that the dose in the syringes drawn up by the claimant was potentially lethal.

93. The Tribunal finds that neither Mr Williams, Ms Scarborough, or Ms Butt were in a senior position to Ms Forbes as Head of Care.

94. On 22 May 2023 the claimant emailed Ms Butt and asked for the disciplinary hearing to be delayed until the information requested in his Subject Access Request had been supplied. Ms Butt responded that the subject access request would not be completed by 5.00 pm that day and the disciplinary hearing would go ahead but that the claimant would have the opportunity to ask questions. The claimant expressed his disappointment by return email and asked if his fiancée could attend to support given that the discussions on site about the fact that he had injected morphine into an owner made it difficult for him to ask a colleague and he was not a union member. This request was refused.

95. On 25 May 2023, the disciplinary hearing chaired by Michelle Forbes was held and Ms Butt attended to take notes. Whilst both Ms Butt's notes and the claimant's notes were included in the bundle, both parties referred to the claimant's notes during this hearing and the Tribunal takes them as a materially accurate summary of the meeting.

96. At the start of the hearing, Ms Forbes set out the allegation as: "you filled up syringes with a controlled medication that being of Morphine, which could have been a potentially lethal dose". Throughout the meeting the claimant denied "filling up" a syringe (and the Tribunal understands from his evidence in the hearing that he stands by this answer by which he meant that the syringe was not full but that a measured dose was drawn up). The claimant also referred to his understanding that the disciplinary was an employment process and did not relate to his private business. Ms Forbes confirmed that she would look into this further. It was then clarified that on 28 March 2023, the claimant took a personal training session with Mrs AB, and the claimant reiterated that he could not talk about these private PT sessions.

97. After a brief discussion about adjourning for the further investigation to take place, the claimant asked some questions of Ms Forbes in relation to: training provided to employees; why when Ms Rooke stated that the syringes had markings and the doses were measured the questions related to "filling" the syringes; why he had not been provided with the written complaint from the owner (and it was confirmed to him by Ms Butt that the concern had arisen from a conversation with the carer); why the carers could not draw up the medication; why the date was initially stated as being 29 March 2023 (which Ms Butt confirmed was an error); asking Ms Forbes to obtain the prescribed doses of medication; asking who had changed the allegation

to refer to a "lethal dose"; questioning why this was an issue when the owner's son left a week's supply of medication; and why a member of staff had challenged him in the supermarket about why he had given Mrs AB morphine. In relation to the breach of confidentiality, the claimant stated that only Ms Rooke, Ms Summer-Players, Mr Williams and Ms Vestrini should have known about his suspension. Ms Forbes adjourned the hearing and said she would go away and look at the questions the claimant had asked.

98. On 30 May 2023, the ICO responded to the claimant's complaint regarding the failure to comply with the claimant's subject access requests and confirmed that it had written to the respondent as they had not complied with the deadline.

99. The disciplinary hearing was reconvened on 5 June 2023 and Ms Forbes gave her decision at the start of the hearing.. Ms Forbes confirmed in her evidence that she had not undertaken any further investigation following the adjourned hearing. She also says she did not speak to anyone, but reviewed the evidence she had and reached her decision. The Tribunal does not find her assertion that she did not speak to anyone else credible for a number of reasons. Firstly, she had stated explicitly that she would look into the questions raised by the claimant and unless she took some advice or consulted another person, there is no obvious reason why she would have reneged on that agreement; the Tribunal does not accept that she would have changed her approach only after reviewing the investigation and documents in her possession if she did so in good faith, as the investigation was clearly flawed and inadequate. Secondly, HR advice was taken throughout this process and the Tribunal does not believe that as a senior manager. Mrs Forbes' would have reached this decision without taking some HR advice. Thirdly she must have consulted with colleagues to answer those of the claimant's questions she did answer after she had communicated her decision to the claimant. The Tribunal does however find that the claimant did not explain his behaviour to her in the hearing, although as Mrs Forbes gave her decision at the start of the re-convened hearing, he was not provided with an opportunity to do so in that meeting. The Tribunal also notes that the previous hearing was adjourned on the expectation that it would be resumed for further discussion, and not for a decision to be given immediately.

100. Ms Forbes' decision was that she did believe the claimant had filled up the syringes at Mrs AB's request and that the dosage was potentially lethal. Ms Forbes acknowledged that the action took place during one of the claimant's PT sessions with Mrs AB but on the basis that it was on the premises of Audley and could potentially have been fatal, she dismissed the claimant with immediate effect for gross misconduct.

101. In response to the claimant's questions, and after she had delivered her decision, Mrs Forbes confirmed that: medication training was not part of team members' roles who work in the village; the doses in the syringes could not be verified but she confirmed she was relying on the act of drawing up the medication as the misconduct; and that there was no way of verifying what was in the syringes and the fact that they were mixed up in the cup. She confirmed that she had no idea who decided it was a potentially fatal dose. The Tribunal finds that she had not subjected the disciplinary allegation to any scrutiny or pro-actively considered the reasonableness of the allegation being framed in this way.

102. The outcome letter was drafted by Ms Butt but approved by Ms Forbes. The Tribunal finds that it is not an unusual or unfair practice for an HR professional to draft a letter of dismissal and that doing so does not in itself support a conclusion that the decision was made or influenced by Ms Butt, and not genuinely made by Ms Forbes. However, the Tribunal does note Mrs Butt's involvement at every stage of the disciplinary process to this point and given her email to Mr Garlich of 19 March 2023 does have some concern that she was facilitating the process with a view to

engineering the claimant's dismissal; although at whose behest is not clear.

103. The letter confirmed that Ms Forbes believed that the claimant had filled up a syringe for Mrs AB at her request, and that the dosage was potentially lethal. Ms Forbes referred to the fact that this was a regulated activity, which the claimant was not trained to do, and whilst acknowledging that the incident took place in a PT session, she noted that it took place on Audley premises, the claimant was an Audley employee, and the ramifications could potentially have been fatal.

104. Ms Forbes acknowledged during the hearing that having heard the evidence in the course of these proceedings, in retrospect she would not have dismissed had this evidence been known to her at the time. She did, however, also say that the claimant failed to provide a clear explanation about what had happened during the disciplinary hearing which the Tribunal accepts was the case. The Tribunal finds however that the claimant was clear that he could not talk about his private sessions in the context of the disciplinary hearing, and further find that Ms Forbes could have asked Mrs AB for her express permission for the claimant to discuss what happened in the PT sessions, (which Ms Forbes accepts that she did not).

105. In relation to whether Ms Forbes knew about the grievance at the time she reached her decision, her evidence was not clear. In her statement she says that she did not know the claimant before she carried out the disciplinary hearing; she was not aware of the previous disciplinary hearing, but she does not expressly deny knowing about the grievance when she heard the disciplinary. She does deny that the grievance was a protected disclosure but gives no reason and she also states: "I am not aware of any previous HR matters that involve Simon Williams". As she denies the grievance is a protected disclosure, she was manifestly aware of it at the time she submitted her statement and in the absence of an unequivocal denial, the Tribunal concludes that she was advised of the grievance before she chaired the disciplinary hearing.

106. On 7 June 2023, the claimant sent a letter to the respondent in response to the dismissal letter, raising the issue of breach of confidentiality and the fact that he did not believe that he could be excluded from the Redwood site and prevented from visiting his clients in their own homes.

107. On 9 June 2023, the claimant sent an appeal against his dismissal on the basis that: no attempt was made to ascertain the correct dosage therefore it could not reasonably be asserted that he had drawn up a "lethal" dose; he did not "administer" medication; it did not take place on Audley premises but in the owner's own home; he was not acting as an Audley employee; the medications were in separate syringes and were identifiable by different coloured plungers; and the owner knew what was in five of the syringes. The claimant provided information about safe doses of morphine (which he had not been given the opportunity to do before Ms Forbes reached her decision, it being one of the things she had agreed to check) and stated that no training was needed as the medication was drawn up in his capacity as a private individual and not as an employee of a care provider.

108. On 10 June 2023, the claimant issued a claim in the Employment Tribunal.

109. On 21 June 2023, Sian Hammer Audley Group sales and Marketing Director wrote to the claimant confirming receipt of his appeal of 9 June 2023 and scheduling an appeal hearing for 28 June 2023.

110. On 23 June 2023, Robert Diaper Operations Director, invited the claimant to a rescheduled grievance hearing to take place on 30 June 2023.

111. On 28 June 2023 a grievance hearing chaired by Robert Diaper took place remotely.

Ollie Frost (HR) attended as a note-taker. Mr Diaper asked the claimant what resolution he was looking for. The claimant said that that was difficult as it was three months on, and they were now facing an employment Tribunal but suggested a review of working practices. The two allegations of sex discrimination in relation to the meeting on 2 March 2023 and the delay in approving holiday leave were discussed.

112. The claimant also raised the issue that Mr Williams had been spying on him as evidenced by the email from the receptionist of 10 May 2023 and another incident not otherwise referred to in the course of these proceedings. He also referred to the delay in complying with the DSAR,

113. The appeal hearing was also held on 28 June 2023. Ms Hammer heard the appeal and Ms Butt attended to take notes. Ms Hammer confirmed in her statement that she was aware at the time that she heard the appeal that the claimant had raised a grievance. The appeal meeting lasted approximately 15 or 20 minutes and the claimant expanded on the grounds of appeal set out in his letter of appeal. The appeal was by way of review of the original decision only (and not a re-hearing).

114. The claimant's appeal was not upheld. The grounds on which the original dismissal was upheld were on the grounds of the risk of reputational damage as set out in the respondent's disciplinary procedure as an example of gross misconduct. This was a different reason from that relied on by Ms Forbes.

115. The Tribunal found the appeal hearing to be perfunctory and were not persuaded either by Ms Hammer's witness statement or her replies under cross examination that she had any genuine intention of considering the claimant's appeal with an open mind. Her evidence was limited to the appeal hearing and she was not able to comment on any of the wider allegations made. Whilst her evidence was of only limited value in supporting the respondent's case as it related to an appeal which took place after the events complained of and was a review of the original decision only, the Tribunal concludes based on her evidence that the respondent had no policies that addressed activities undertaken outside of an employed role. Specifically, there was no company guidance that in a personal capacity (or on behalf of another employer or business), an individual could not undertake activities, which would be regulated if undertaken by Audley Care. The Tribunal does not accept that an employee would be guilty of misconduct if they were to assist a family member by drawing up medication as stated by Ms Hammer and her dogged pursuit of this line of argument under cross-examination was jarring. The Tribunal concludes based on her demeanor and the paucity of her evidence that she did not consider the appeal fairly.

116. The appeal outcome was confirmed by letter dated 21 July 2023. A draft had been prepared by Ms Butt for review by Ms Hammer. Ms Hammer concluded that the claimant should not have drawn up medication as it was not part of his role and there could have been severe reputational damage to Audley. She noted that this was despite it being done outside his working hours as leisure club manager. She stated that the L & D policy and H & S policy would be updated to deal with requests from owners but found that this did not negate the decision to dismiss the claimant.

117. In or around July 2023, Mr Diaper undertook an investigatory interview with Mr Williams in connection with the claimant's grievance. Mr Williams set out his account of the dispute about PT sessions; described how and where he met with the claimant on 2 March 2023 and Ms Sanchez on10 March 2023 and the purpose of those meetings: namely an investigatory meeting with the claimant and a meeting to discuss arrangements with Ms Sanchez. The Tribunal finds that as stated by Mr Williams the two meetings were held in a different context; the claimant's meeting was part of an investigation into what was alleged to be an unlawful refusal to agree

to stop taking on new clients, and the meeting with Ms Sanchez was held when she approached Mr Williams with Ms Vestrini in his office. The misleading statement that "we felt that there was nothing to answer due to grey areas contractually" when in fact a disciplinary invite letter was issued, in the absence of any explanation from Mr Williams raises a question as to his veracity and motivation. His denial that he asked a receptionist to spy on him is manifestly untrue in the light of the redacted email from a receptionist dated 10 May 2023 referred to at paragraph 89 of this judgment.

118. On 27 July 2023, Robert Diaper wrote to the claimant with the outcome of the grievance, which was not upheld.

119. The claimant responded to the grievance outcome on 28 July 2023, disputing the outcome, but did not appeal.

120. Sometime after December 2023, which was after Ms Vestrini had left her employment with the respondent, the respondent undertook a cursory investigation into the allegations made by the claimant about the breach of confidentiality allegations and interviewed Mr Williams, Ms Summers-Player and Ms Rooke who each denied that they had breached confidentiality. Ms Summers-Player referred to there being "Chinese whispers" and Ms Rooke referred to the fact that she believed the claimant was spreading rumours.

121. On 15 March 2024, an owner sent an email (redacted in the Tribunal bundle) to confirm that in April 2023, Mr Williams had after initially being reluctant to discuss it, and in confidence, said "that that [the claimant] had not only given medication to a vulnerable female owner, but had also given a double dose". The email goes on to attribute motivation to Mr Williams in so doing, which the Tribunal does not accept. However, the respondent did not challenge this evidence and it is accepted, based on this email and the claimant's evidence, that this did occur notwithstanding Mr William's denial in the investigation into the breach of confidence, the Tribunal having already concluded that Mr William's statements in the previous investigation were untrue and therefore giving limited weight to his recorded response in this investigation.

The Law

Protected Disclosure

122. In relation to ascertaining which disclosures qualify for protection, section 43B of the Employment Rights Act 1996 (the ERA) provides:

> (1) In this Part, a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) ….,
> (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) …...
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) ……
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed

123. Counsel for the respondent has also referred the Tribunal to the case of El-Megrisi v Azad University (IR) in Oxford UKEAT/0448/08 in support of the principle that

where multiple disclosures are made, an employment tribunal should consider whether cumulatively they were the principal reason for the dismissal.

124. In relation to whether the disclosure is made in the public interest, the Tribunal is mindful of the principles set out in Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA namely that the following factors are relevant (if not determinative): the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer.

Whistleblowing detriment

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

Automatic unfair dismissal for whistleblowing

126. Section 103A of the ERA 1996 provides that an employee will be considered unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure.

127. The Tribunal has also considered the decisions of both the Court of Appeal and the Supreme Court in case of Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC and the principles which apply where, even if the dismissing officer did not know about the protected disclosure, whether one employee's knowledge of a protected disclosure can be imputed to an employer acting through a dismissing officer who is unaware of it. In considering this principle the Tribunal has also considered the earlier decision of Co-Operative Group Ltd v Baddeley 2014 EWCA Civ 658, CA and whether a respondent can be liable where there has been manipulation of the investigation or disciplinary process by another employee. The principle to be applied (as summarised in the IDS Handbook on whistleblowing), is where the real reason for dismissal was whistleblowing, the automatic consequence should be a finding of unfair dismissal. Generally, a Tribunal should look no further than the reasons given by the appointed decision-maker. If. however, a person in the hierarchy of responsibility above the employee determines because of a protected disclosure that the employee should be dismissed, but that reason is hidden behind an invented reason and the facts manipulated to that effect, and this is adopted by the decision maker, the Tribunal should penetrate through that invention. However, this should be limited to a person placed by the employer in the hierarchy of responsibility above the employee.

128. The Tribunal has also considered the case of University Hospital North Tees and Hartlepool NHS Foundation Trust v Fairhall EAT 0150/20 which clarified that Jhuti only applies where an innocent decision-maker is manipulated into dismissing a whistleblower for an apparently fair reason and is 'unaware of the machinations of those motivated by the prohibited reason' but does not apply where the decision-maker is aware of the protected disclosure'. However, it also supports the principal that a tribunal is entitled in certain circumstances to conclude that a dismissal is the culmination of a process designed to get rid of a whistleblowing employee because of the making of a protected disclosure.

Burden of Proof

129. A detriment is unlawful under S.47B if done 'on the ground' of a protected disclosure, whereas dismissal is unfair under S.103A only if the protected disclosure is the reason or principal reason for it. Lord Justice Elias confirmed (obiter) in Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA, that the latter test is stricter than the former - a S.47B claim may be established where the protected disclosure is one of many reasons for the detriment, whereas S.103A requires the disclosure to be the primary motivation for a dismissal.

130. Under section48(2) of the ERA in a complaint of detriment it is for the respondent to show the ground on which any deliberate act was done. However, for the burden of proof to shift to the respondent, it is not enough to show that the claimant has made a protected disclosure and they have been subjected to a detriment, there needs to be a prima facie case that the respondent's conduct calls for an investigation.

131. Where an employee does not have the qualifying service to bring an unfair dismissal claim, the burden of proof rests with the employee to show the reason for the dismissal (Kuzel v Roche Products Ltd [2008] IRLR 530.

Sex Discrimination

132. Section 13 Equality Act 2010 (EqA) sets out the provisions relating to direct discrimination. (i) A person (A) discriminates treats another (B) if, because of a protected characteristic, A treats B less favourably than A treats, or would treat, others.

133. There must be no material difference between the circumstances of the claimant and their comparator.

Victimisation

134. Section 27 EqA sets out the provisions relating to victimisation. A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done or may do a protected act. Section 27(2)(d) EqA provides that a protected act includes making an allegation (whether express or not express) that A or another person has contravened the EqA.

135. Similarly to direct discrimination, whether a detriment is because of a protected act should be addressed by asking why A acted as they did, and not by applying a but for approach. The protected act must be a real reason for the treatment (Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425, [2017]). Put another way, the correct legal test to the causation or "reason why" question is whether the protected act had a significant influence on the outcome (Warburton v the Chief Constable of Northamptonshire Police [2022] EAT 42 applying Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947HL, Nagarajan v London Regional Transport [2000] 1 AC 502 and Chief Constable of Greater Manchester v Bailey).

136. Counsel for the respondent has also referred the Tribunal to the case of Shamoon as authority for the principle that in determining whether something is a detriment the test is: "is 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 (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 [35]) .

Burden of Proof in discrimination/victimisation claim

137. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

138. These provisions need to be considered carefully where it is not clear on the facts whether discrimination has or has not occurred bearing in mind that discrimination is often not obvious or overt, but do not need to be considered if a tribunal is in a position to make positive findings of fact based on the evidence one way or another (Hewage v Grampian Health Board [2012] IRLR 870 SC).

139. Igen v Wong [2005] IRLR 258 CA sets out guidelines on the burden of proof. Once the burden of proof has shifted it is for the respondent to show that they have not committed an act of discrimination. In order to discharge that burden the respondent must show, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

140. Madarassy v Nomura International Plc [2007] ICR 867 CA is authority for the proposition that: "The burden of proof does not shift to the employer simply on the claimant establishing a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination".

141. The Tribunal is also mindful of the relevant provisions of the EHRC Employment Code.

Decision

Protected Disclosure

142. The Tribunal first considers if the disclosures made by the claimant, are qualifying disclosures.

143. The first qualifying disclosure the claimant relies on is the grievance dated 23 March 2023 sent to Kathryn Butt. The Tribunal has found that in this written grievance about Simon Williams the claimant complained of a breach of s.13 EqA 2010 which constitutes an allegation of breach of a legal obligation. The Tribunal is also satisfied that the disclosure was of information and did not merely raise an allegation as it set out the detail of the discrimination alleged, namely the detrimental difference in treatment compared with Ms Sanchez in relation to being invited to a meeting in a room next to the restaurant with a glass door and the email of 7 March in relation to change of working practices, followed by an invitation to a disciplinary hearing. It also referred to a separate act of discrimination, not relied on in this claim, in relation to delay in approving holiday requests.

144. The Tribunal is not, however, persuaded that the claimant genuinely believed the disclosure was made in the public interest. The claimant asserts that he believes that it is was in the public interest for this issue to be addressed, as the respondent operates retirement villages where properties are on sale to members of the public and operates facilities that are open to owners who live in the village as well as other members of the public and that it is in the public interest for it to be disclosed where a front-line manger breached his equality duties. However, the Tribunal concludes that the dispute he had with Mr Williams was essentially a private dispute over PT

fees and the terms of his contract of employment with the respondent which the claimant considered to be a breach of equality legislation because a female colleague was in his view treated differently. Whilst the fact that it related to his individual contract terms, is not a bar to it constituting a qualifying disclosure, on this occasion and bearing in mind but not applying rigidly, the considerations set out in *Chesterton v Nurmohamed*, the Tribunal concludes that village owners, and wider members of the public were not affected by the alleged discrimination. The Tribunal concludes that the claimant was the only PT trainer who retained 100% of the PT fees. The only other colleague who could have benefitted from the same arrangement was his female colleague Ms Sanchez. However, she did not retain 100% of PT fees, as she did not provide paid for PT sessions during the relevant period.

145. The Tribunal further concludes that whether there was delay in approval of holiday requests or the use of an inappropriate room for an investigatory meeting is also a personal matter, with no public interest element. The Tribunal notes that Mr Williams was the General Manager of Redwood but do not conclude that this is a sufficiently senior role to mean that any action he might take as a manager is in the public interest insofar as village owners or the wider public are concerned.

146. The Tribunal is unpersuaded that the claimant had a genuine belief that it was in the public interest to raise his concerns and conclude that he did not. To the extent that the claimant did hold a genuine belief, then the Tribunal concludes that this was not a reasonable belief.

147. The Tribunal does not therefore conclude that the grievance was a qualifying disclosure for the purposes of a whistleblowing claim.

148. The second disclosure relied on was made on 25 May 2023 verbally to Mrs Michelle Forbes complaining that the respondent was acting in breach of its obligations under section 9(1) and 9(3)(b) of the Social Care Act to provide person centred care during the disciplinary meeting.

149. The Tribunal is satisfied that this constitutes a qualifying disclosure on the basis that it alleges a breach of a legal obligation, communicated information about a failure to provide adequate care for a village resident and the Tribunal accepts that the claimant had a genuine belief that it would be in the public interest to ensure that all village owners received an acceptable standard of person centred care. Counsel for the respondent submits that there was no breach of a legal obligation, as the respondent's policy of charging for a 15 minute bed call and not providing it for free was not breaches of Reg 9 of the Health and Social Care Act 2008. However, it is not necessary that there was in fact a breach of a legal obligation, only that the claimant believed that there was a breach, which the Tribunal concludes he did. Having accepted that the claimant genuinely believed that ensuring village owners had adequate care was in the public interest the Tribunal concludes that it was reasonable for him to do so.

Protected disclosure – detriment

150. However, as all the detriments complained of pre-date the 25 May other than the delay to the data subject access request the Tribunal concludes that they cannot be a result of the 25 May 2023 disclosure.

151. In relation to the delay in responding to the data subject access request, this was on-gong at the time that the disclosure was made and there is no direct evidence that Mr Sadler knew of the 25 May 2023 disclosure and no indirect evidence to suggest that he did.

152. The claim under s47B ERA for whistleblowing detriment therefore fails.

Protected disclosure - dismissal

153. In relation to the dismissal, as the claimant did not have two years' continuous employment, the burden of proof is on him to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosures.

154. The dismissal decision was taken by Ms Forbes, and it is her decision that first needs to be considered. The protected disclosure was made in the disciplinary hearing to her so Ms Forbes was self-evidently aware that the disclosure had been made, whether or not she was aware that it was a protected disclosure. The Tribunal has also concluded that she was aware of the grievance when she chaired the disciplinary hearing, although unless the finding that this was not a protected disclosure is unsound, this is not of direct relevance.

155. However, the Tribunal has also concluded that the allegations against the claimant had been exaggerated firstly by Ms Rooke, and then with the support of Ms Butt by Mr Williams on 30 March 2023, and it was these exaggerated allegations that came before Ms Forbes for decision. The Tribunal has further found that the investigation undertaken by Ms Scarborough was inadequate and conclude that Ms Forbes was therefore not presented with a clear picture of what had occurred by the respondent and that the claimant's reluctance to speak about what happened (as it occurred in a PT session), led him to sound evasive and that this did not assist in giving Ms Forbes a clear picture of what had actually happened. Under cross-examination, Ms Forbes was consistent and credible in maintaining that she genuinely felt that there was an unacceptable risk to Mrs AB and that this was the reason she reached the decision to dismiss. Mrs Forbes acknowledged in her evidence, that in retrospect, she may have reached the wrong decision, and had the claimant had two years' service, there is little doubt that the Tribunal would have found the dismissal to be unfair, however, that is not the claim before this Tribunal. The Tribunal is satisfied that the principal reason for Ms Forbe's decision was that she believed that the claimant had drawn up a dose or doses of morphine and that as it was not clear what was in the syringes, and because she had misunderstood (and had not verified) the quantities involved, she genuinely considered that there was an unacceptable risk to Mrs AB and that the claimant had acted irresponsibly in drawing up and leaving medication for an elderly and vulnerable client of Audley Care. The evidence does not support the claimant's claim that the principal reason that Ms Forbes reached the decision to dismiss was because the claimant had made a protected disclosure to her in the disciplinary hearing on 25 May 2023. Ms Forbes, as Head of Care, was confident in refuting the suggestion that the respondent had acted in breach of their responsibilities as a care provider and to the extent that there was manipulation by others behind the scenes, it arose at an earlier stage when the allegations were framed in an exaggerated way.

156. For completeness and being mindful of potential challenge to the findings in relation to the public interest test for the first protected disclosure, the grievance, the Tribunal also considered whether the grievance was the principal reason for the dismissal. The Tribunal has concluded that Ms Forbes was aware of the grievance but for the reasons set out above do not conclude that it played a significant part in the decision to dismiss; nor taken cumulatively would both protected disclosures taken together meet this threshold.

157. In relation to the appeal, the Tribunal has concluded that the appeal was by way of review and not a re-hearing. It is therefore Mrs Forbe's decision which was the effective cause of termination. In any event and notwithstanding that the appeal

hearing was perfunctory and the Tribunal has concluded that Ms Hammer had no genuine intention of considering the claimant's appeal with an open mind or of re-instating him even though her findings were at odds with those reached by Ms Forbes, there is no evidential basis to isolate the protected disclosure made by the claimant on 25 May 2023 as a significant factor in her reaching the decision to uphold the dismissal on appeal and the Tribunal does not conclude that it was the principal reason for the appeal outcome.

158. Finally, the Tribunal has spent some time deliberating as to whether this case is one in which there is a hidden motivation and/or behind the scenes manipulation of the facts communicated internally which would fall within the narrow exceptions set out in Jhuti and Baddeley and therefore whether on this occasion the Tribunal should look behind the motivation of the dismissing officer. The Tribunal notes the conflict between Mr Willims and the claimant over his private PT sessions in early March 2023 and conclude that from this time, Mr Williams wished to remove the claimant from his role as evidenced by his move to instigate formal disciplinary proceedings for failure to follow a lawful instruction with no credible basis (and as stated by him in the internal investigation after being informed there was no case to answer). This intention was supported by Ms Butt as evidenced by her inappropriate email to Mr Garlich on 19 March 2023. However, these actions occurred before either of the alleged protected disclosures were made and whatever the reason for the apparent concerted attempt to remove the claimant this intention cannot therefore have been because of them.

159. The Tribunal has also concluded that Ms Forbes had spoken to at least one person between the initial disciplinary hearing on 25 May 2023, and the reconvened hearing when she gave her decision on 5 June 2023 and have noted the fact that she finished the first disciplinary hearing with an agreement to reconvene and then on reconvening, with no credible explanation gave an immediate dismissal decision and considered if this is in itself sufficient to evidence behind the scene manipulation and/or a concerted effort to remove a whistleblower.

160. However, the Tribunal concludes that this is not applicable in this case for two reasons.

161. Firstly, although the Tribunal was presented with no direct evidence on this point, it concludes that Mr Williams and Ms Butt were not in hierarchical terms "senior" to Ms Forbes and has accepted Ms Forbes evidence that she reached the decision to dismiss herself (albeit potentially after speaking to colleagues) based on the evidence before her at that time. There is no persuasive evidential basis from which to draw an inference that a decision had been taken at a more senior level and that Ms Forbes had either been instructed to dismiss because a protected disclosure had bene made, or had been manipulated into reaching her decision by that more senior manager, although the claimant suggests that this was the case.

162. Secondly and in any event, even if there were a hidden agenda, the Tribunal does not conclude that there is sufficient evidence to conclude that it was the protected disclosure which primarily led to the decision to terminate the claimant's employment (whether the upheld disclosure of 25 May 2023 in isolation or even taken in conjunction with the grievance which has not been upheld as a disclosure). It is material that the initial investigation and first disciplinary action had already been started before the claimant raised a grievance (the first alleged disclosure) and the fact that a new set of circumstances resulted in a second disciplinary investigation and a further opportunity for the respondent to move towards dismissal does not support the claimant's contention that it was because he had made the protected disclosure that this occurred.

163. The claim for automatic unfair dismissal for making a protected disclosure therefore fails.

Direct sex discrimination

164. The Claimant asserts two acts of direct sex discrimination relying in each case on Ms Sanchez as a female comparator.

165. In relation to the investigation meeting on 2 March 2023, the Tribunal has concluded it was held in a room visible to the public, adjoining a public area and lacking in sound-proofing and conclude that the lack of privacy constituted less favourable treatment than being interviewed in a room that was not visible to the public and/or with sound-proofing. However, the Tribunal is not satisfied that Ms Sanchez is an appropriate comparator in relation to this complaint. Ms Sanchez was not summonsed to an investigatory meeting in the context of potential disciplinary action in the same way as the claimant was, but pro-actively sought out Mr Williams in his own office to talk with him as she wanted to have a discussion with him. The location of the two meetings was not therefore on each occasion chosen by Mr Williams and the Tribunal concludes that this was a relevant material difference in the circumstances that applied to this incident.

166. The second incident relied on, is the email sent by Mr Williams on 7 March 2023 which the claimant says purported to unilaterally change the terms of his contract relating to provide private sessions of personal training to residents of the respondent's premises. The Tribunal has concluded that Mr Williams did send an email on 7 March 2023 which asked the claimant to work continuous hours and take his PT sessions outside his contracted hours and stated that no further owners were to be taken on. The Tribunal is satisfied that this was not in line with the agreement reached with Mr Millikin specifically in relation to the fact that the claimant could retain 100% of the fees and was not restricted from taking on new clients. The Tribunal is however not satisfied that this was less favourable treatment than that afforded to Ms Sanchez on the basis that she was firstly not at that time undertaking paid PT sessions and secondly had not expressed an intention of continuing to undertake paid PT sessions on the basis that she retained 100% of the fees (as the claimant had). In relation to provision of PT sessions, and notwithstanding that she had the same contractual arrangements the Tribunal accepts the respondent's submission that she was not therefore in materially the same circumstances as the claimant and is not therefore an appropriate comparator, as she did not offer private chargeable personal training sessions.

167. Further and in any event the Tribunal concludes that there is no link between the claimant's sex and the treatment afforded to him and conclude that the dispute arose because the claimant was in an anomalous position in having previously reached an agreement with Mr Millikin that he could retain 100% of fees and having relied on that agreement. The Tribunal concludes that both the original agreement and the decision to change it were unrelated to the claimant's sex as evidenced by the fact that Ms Sanchez (a woman) had also reached the same agreement with Mr Millikin although she had had not sought to rely on it, and it was subsequently also made clear to her that the more usual arrangement of retaining 50% of fees would apply going forward, should she choose to undertake private PT sessions in the future. The claimant referred in the course of the hearing to a further argument that the difference in treatment related to the failure to offer him the opportunity to continue to undertake PT sessions on a split fee basis, but this argument was not in line with his pleaded case, nor was it credible given the weight of evidence related to his absolute refusal to move away from the favourable terms he had negotiated with Mr Millikin.

168. The Tribunal therefore finds that no facts have been established upon which the Tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails.

Victimisation

169. The respondent concedes that the claimant did a protected act by presenting a grievance against Mr Williams complaining of sex discrimination.

170. In relation to each of the six allegations the Tribunal reaches the following conclusions.

171. The Tribunal has found that the claimant was suspended on 30 March 2023 by Mr Williams who travelled to Bristol to do this in person. Mr Williams had been involved in the earlier call with Ms Forbes and Ms Butt the outcome of which was an agreement that the actions highlighted could be deemed as gross misconduct and the Tribunal has accepted Ms Forbes' evidence that she did not reach the decision to suspend in or following that meeting but provided advice in her role as Head of Care to Mr Williams who was conducting the meeting. The discrepancies between the original concern raised by Ms Summers-Player about it being "unclear what medication was in the syringes" and the disciplinary allegation set out in the suspension letter "of potential gross misconduct in relation to administering medication (morphine) to an owner in a dosage that is potentially fatal" have not been adequately explained by the respondent in their evidence. In the absence of any other evidence from the respondent as to who reached this decision, the Tribunal has concluded that the decision to suspend was taken by Mr Williams.

172. The Tribunal has also noted the lack of an explanation as to why suspension was considered necessary when the claimant was about to go on annual leave, or as to any alternatives considered.

173. The Tribunal is satisfied that Mr Williams decision to suspend the claimant, (following the exaggeration of the allegations against him) and the manner in which this was implemented, by having him publicly escorted from the site constituted a detriment. The Tribunal further concludes that the timing of the decision to suspend by Mr Williams, the manager against whom a grievance alleging sex discrimination had been raised only 7 days earlier, is sufficient to shift the burden of proof to the respondent to explain why these actions were taken, bearing in mind the Tribunal's findings that that the respondent was aware of a previous incident when the claimant had drawn up medication prior to the meeting on 2 March 2023 but did not choose to suspend on that occasion to investigate further. The respondent has not provided a non-discriminatory explanation (or indeed any explanation) as to why the allegations were framed in this way or why suspension was considered necessary at this point in time and in the absence of any explanation as to why suspension was decided on and in particular having heard no evidence from Mr Williams the Tribunal concludes on the balance of probability that the grievance was in Mr Williams mind when he reached the decision to suspend the claimant and that had the claimant not raised a grievance against Mr Williams, Mr Williams would not have suspended the claimant.

174. The Tribunal is therefore satisfied that the suspension was because of the allegations of sex discrimination as set out in the claimant's grievance and that the act of suspending the claimant was an act of victimisation applying the statutory test.

175. In relation to the breaches of confidentiality as detailed in paragraphs 16, 17 and 21, 22 of the particulars of claim the Tribunal has concluded that:

175.1. On 17 April 2023, Ms Rooke had been asked by Mr Williams to tell the claimant that he was not allowed on site;
175.2. On 18 April 2023, one of the claimant's PT clients was informed by reception that the claimant was banned from site;
175.3. No evidence was led in relation to the alleged breach of confidentiality on 11 May and the Tribunal therefore do not find that this occurred;
175.4. On 17 May the claimant met Ms Sanchez in the supermarket, and she reported to the claimant an earlier conversation held with Ms Vestrini about the fact that the claimant had been suspended because he had injected an owner with morphine.

176. Considering further the three incidents on 17 and 18 April 2023 and 17 May 2023, the Tribunal is satisfied that these are all breaches of confidentiality and constitute a detriment. However, the Tribunal is not satisfied that the claimant has provided sufficient evidence to demonstrate that these arose as a consequence of the sex discrimination complaints raised in the grievance rather than for example because of general poor practice or a continuation of Mr Williams general unfair treatment of the claimant which started with the investigation and first disciplinary action before the claimant raised his grievance.

177. In relation to the claimant being prevented from attending the respondent's site on 17 April 2023 as detailed in paragraph 16 of the Particulars of claim, this is the same incident relied on as one of the breaches of confidentiality (par175.1 above). The Tribunal applies the same reasoning and concludes that whilst these actions constituted a detriment, the claimant has not provided sufficient evidence to demonstrate that they arose because of the sex discrimination complaints raised in the grievance.

178. In relation to the allegation that at the investigation meeting, Mrs Hayley Scarborough told the claimant that she had no knowledge of the disciplinary allegations when that was not true because she had been involved in the CQC referral and had been involved in the drafting the questions for the meeting, the Tribunal has found that what she in fact said was that she "had no knowledge of what's gone on in the past and "really haven't been involved at all". The Tribunal has found that on 31 March 2023, Ms Scarborough had asked Ms Butt for assistance with questions for Ms Rooke to ask the claimant in the investigation meeting into the disciplinary allegations and that on 3 April 2023, Ms Butt emailed a draft script to both Ms Scarborough and Ms Rooke. The Tribunal has reached no conclusions on the extent to which Ms Scarborough may (or may not) have been involved in the safeguarding referral to CQC but have found that this was primarily completed by Ms Rooke.

179. The Tribunal concludes that this does not constitute a detriment when reviewed in the context of the entire conversation on the basis that Ms Scarborough is more likely to have meant that she had no involvement in the previous disciplinary (rather than the current disciplinary) and further and in any event the fact that Ms Scarborough had previously asked HR to provide questions to use in the investigation meeting when she anticipated Ms Rooke would be undertaking the investigation (and if and to the extent that she had been involved in the safeguarding referral) does not prejudice the claimant in any way. Further and in any event, there is no evidence from which the Tribunal could infer that the representation in the meeting that "she had not been involved" was caused by the fact that the claimant had raised his grievance and the specific allegations of sex discrimination against Mr Williams, the connection is too remote.

180. In relation to the complaint that the respondent delayed the response to the claimant's DSAR so as to prevent him having relevant information to defend himself, the Tribunal accepts that there was delay and that this constituted a detriment but conclude that there is no evidence at all that Mr Sadler delayed responding to the DSAR because of the fact that the claimant had raised his grievance and the specific allegations of sex discrimination against Mr Williams; in the absence of any evidence it is a mere assertion.

181. In relation to the final allegation that the claimant was dismissed on 5 June 2023 as a result of raising the allegations of sex discrimination against Mr Williams, the Tribunal has accepted Ms Forbes evidence that she believed that the claimant had filled up a syringe for Mrs AB at her request, and that the dosage was potentially lethal. Ms Forbes also referred to the fact that this was a regulated activity, which the claimant was not trained to do, and whilst acknowledging that the incident took place in a PT session, she noted that it took place on Audley premises, the claimant was an Audley employee, and the ramifications could potentially have been fatal. In considering whether the dismissal was a result of the protected disclosure, the Tribunal concluded that Ms Forbes was consistent and credible in maintaining that she genuinely felt that there was an unacceptable risk to Mrs AB and that this was the reason she reached the decision to dismiss. The Tribunal recorded its conclusion that the principal reason for Ms Forbe's decision to dismiss was that she believed that the claimant had drawn up a dose or doses of morphine and that as it was not clear what was in the syringes, and because she had misunderstood (and had not verified) the quantities involved, she genuinely considered that there was an unacceptable risk to Mrs AB and that the claimant had acted irresponsibly in drawing up and leaving medication for an elderly and vulnerable client of Audley Care. The evidence does not support the claimant's claim that the reason that Ms Forbes reached the decision to dismiss was because the claimant had made allegations of sex discrimination against Mr Williams in his grievance.

182. In relation to the appeal, whilst the flaws in the process have been noted, to the extent it is relevant, the Tribunal concludes that there is not sufficient evidence to infer that the decision reached was because the claimant had raised a grievance about sex discrimination.

183. Therefore, the Tribunal upholds the claimant's complaint that he was victimised by being suspended but his further claims for victimisation do not succeed.

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Employment Judge Halliday

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Date: 12 July 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
29 July 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

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