EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105389/2024

Held in Dundee on 19 and 20 March 2025

Employment Judge W A Meiklejohn

Miss H Robertson	**Claimant** **Represented by:** **Mr J Lawson - Solicitor**
Unicare – Homecare Ltd	**Respondent** **Represented by:** **Mr T Muirhead - Tribunal Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claims brought by the claimant under sections 47B and 103A of the Employment Rights Act 1996 do not succeed and are dismissed.

REASONS

1. This case came before me for a final hearing, dealing with both liability and remedy. Mr Lawson appeared for the claimant and Mr Muirhead for the respondent.

Nature of claims

2. The claimant initially brought complaints of automatically unfair constructive dismissal on grounds of health and safety, sex discrimination, age discrimination, harassment and victimisation. She also referred to *"other payments"* which appeared to relate to a deduction from her salary made by the respondent. Following the instruction of her solicitors, further and better particulars were provided (29-31) and the complaints were amended to comprise harassment related to sex under section 26(2) of the Equality Act

2010 "EqA"), detriment on the ground of having made a protected disclosure under section 47B of the Employment Rights Act 1996 ("ERA"), constructive automatically unfair dismissal because the claimant made a protected disclosure under section 103A ERA and discrimination by dismissal under section 39(2)(c) EqA.

3. A preliminary hearing took place on 29 October 2024 (before Employment Judge Jones). Thereafter the claimant's solicitors confirmed she was not making claims for harassment and victimisation, nor was there a claim for *"other payments".* They made an application to amend (41-42) to bring in the claims under sections 47B and 103A ERA. This was not opposed. The respondent replied to the claimant's further and better particulars (44-47).

4. A Judgment dated 10 December 2024 was sent to the parties on 12 December 2024. It was in these terms –

"The claims of discrimination, including indirect discrimination, discrimination based on association or perception, or harassment on grounds of sex, marriage and civil partnership, and discrimination including harassment based on association or perception on grounds of age, having been withdrawn by the claimant, is dismissed under Rule 52 of the Rules contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

As this decision has been made by a Legal Officer, you may apply to the Tribunal for the decision to be considered afresh by an Employment Judge. Such an application must be made within 14 days of this judgment being sent to the parties."

There was no application for this Judgment to be reconsidered by an Employment Judge.

5. The parties agreed at the start of the hearing that the claims brought by the claimant were as set out in the List of Issues (278-279). These were as follows –

1. Section 43B/47B of the Employment Rights Act 1996.

2. Section 103A of the Employment Rights Act 1996.

3. Section 39(2) of the Equality Act 2010.

6. The claim under section 39(2) EqA was withdrawn by Mr Lawson in the course of the hearing. Had it not been withdrawn, I would have taken the view that it was in any event a discrimination claim and therefore covered by the Rule 52 Judgment.

Evidence

7. I heard evidence from the claimant and from Mrs T Mason, director and owner of the respondent company. I had a bundle of documents extending, including various items submitted at the start of the hearing, to 294 pages. I refer to these documents above and below by page number.

8. There was a short Statement of Agreed Facts (277). This confirmed the details of the claimant's employment with the respondent and recorded that she *"provided care to service user X and others".* An Order had been made under Rule 49(3)(b) of the Employment Tribunal Procedure Rules 2024 preventing disclosure of the identity of service user X.

Findings in fact

9. The respondent's business is the provision of care services in the community for elderly adults. These services are provided by around 50 staff to some 200 clients. Most of this care is funded by the local authority. The respondent is regulated by the Care Inspectorate. Individuals providing care are regulated by the Scottish Social Services Council.

10. The respondent's business is managed by Mrs Mason who has more than twenty years' experience in the care sector. She is assisted by her daughter Ms S Mason, and an Administrator. There are six Senior Carers who operate in specific geographic areas, and are line managers to the Care Assistants employed by the respondent. Some of the Care Assistants visit clients on foot while others drive.

11. The claimant commenced employment with the respondent as a Care Assistant on 26 July 2023. She was issued with a contract of employment (48-55) which incorporated the terms of the respondent's employee handbook (56-102). The claimant was also provided (electronically) with the respondent's policies and procedures, and confirmed in an email dated 24 January 2024 (114) that she understood these (although she accepted in evidence that she had only looked briefly at some of them).

12. Before commencing employment with the respondent the claimant studied health and beauty at Dundee and Angus College. She described her employment with the respondent as *"my first proper job".* She had no previous experience of care work. Her induction with the respondent involved working a number of shifts shadowing another Care Assistant. She attended a manual handling course and was expected to undertake e-learning.

13. The nature of the work undertaken by the claimant with each client depended on the client's care plan. In the case of service user X, the care included helping him to shower on certain days. This entailed guiding X in and out of the shower, and entering the shower with X to help him wash. On other days the claimant would give X a body wash. She would also empty his catheter bag and help him to dress.

November 2023

14. The claimant began to provide care to service user X in September or October 2023. Initially this was normal and like any other client. However, from late October or early November 2023, X's behaviour towards the claimant began to cause her concern. He would tell her that she was *"beautiful".* As well as saying this to the claimant, he said it in the presence of the District Nurse. The claimant said that this was *"awkward and very embarrassing".*

15. The claimant said that service user X started to touch and stroke her hair as she was emptying his catheter bag. He told the claimant that he would like to marry her. On one occasion, after the claimant had assisted X in the shower, he grabbed her arm and said that he was going to kiss her. The claimant described feeling *"unsafe"* and being unsure how to react.

16. The claimant's evidence was that she told Mrs Mason about service user X's behaviour on two occasions during November 2023. She was unable to recall the exact dates but said that the first time was around the middle of the month and the second time was towards the end of November.

17. The claimant said that in the first call she told Mrs Mason about service user X saying she was *"beautiful"* in front of the District Nurse and that he wanted to marry her. She said that she was frightened for herself and other staff who cared for X.

18. According to the claimant, the second call to Mrs Mason was made after she had been assisting service user X to shower. He made a comment that he would like the claimant to shower with him. She said that she was *"taken aback"* and *"quite shocked".* She said that it would not have been safe for her to leave X in the shower as he required assistance. The claimant told Mrs Mason that X's behaviour had made her *"extremely uncomfortable".* Mrs Mason told the claimant that she should walk out if it happened again.

19. Mrs Mason denied that the claimant had made these two telephone calls regarding service user X's behaviour. She said that the first complaint made by the claimant about X was in January 2024. She maintained a record of contact with the claimant (115-118) on which she noted brief details of telephone calls, text messages and emails. These *were "communication sheets"* completed in Mrs Mason's handwriting.

20. There were also communication sheets in respect of service user X (147-160). These were kept in X's home and were completed and signed by the care assistant to record what care had been given during each visit. They disclosed that the claimant had visited X's home on 6, 7, 8, 13, 19, 21, 27 and 30 November 2023. None of the entries made by the claimant in relation to these visits referred to the behaviour by X which the claimant said she had reported to Mrs Mason. Two of the entries (on 19 and 21 November 2023) mentioned that the nurse had been present during the claimant's visit to X.

21. Subsequent events had some bearing on this conflict of evidence. In her email of 8 January 2024 (119) the claimant used the phrase *"every time I'm*

in" which suggested that the behaviour of service user X to which she was referring had been ongoing for some time. When questioned about the reason for her absence in February 2024 the claimant said that there were personal reasons for her mental health issues at that time and it was not to do with X. In her appeal letter (137) the claimant referred to reporting service user X to Mrs Mason *"on 4 separate occasions".* In her reply of 6 March 2024 Mrs Mason did not challenge this. These matters all supported the claimant's evidence that she had spoken to Mrs Mason about X's behaviour during November 2023.

22. On the other hand Mrs Mason's recording of contact with the claimant was contemporaneous. It included references to the January 2024 incidents described below. In contrast, while there were entries in November 2023, there was no reference to the phonecalls mentioned above. When responding to the claimant's email on 8 January 2024, Mrs Mason's daughter said *"this is the first we have heard of this behaviour".* Also, Mrs Mason had completed handwritten risk assessments (286-287) in relation to the January 2024 incidents but not in relation to matters said by the claimant to have been disclosed during her November 2023 phonecalls. These matters tended to support Mrs Mason's evidence that the phonecalls from the claimant in November 2023 did not take place.

23. This conflict of evidence was not easy to resolve. I decided that, on the balance of probability, the claimant had spoken to Mrs Mason about service user X's behaviour during November 2023. I came to that view because –

(a) When pressed under cross-examination the claimant was consistent in maintaining that she made the calls, notwithstanding that she was unclear as to exactly when they had taken place.

(b) The claimant's use of the phrase "every time" indicated that there had been behaviour of the type about which she was complaining earlier than January 2024.

(c) Although Mrs Mason's recording of matters was done contemporaneously, the absence of a record of the November calls on

the communication sheets did not necessarily mean that the calls did not take place.

(d) I found the claimant's evidence about making the November 2023 calls to be credible.

January 2024 (1)

24. The claimant emailed Mrs Mason on 8 January 2024 in these terms –

"Hello, I'm not long out of [reference to service user X] , *I'm not sure if I'm the only one to have this problem but every time I'm in he mentions about marrying me, tries to play with my hair when I'm emptying his leg bag, mentions about how he wants me to shower with him when I'm doing his showers, when he's got visitors in he'll speak to them about how beautiful I am, walking back through to the living room he stops looks at me for a while and then says about how he was wanting to kiss me.*

I don't mind going into him and doing what needs to be done but I'd like this to stop as it does make me feel uncomfortable."

25. The claimant explained sending an email rather than phoning – *"I thought it might be taken more seriously and something would be done".* She said that she was *"scared"* about giving care to service user X and that she would sit in her car and *"mentally prepare myself".*

26. Mrs Mason's daughter replied to the claimant's email –

"Hello, this is the first we have heard of this behaviour – nobody else has said this.

We will call [X] *and make him aware that this behaviour is not acceptable.*

You should also advise him when you are there that this is not acceptable behaviour and that you will be leaving if this continues."

The claimant speculated that Mrs Mason's daughter might not have been aware of her (the claimant's) earlier phonecalls with Mrs Mason about service user X's behaviour.

27. Mrs Mason spoke to service user X on 8 January 2024 about his behaviour towards the claimant. In a document headed "Professional Bodies – Communication Sheets" (159) Mrs Mason wrote the following, dated 8 January 2024 –

"Hayley Carer mailed to advise [X] *had tried to touch hair when doing leg bag – I phoned* [X] *to advise this was not acceptable – Hayley is a young girl and felt intimidated by this. I told* [X] *if he does it again she will leave."*

28. Mrs Mason messaged the claimant on 11 January 2024 (120) –

"And [X] *has been told it's not in any way acceptable to make disgusting comments.*

If he says anything just firmly tell him not to talk to you like that. Also if he touches fair [should read "hair"] *or anything, tell him to stop it you will inform the office who will call his family.*

Is that ok? Just be firm and he will stop."

The claimant replied *"That's perfect thank you".*

29. Mrs Mason completed a handwritten risk assessment in relation to the events of 8 January 2024 (287). This differed from the typewritten version (122), which was provided in response to a data subject access request from the claimant, in that the latter included a reference to Mrs Mason's telephone conversation with service user X. I understood that the typewritten version was prepared to avoid disclosing third party personal data.

30. The respondent's Violence Against Staff Policy (107-109) includes the following –

"Unacceptable Standards of Behaviour

Any behaviour which causes fear or alarm to Unicare employees will be investigated.

These behaviours may include:

Shouting or uncontrollable behaviour. Threatening or abusive language, swearing or derogatory racial or sexual remarks ….”

31. The respondent’s Lone Working Policy (110-113) includes the following –

“Incident Reporting

In order to maintain appropriate records of incidents involving lone workers, it is essential that all incidents are reported to your line manager. Staff should ensure that all incidents where they feel threatened or unsafe are reported even if this was not a tangible event or experience. Reports of these incidents are imperative in informing future visits, meetings, etc and will help to inform lone working policies and procedures. All reported incidents will be recorded on the relevant database where information on the service user or member is kept. All incidents will be discussed with the employee and office staff, notes of which will be kept on the employee file and if required the service users file. This will be monitored by the manager.”

32. Mrs Mason accepted that what the claimant reported on 8 January 2024 did constitute *“sexual remarks”* and that there had been no investigation. She said *“Investigation would have been the next step”.* She agreed that she had not met with the claimant but denied that she had taken the view that what the claimant reported was not serious. However, she said that she *“did not see it as serious sexual harassment”.* Mrs Mason’s position was that she had taken action and *“remedied it”,* and the claimant had confirmed she was happy with that.

January 2024 (2)

33. When the claimant was asked why she did not record the incident of 8 January 2024 in service user X’s communication sheet, she said that she was aware that other carers would read what she wrote, that she was embarrassed and did not want other carers to gossip about it.

34. Notwithstanding that, the claimant did record comments made to her by service user X –

(a) In the entry dated 16 January 2024 (154) the claimant wrote *"some comments about getting married".*

(b) In the entry dated 28 January 2024 the claimant wrote *"still making very weird comments".*

The claimant's explanation for recording these matters when she had not previously done so was that this was what Mrs Mason had told her to do when they spoke on 8 January 2024.

35. On 30 January 2024 the claimant was due to visit service user X. While outside X's home she sent a text message to Mrs Mason (121) –

"Hello, did you get my messaging about [X] *as I stated I wasn't comfortable going back in yet there's been no change. Thanks"*

36. On receipt of this message Mrs Mason telephoned the claimant. She told the claimant to wait where she was. She took steps with a view to getting another carer to deal with service user X. She found that the other Brechin carer was six miles away and the Montrose carers were with clients, so unable to visit X. She tried to telephone X without success and left a voicemail message for him. She then replied to the claimant's text message –

"*Just hold off, he didn't answer so I'll keep trying. I've left a voicemail"*

37. Mrs Mason tried again to telephone service user X but still without success. She then called the claimant asked asked her to go into X's home, but to leave immediately if he did anything inappropriate. The claimant agreed. The claimant then entered X's home and the visit passed off without incident.

38. Mrs Mason made a third call to service user X and on this occasion he answered. Mrs Mason told X that it was not acceptable to make untoward comments to a young girl. X apologised.

39. Mrs Mason recorded these events in the Professional Bodies – Communication Sheets (159) as follows –

"10.00 Carer Hayley texted, she was outside [X]'s door, she stated she was still uncomfortable going in as he was still making weird comments. I called [X] *a couple of times with no reply – I left a voicemail for him to call me back.*

11.00 Hayley called to say she got on alright in [X's home], *it was OK, he didn't say or do anything untoward. I called* [X] *again to remind him it is inappropriate to comment to staff on how beautiful they are or wanting to marry them.* [X] *couldn't hear to start with then apologised."*

40. Mrs Mason completed a handwritten risk assessment in relation to these events (286). Once again this differed from the typewritten version (122) which expanded on the handwritten one by incorporating matters which, while factually correct, were not included in the original risk assessment.

41. The claimant said that Mrs Mason's call to service user X on 30 January 2024 stopped his behaviour towards her for a day or so, but he then resumed making imappropriate comments. The claimant said that she did not report any further incidents because *"I felt I was not getting listened to and nothing was being done about it. I was still getting sent into X's house".* The claimant accepted that she did not speak to Mrs Mason about changing the clients she was rota'd to visit, and that she could have done so.

February 2024

42. On 16 February 2024 Mrs Mason circulated a "Client Updates" document to the respondent's staff. This included –

"We spoke with [X] *the last week regarding his inappropriate behaviour towards Hayley – he stated he could not hear on the phone & then swore at us. However we hope this will have made him understand it's not acceptable – all staff should report any inappropriate behaviour to the office as soon as it happens – via phone call."*

43. Mrs Mason said that there were no reports from any other member of staff of inappropriate behaviour by service user X. If there had a report from another carer, Mrs Mason indicated that she would have contacted the care

management team at the local authority and X's family. Mrs Mason accepted that she did nothing else about the incidents in January 2024.

44. The claimant said she had hoped that Mrs Mason might *"double up"* when she was providing care to service user X, i.e. she would be accompanied by another carer. Mrs Mason explained that this would not be financially viable since the local authority only funded a single carer for X. It was the local authority which decided if they were willing to fund two carers.

45. The claimant was absent from work on 12 and 13 February 2024. Mrs Mason conducted a return to work interview with the claimant which was documented on the appropriate form (125-126). This stated the reason for absence as *"Mental health, not eating/drinking properly – made self ill".* Where the form set out the question *"Are there any underlying problems relating to the absence (personal, work or domestic)",* Mrs Mason had circled *"No"* and had written *"Hayley states she will be OK now".*

46. The claimant's evidence was that her time off was due to her mental health, for personal reasons. It was *"not to do with X".* She referred to having *"difficulties in my life"* at the start of 2024 and *"finding some things difficult to cope with".* She agreed that she was *"being supported"* by her family at this time.

47. Mrs Mason held face-to-face meetings with the claimant in January and February 2024. These related to her ongoing probationary period which had been extended because the claimant had not completed her e-learning. Nothing was said about service user X's behaviour at these meetings.

Claimant resigns

48. The claimant sent an email to Mrs Mason at 14.35 on 3 March 2024 –

"Hello Tracy, please take this as my notice of resignation, that I will not be returning to work for this company. This is with immediate effect."

49. The claimant's evidence was that she decided to resign because she was still being sent into service user X's house after she had said on four occasions

that he had made her feel uncomfortable and not safe. She said she was left to feel that she had no other option, and that her comments (about X) were not being taken seriously. The claimant also said that she had resigned on Sunday 3 March 2024 because she noticed that X was still on her rota for the coming week.

50. When asked why she had not raised a formal grievance, the claimant said that she had *"lost all trust".* She said that she felt that, no matter what she said or did, the situation would not be taken seriously.

51. The claimand subsequently sent a text message at 17.59 on 3 March 2024 which, according to Mrs Mason, was received by the Senior Carer who was on call. The claimant's message read –

"Hello, I did send a email but I just got your message. Please take this as my notice of resignation, that I will not be returning to work for this company. This is with immediate effect."

52. The Senior Carer replied to the claimant by text in these terms –

"Hi Hayley thanks. Your notice will be 1 week, we wouldn't expect you to just not turn up with no notice."

The claimant's response was –

"Unfortunately I won't be able to work a weeks notice, I did email earlier on today."

53. The claimant said under cross-examination that she had not personally sent the text message about resigning. She is dyslexic and her older sister had done this for her. She said that she had not told her sister what to say. The claimant said her sister knew she was leaving her employment, and her parents also knew what was happening. However, the claimant said that she herself had sent the message responding to the Senior Carer.

54. Mrs Mason sent an email to the claimant on 4 March 2024 (133) attaching a copy of her contract and advising that the claimant would be responsible for any extra costs in covering her shifts during her notice period. Mrs Mason

then wrote to the claimant on 5 March 2024 (135-136) accepting her resignation and advising the claimant that, as she had not given her contractual notice, an additional cost of £57.50 would be incurred by the respondent and this would be deducted from the claimant's final pay. This reflected a provision in the claimant's contract of employment (at 51).

55. The claimant appealed against the proposed withholding of salary. Her letter (137) was undated but was almost certainly sent to Mrs Mason on 5 March 2024. This letter was drafted by the claimant's father and included the following –

"…. No one in the company has asked "Why?" I have left. The main reason was for my own mental health, as I had reported a client to you (the company) of sexual assault by a client to myself on 4 separate occasions, and not once was I offered any resolution other than to "Walk out" (only at the 4th report) this is difficult as he held me when this happened each time. Unicare never offered any resolution at the time, like to double me with someone when going into this man. I feel here, that in this instance, Unicare failed in your duty of care to me (your employee) …."

"Ultimately my mental health had to be prioritised over the job. This is the reason why I was unable to work the notice you mentioned."

56. Mrs Mason replied by letter dated 6 March 2024 (138-139). In her letter Mrs Mason told the claimant that she did not have any right of appeal because the deduction for extra business costs was covered in her signed contract. Mrs Mason's letter also advised the claimant that she had no right to raise a grievance *"as you are no longer an employee but I can assure you that correct procedure was followed and recorded with each of your sexual assault allegations and a remedy offered to yourself but declined."*

57. Mrs Mason's letter also contained this paragraph –

"I accept you advised me of poor mental health for your most recent absence. We acknowledged this at you[r] most recent return to work meeting but you said it was because you had not been eating and drinking correctly

(documented). We discussed if there was anything at work causing this and you said no. I asked if I could be of any assistance in your return to work and you said no. You have signed this form to agree that's what we discussed."

58. I understood that the deduction from the claimant's final pay in respect of additional costs incurred by the respondent was reimbursed by the respondent.

Claimant's new job

59. The claimant became aware of a job as a carer for a local disabled lady. Within the bundle there were two Facebook screenshots about this dated 28 November 2023 (129) and 27 February 2024 (128). Prior to submitting her resignation the claimant applied for this job.

60. The claimant was interviewed for this job on 28 or 29 February 2024. She was offered the job by email. She said that she had looked for this email but had not been able to find it. She said that she was sure she did not have the offer of the new job before she resigned. She signed the statement of terms and conditions of employment for the new job (268-276) on 5 March 2024. In this document the claimant's start date was left blank; the claimant said that she started one week after she was given the new job.

61. In the new job the claimant was paid around £157 (net) per week less than when she worked for the respondent. She had not initially taken any steps to find a job with comparable pay because she was not keen to work in the community. However she obtained another job with Castle Care, involving work in the community, commencing 9 December 2024. This paid a little over £60 (net) more per week than her previous job, and she was trying (with some success) to obtain extra shifts to achieve a similar level of earnings as she had enjoyed with the respondent.

62. Mrs Mason said that work is plentiful in the care industry, although she accepted that some employers are better than others. She also fairly accepted that having a bad experience might put someone off working in the community.

63. While she was employed by the respondent the claimant had a second job, working two days per week in a nail salon. She continued to work there after leaving the respondent's employment, although she had more recently ceased doing so.

Comments on evidence

64. It is not the function of the Employment Tribunal to record every piece of evidence presented to it, and I have not attempted to do so. I have focussed on those aspects of the evidence which I considered to have the closest bearing on the matters I had to decide.

65. Notwithstanding the conflict between their respective positions as to whether the November 2023 phonecalls took place, both the claimant and Mrs Mason were credible witnesses. Both sought to tell the truth as they recalled it. Neither was prone to exaggeration. The extent of the contemporaneous documentation meant that there was no other material conflict in the evidence.

66. One area where the claimant's evidence was not entirely satisfactory was in relation to when she accepted the new job in March 2024. It was unfortunate that the email offering the job to the claimant could not be produced, when earlier emails were available. The proximity of the dates of (a) the interview for the new job and (b) the claimant's resignation tended to suggest that, on the balance of probability, she resigned after she was offered the new job.

67. Giving evidence about the incidents with service user X proved challenging at times for the claimant. That was unsurprising as X's behaviour towards her had clearly been an unpleasant experience. It was to her credit that she was able mostly to maintain her composure.

68. Mrs Mason gave her evidence confidently. She did not seek to emphasise any shortcomings in the claimant's performance or progress. She was willing to make appropriate concessions which served to enhance her credibility.

Applicable law

69. As I refer in my recording of the submissions to some of the applicable statutory provisions, it is convenient to set these out here.

70. Section 43A ERA (**Meaning of "protected disclosure")** provides as follows –

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of section 43C to 43H.

71. Section 43B ERA (**Disclosures qualifying for protection**) provides, so far as relevant, as follows –

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable opinion of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed ….

72. Section 47B ERA (**Protected disclosures**) provides, so far as relevant, as follows –

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

(2) This section does not apply where –

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X) ….

73. Section 95 ERA (**Circumstances in which an employee is dismissed**) provides, so far as relevant, as follows –

(1) For the purposes of this Part an employee is dismissed by his employer if ….

(a) ….

(b) ….

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct ….

74. Section 103A ERA (Protected disclosure) provides as follows –

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

Submissions - claimant

75. Mr Lawson submitted that there were four key areas of dispute –

(i) Had the claimant made a qualifying dsiclosure under section 43B ERA?

(ii) Did the November 2023 telephone conversations take place?

(iii) If the Tribunal answered these questions in the affirmative, was the claimant subjected to a detriment?

(iv) Was the claimant's resignation due to her making a public interest disclosure and her lack of confidence in the respondent's reaction?

76. Addressing these issues in order, Mr Lawson said that the claimant was asserting that she made qualifying disclosures within the meaning of section 43B ERA which were in the public interest under criteria (a) and (d) – commission of a criminal offence and endangering of health and safety respectively.

77. The first disclosure made during November 2023 to Mrs Mason, a relevant individual, was information that the claimant had been subjected to sexual harassment. This engaged criteria (a) and (d). It was made in the public interest because the claimant was concerned not only for her own safety but also that of other carers.

78. The second disclosure made at the end of November 2023 was again information that the claimant had been subjected to sexual harassment. This engaged the same criteria under section 43B(1) (a) and (d) and was made in the public interest for the same reason as the first disclosure.

79. The third disclosure made on 8 January 2024 once again provided information about sexual harassment, said to have been ongoing for a long time. The public interest test was met for the same reason as for the earlier disclosures.

80. The fourth disclosure was made by the claimant in her conversations with Mrs Mason after her text message on 30 January 2024. As before, the claimant disclosed information about sexual harassment.

81. Mr Lawson invited me to prefer the claimant's evidence over that of Mrs Mason that the telephone conversations in November 2023 did take place.

The claimant had been unwavering in her evidence to that effect. The claimant's appeal letter referred to four instances and this was not contradicted in Mrs Mason's reply.

82. Mr Lawson argued that it was more credible that the claimant should recall making the November 2023 disclosures. It was a *"bigger deal"* for her than for the respondent. It was credible that Mrs Mason had simply failed to record the conversations in writing, particularly as she did not regard it as something particularly serious.

83. Mr Lawson submitted that the claim under section 47B ERA was made out because the respondent had deliberately failed to act to safeguard the claimant and other staff. Mr Lawson acknowledged that Mrs Mason said she could have doubled up on visits to service user X if the claimant reported it again, but this did not take the matter seriously enough.

84. There had also been, Mr Lawson contended, a deliberate failure to remove service user X from the claimant's rota of client visits. It was clear that the respondent could have done this, and would have done so if further incidents had been reported. This again was not taking the matter seriously enough and was a failure to act to protect the claimant. The claimant had been subjected to detriment.

85. Turning to the automatically unfair dismissal claim under section 103A ERA, Mr Lawson submitted that the claimant had been constructively dismissed. Her trust and confidence in the respondent was lost. She made four protected disclosures and yet the respondent failed to remove her from the situation. The final straw had been the claimant's receipt of the rota for the first week of March 2024 showing that service user X was still on her list. It had been reasonable for the claimant to resign when she did.

86. In relation to whether the claimant should have raised a grievance, Mr Lawson observed that any grievance would have to have been made to Mrs Mason as owner of the respondent. However, the grievance would have been about Mrs Mason and there was noone above her to deal with it. The claimant had therefore taken the alternative route of resigning.

87. Mr Lawson argued that the claimant's trust and confidence in the respondent had deteriorated because they had failed to act. The reason for her resignation had been because she made protected disclosures. Accordingly section 103A ERA applied.

88. In terms of remedy, Mr Lawson referred to the claimant's schedule of loss (258-259) in relation to the unfair dismissal claim. For the detriment claim Mr Lawson referred to the claimant's evidence about how she had felt in consequence of service user X's behaviour and argued that an award in the middle Vento band should be made.

89. Mr Lawson invited me to reject any suggestion that the real reason for the claimant's resignation had been her new job. Her evidence was that she did not accept that job until after she resigned.

90. Turning to whether the claimant had done enough to mitigate her loss, Mr Lawson submitted that the claimant had given credible evidence as to why she was unwilling to work in the community, and with males. When her confidence improved she had felt able to take her current role with Castle Care. There had been no failure to mitigate.

91. Mr Lawson submitted that it would not be just and equitable to reduce compensation on the basis of contributory conduct by the claimant. He also argued that the claimant had not waited too long between her final disclosure on 30 January 2024 and her resignation on 3 March 2024. This was because service user X's behaviour towards her had improved briefly, and it had been reasonable for the claimant to wait to see if that improvement was sustained.

Submissions- respondent

92. Mr Muirhead reminded me that this case was not about whether the claimant was subjected to inappropriate treatment by service user X. It was whether the actions of the respondent constituted a detriment to the claimant.

93. Mr Muirhead submitted that the evidence of Mrs Mason should be preferred in relation to the number of disclosures made by the claimant. Her evidence that there were no disclosures made in November 2023 should be accepted

as credible. The claimant had been vague about the dates on which the alleged November disclosures were made – if those events were clear in the claimant's mind she should have been much clearer about the dates.

94. The respondent operated in a highly regulated sector and Mrs Mason's evidence about recording matters rigorously should be accepted. The absence of any record of incidents in November 2023 was therefore significant. There was simply nothing on service user X's communication sheets nor on the Professional Bodies – Communication Sheets.

95. Mr Muirhead argued that there was nothing in the claimant's email of 8 January 2024 to suggest that she had previously reported service user X's behaviour. It was, he argued, more likley that she would have referred to earlier reports if these had in fact been made. Similarly, when the claimant received the reply from Mrs Mason's daughter – that this was *"the first we have heard of this behaviour"* – she would surely have reacted to that statement if she believed it to be untrue.

96. Mr Muirhead noted the claimant's evidence about why she had not recorded the alleged November 2023 incidents on service user X's communication sheet. He pointed out that she had made reference to X's conduct when completing the communication sheet on 16 and 28 January 2024.

97. Mr Muirhead also argued that, given Mrs Mason had taken immediate action on 8 and 30 January 2024, there would have been no reason for her to ignore incidents said to have been reported in November 2023. Mr Muirhead invited me to find that only the January 2024 incidents had been reported by the claimant.

98. Mr Muirhead accepted that the disclosures made by the claimant on 8 and 30 January 2024 did amount to a disclosure of information. He argued, however, that, when the claimant made her disclosures, she did not have a reasonable belief that they were made in the public interest. There was, Mr Muirhead submitted, no evidence that the claimant was seeking to protect the wider staff (of the respondent). It was a personal matter. If this was accepted, it was fatal to the claimant's case.

99. Turning to the January 2024 incidents (the respondent's position being that there were no reports of incidents in November 2023), Mr Muirhead argued that the respondent had taken reasonable and prompt action. The claimant had confirmed at the time that she was happy. No further mistreatment had been reported by the claimant after 30 January 2024.

100. Mr Muirhead argued that the respondent had not been at fault in failing to remove service user X from the claimant's rota. It had not been feasible to do so on 30 January 2024 because no other staff member was available. Mrs Mason's position was that she would have considered this if X's behaviour towards the claimant had happened again.

101. It had also, Mr Muirhead contended, not been unreasonable for Mrs Mason to have decided not to report service user X's behaviour to the local authority and his family. Because X was funded only for a single carer, Mrs Mason had been entitled not to pursue doubling up. That was particularly so when things appeared to be alright after 30 January 2024. The test was whether reaonable steps were taken and Mr Muirhead submitted that they were.

102. Mr Muirhead contended that the alleged failure needed to be on the ground that the claimant made a protected disclosure. The ethos behind the statutory provision was (a) to encourage public interest disclosures and (b) to protect the workler making such a disclosure. In this case, anything done or not done by the respondent was not because the claimant had made protected disclosures.

103. In relation to the claimant's section 103A ERA claim, Mr Muirhead accepted that a failure to take appropriate action could breach mutual trust and confidence – ***The Post Office v Roberts 1980 IRLR 349.*** In the present case, however, what the respondent did (or failed to do) was not sufficiently serious to amount to a breach.

104. Moving to the issue of whether the claimant resigned in response to a breach of contract by the respondent, Mr Muirhead submitted that the claimant had resigned because she had a new job. She had applied for this job before she resigned. Her evidence about when she was offered the new job was vague.

She referred to an offer by email but this was not produced. She gave no reason for her resignation when she communicated it to the respondent.

105. Mr Muirhead argued that the claimant had failed to mitigate her loss. There was plenty of care sector and other work available. She could have fully mitigated her loss much sooner.

106. In relation to injury to feelings, Mr Muirhead said that no real evidence had been provided. There was no medical evidence. There was a need to separate out (a) what service user X had done and (b) what the respondent did. Only the latter was relevant. If there was injury to feelings, it fell into the lower Vento band.

107. The claimant could and should, according to Mr Muirhead, have raised a grievance. By making no formal complaint, she denied the respondent on opportunity to address it. This should be reflected in any award of compensation.

Discussion

108. The agreed list of issues (278-279) set out the following matters requiring to be determined by the Tribunal. I record these here (with some minor changes to the language) –

1. Section 43B/47B of the Employment Rights Act 1996

1.1 Has the claimant made a qualifying disclosure in terms of section 43B ERA?

1.1.1 Was there a disclosure of information?

1.1.2 Did the claimant believe that the disclosure was made in the public interest?

1.1.3 Was that belief reasonable?

1.1.4 Did the claimant believe that the disclosure tended to show a relevant failure?

1.1.5 Was that belief reasonable?

1.2 If the claimant has made a protected disclosure, was the claimant subjected to detriments in terms of section 47B ERA, on the ground that she made a protected dsisclosure?

1.3 In terms of the detriments the claimant seeks to rely upon:

1.3.1 Did the respondent fail to take any action to prevent further acts of sexual harassment?

1.3.2 Did the respondent fail to move the claimant off the rota for service user X?

1.3.3 Did the respondent fail to report the allegations of sexual harassment to the service user's family?

1.3.4 Did the respondent fail to appoint an additional person to assist the claimant with the service user?

1.4 If the respondent failed to take the above steps, was this on the ground that the claimant made a protected disclosure?

2. Section 103A ERA

2.1 Did the claimant make a protected disclosure?

2.2 Was the claimant dismissed, albeit constructively, because of the protected disclosure?

The claimant asserts that her resignation as a dismissal was due to raising the protected disclosures, and by the respondent's lack of action and persistently putting the claimant in a position of being subjected to harm, the respondent breached the implied term of mutual trust and confidence.

2.3 If there was a breach on the respondent's part of the implied term of mutual trust and confidence, did the claimant affirm the breach by reason of delay in submitting her resignation?

2.4 If there was a breach of the implied term of mutual trust and confidence, did the claimant resign in response to it, or for some other reason?

3. Section 39(2) EqA – no longer relevant

4. Remedy

If the claimant is successful in all or some of the above claims:

4.1 How much compensation should the claimant receive for loss of income following the dismissal?

4.2 How much should the claimant be awarded for injury to feelings?

4.3 Has the claimant taken reasonable steps to mitigate her losses?

4.4 Should compensation be reduced on a just and equitable basis on the grounds of contributory fault, and/or failure to mitigate?

Did the claimant make a qualifying disclosure or disclosures?

109. I approached this by looking at each of the elements of section 43B(1) ERA, as correctly set out in the agreed list of issues. Some of these elements were straightforward –

(a) It was not disputed that the claimant did make a disclosure of information.

(b) The claimant did believe that what she told Mrs Mason tended to show that a criminal offence had been committed and that her health and safety had been endangered.

(c) That belief was reasonable.

110. I found that these elements of section 43B(1) ERA were satisfied because –

(a) The claimant told Mrs Mason how service user X behaved towards her. Even if I had not found, on the balance of probability, that the claimant did telephone Mrs Mason about service user X's behaviour

during November 2023, I would have found that what the claimant reported on 8 January 2024 and what she said to Mrs Mason on 30 January 2024 were disclosures of information. Mr Muirhead was right to concede this.

(b) The claimant used the phrase *"sexual harassment".* While this does not necessarily connote the commission of a crime, the claimant did believe that what service user X was saying and doing (including unwanted physical contact) was wrong. The claimant described being made to feel *"extremely uncomfortable"* by service user X's behaviour towards her. She was concerned – and in my view believed - that there would be a risk to her safety if she stayed, and to X's safety if she left.

(c) That the claimant held these beliefs was unsurprising given the inappropriate nature of service user X's behaviour towards her. It was entirely plausible that she would be apprehensive. Her belief as to what her disclosures tended to show was reasonable.

Public interest

111. I next considered whether the claimant reasonably believed that her disclosures were made in the public interest. This took me to the decision of the English Court of Appeal in ***Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979***. In that case, at paragraph 37, Underhill LJ said this –

"…. in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a

consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para 34 above may be a useful tool …."

112. The *"fourfold classification of relevant factors"* to which Underhill LJ referred was as follows (paraphrasing slightly) –

> *"(a) the numbers in the group whose interests the disclosure served;*
>
> *(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*
>
> *(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*
>
> *(d) the identity of the alleged wrongdoer …. the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and client), the more obviously should a disclosure about its activities engage the public interest – though this should not be taken too far".*

113. As explained in ***Chesterton***, the wording of section 43B(1) ERA as it now stands results from amendments made by the Enterprise and Regulatory Reform Act 2013. These amendments were intended to reverse the effect of ***Parkins v Sodexho 2002 IRLR 109***. In that case the Employment Appeal Tribunal held that the disclosure of a breach of a legal obligation arising from an employee's contract of employment fell within the terms of that section.

114. Underhill LJ said this at paragraph 31 in ***Chesterton*** –

"The relevant context here is the legislative history …. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest."

and then at paragraph 36 –

"The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of a **Parkins v Sodexho** *kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers even …. where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest."*

115. Finally, in terms of the decision in ***Chesterton***, at paragraph 8 Underhill LJ said this (under reference to ***Babula v Waltham Forest College [2007] EWCA Civ 174)*** about the definition of a qualifying disclosure in section 43B(1) ERA –

"(1) The definition has both a subjective and an objective element …. The subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed in subsection (1). The objective element is that the belief must be reasonable.

(2) A belief may be reasonable even if it is wrong …."

Although this was said about the part of the definition relating to whether the disclosure tended to show one of the six forms of wrongdoing in subsection (1), it equally holds good for the public interest part of the definition in terms of what amounts to a reasonable belief. Parliament cannot have intended that the words "reasonable belief" would have different meanings within the same section of the same Act.

116. It could be said that there is always public interest in protecting care workers from being subjected to inappropriate behaviour by service users. Alternatively, it could be said that there is always public interest in protecting female care workers from inappropriate behaviour of a sexual nature by male service users. However, such a general approach would mean that the public interest was inevitably engaged without reference to (a) the circumstances of the particular case and (b) what the worker making the disclosure reasonably believed.

117. I considered the factors set out in paragraph 112 above. Firstly, how many were in the group whose interests the disclosure served? I believed that the answer to this was that the group comprised those of the respondent's employees who provided care or were, on the balance of probability, likely to provide care to service user X. The evidence did not disclose a precise number but it would include those of the respondent's employees who worked in the same geographic area as the claimant. This was a subset of the respondent's 50 or so employees, and that is what I have in mind when (except in paragraph 127) I refer below to the *"group".*

118. Secondly, what was the nature of interests affected and the extent to which they were affected by the wrongdoing disclosed? The nature of the interests was, it seemed to me, the protection of the group from behaviour of a sexual nature involving inappropriate language and physical contact similar to that experienced by the claimant.

119. Thirdly, what was the nature of the wrongdoing disclosed? Clearly what occurred here was deliberate rather than inadvertent.

120. Finally, what was the identity of the wrongdoer? The answer to this was one individual, service user X.

121. Drawing these threads together with a view to assessing whether the public interest was engaged, I decided that –

(a) The affected group was relatively small which pointed away from a conclusion that the public interest was engaged.

(b) There was public interest in the protection of the group from the conduct experienced by the claimant. Care workers should not be exposed to unwanted conduct of a sexual nature by a service user.

(c) The deliberate nature of the wrongdoing disclosed pointed towards a conclusion that the public interest was enagaged.

(d) The identity of the wrongdoer pointed away from such a conclusion. Without wishing to be disrespectful to X, it was one elderly man behaving badly.

122. These factors were quite finely balanced. Not without considerable hesitation, I found that the public interest was engaged in this case. Calling a care worker "beautiful" and stating a wish to marry her (or him) was relatively innocuous. However, unwanted physical contact was more serious, and tipped the scales in favour of a conclusion that the public interest was engaged.

Reasonable belief

123. Did the claimant reasonably believe that her disclosures were made in the public interest? I reminded myself of what Underhill LJ said about reasonable belief in ***Chesterton***. There was (a) a subjective element – did the claimant believe that her disclosures were made in the public interest, and (b) an objective element – was her belief reasonable?

124. The claimant said on a couple of occasions during her evidence that she was frightened/concerned for herself and others who cared for service user X. I found it informative to look at what was stated in writing.

125. In her email to Mrs Mason on 8 January 2024 the claimant did make reference to being uncertain whether others had a problem with service user X similar to herself. However, she did not say anything about being concerned for the wellbeing or safety of other staff. In her text message to Mrs Mason on 30 January 2024 the claimant referred only to herself not being comfortable. In the letter of appeal written for the claimant by her father on or around 5 March 2024, the focus was on the respondent's treatment of the claimant herself. There was no mention of any concern for others.

126. I took the view that what the claimant (and her father on her behalf) had expressed in writing was the most reliable indication of the claimant's belief, or otherwise, that her disclosures were made in the public interest. I decided that the claimant was concerned only for her own wellbeing and safety. That was entirely understandable but it did not engage the public interest. Accordingly the necessary subjective element was absent.

127. I also decided that a belief on the part of the claimant that her disclosures about service user X were in the public interest was not objectively reasonable. The evidence tended to suggest that X had developed some sort of fixation about the claimant. There was nothing to even hint at X behaving in a similar way towards other carers. There was in that respect no group whose interests were served by the claimant's disclosures.

Disposal

128. My conclusion that the claimant's disclosures were not made in the public interest was sufficient to dispose of this claim. If there was no qualifying protected disclosure, neither section 47B ERA nor section 103A ERA could apply. The claim therefore could not succeed.

129. This conclusion rendered the other questions in the list of issues redundant. I have not sought to answer those questions hypothetically.

Date sent to parties **31 March 2025**